$~ (Appellate)

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

Reserved on : 16.11.2022
Pronounced on : 22.11.2022

\+ CM (M) 1140/2022 & CM APPL.45939/2022, CM APPL.45940/2022, CM APPL.45941/2022

FUTURE COUPONS PRIVATE LIMITED & ORS.
..... Petitioners

Through: Mr.Dayan Krishnan, Sr. Adv. with Mr.Rishi Agrawala, Mr.Pranjit Bhattacharya, Mr.Sanjeevi Sheshadri and Mr.Sukrith Sethi, Advs.

versus

AMAZON.COM NV INVESTMENT HOLDINGS LLC & ANR. ..... Respondents

Through: Mr. Rajiv Nayar, Mr. Amit Sibal and Mr. Nakul Dewan, Sr. Advs. with Mr.Anand S. Pathak, Mr. Amit K. Mishra, Mr.Shashank Gautam, Mr.Vijay Purohit, Ms.Sreemoyee Deb, Mr. Mohit Singh, Ms.Devna Arora, Ms. Anubhuti Mishra, Mr.Shivam Pandey, Ms. Samridhi Hota, Ms.Didon Misri, Mr. Pratik Jhaveri, Ms.Nikita Bangera, Mr. Faizan Mithiwala, Mr.Vijayendra Pratap Singh, Mr.Rachit Bahl, Ms. Roopali Singh, Mr. Abhijnan Jha, Mr. Priyank Ladoia, Mr. Tanmay Sharma, Mr. Chetan Chawla, Mr. Abhisar Vidyarthi, Advs. for R-1

Ms.Smarika Singh, Mr.Anoop Rawat, Mr.Saurav Panda, Ms.Yashna Mehta, Mr.Saifur Rahman Faridi and Ms.Mohana Nijhawan, Advs.for R-2/Future Retail Ltd.

\+ CM (M) 1141/2022 & CM APPL.45942/2022, CM APPL.45943/2022, CM APPL.45944/2022

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

FUTURE COUPONS PRIVATE LIMITED & ORS.

..... Petitioners

Through: Mr.Dayan Krishnan, Sr. Adv. with Mr.Rishi Agrawala, Mr.Pranjit Bhattacharya, Mr.Sanjeevi Sheshadri and Mr.Sukrith Sethi, Advs.

versus

AMAZON.COM NV INVESTMENT HOLDINGS LLC & ANR.

..... Respondents

Through: Mr. Gopal Subramanium, Mr. Rajiv Nayar, Mr. Amit Sibal and Mr. Nakul Dewan, Sr. Advs. with Mr.Anand S. Pathak, Mr. Amit K. Mishra, Mr.Shashank Gautam, Mr.Vijay Purohit, Ms.Sreemoyee Deb, Mr. Mohit Singh, Ms.Devna Arora, Ms. Anubhuti Mishra, Mr.Shivam Pandey, Ms. Samridhi Hota, Ms.Didon Misri, Mr. Pratik Jhaveri, Ms.Nikita Bangera, Mr. Faizan Mithiwala, Mr.Vijayendra Pratap Singh, Mr.Rachit Bahl, Ms. Roopali Singh, Mr. Abhijnan Jha, Mr. Priyank Ladoia, Mr. Tanmay Sharma, Mr. Chetan Chawla, Mr. Abhisar Vidyarthi, Advs. for R-1

Ms.Smarika Singh, Mr.Anoop Rawat, Mr.Saurav Panda, Ms.Yashna Mehta, Mr.Saifur Rahman Faridi and Ms.Mohana Nijhawan, Advs.for R-2/Future Retail Ltd.

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

J U D G M E N T

% 22.11.2022

1. Both these petitions have been instituted under Article 227 of the Constitution of India, and challenge orders passed by the learned Arbitral Tribunal, functioning under the aegis of the Singapore

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

International Arbitration Centre (SIAC) and in *seisin* of the disputes between the parties before me. CM (M) 1140/2022 challenges Procedural Order No.10 dated 11th October 2022, which allows an application by Amazon.Com NV Investment Holdings LLC ("Amazon", hereinafter) to supplement the Statement of Claim (SOC) initially filed by it in the arbitral proceedings. CM (M) 1141/2022 assails order dated 28th June 2022, whereby an application, by the petitioners and Respondent 2, seeking termination of the arbitral proceedings under Section 32(2)(c)[1] of the Arbitration and Conciliation Act, 1996 ("the 1996 Act") has been rejected.

2. The memo of parties in both these petitions is identical. The petitioners are Future Coupons Pvt. Ltd. (FCL), Future Coupons Resources Pvt. Ltd. (FRL), Akar Estate and Finance Pvt. Ltd. and the Directors of FCL who would, hereinafter, be referred to as "the Biyanis".

3. The orders under challenge are interlocutory in nature. They do not bring, to an end, the arbitral proceedings, which are still continuing.

4. For reasons which would presently become apparent, these petitions are, in my view, not maintainable under Article 227 of the Constitution of India. They are, therefore, liable to be dismissed as

[1] **32. Termination of proceedings**. –
(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where –
*****
(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

such. But first, the facts.

Facts

5. There are, essentially, four *dramatis personae* in these proceedings. They are FCL, FRL, Amazon and Reliance Industries Ltd ("Reliance"), though Reliance is not a party to these proceedings.

6. Three agreements came to be executed amongst FRL, FCL and Amazon. These were (i) a Share Holders Agreement, dated 12th August 2019, between FRL and FCL (hereinafter referred to as "FRSHA"), (ii) a Share Holders Agreement, dated 22nd August 2019, between FCL and Amazon (hereinafter referred to as "FCSHA") and (iii) a Share Subscription Agreement, dated 22nd August 2019, between FCL and Amazon (hereinafter referred to as "FCSSA").

7. The FRSHA, dated 12th August 2019, between FRL and FCL restrained FRL from disposing of its retail assets to third parties including, for the purpose of the present controversy, Reliance. The retail assets were, mainly, supermarkets, run under the name "Big Bazaar".

8. The FCSHA and FCSSA, dated 22nd August 2019, executed between FCL and Amazon, envisaged investment, by Amazon, of ₹ 1,431 crores, to acquire 49% equity in FCL. Clause 3.4 of the FCSSA required Amazon to obtain prior approval from the Competition Commission of India (CCI) before investment.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

9. On 23rd September 2019, Amazon applied to the CCI for approval to invest in FCL. This was, purportedly, to strengthen the business of FCL and unlock its value. Conditional approval was granted by CCI on 28th November 2019, for Amazon to invest in FCL.

10. On 29th August, 2020, FCL gave consent to FRL entering into a Scheme of Arrangement ("SOA", hereinafter) with Reliance, *vide* a Board Resolution. Under the said SOA, the retail assets of FRL and its group companies were to be sold to Reliance for approximately ₹ 25,000 crores, apart from an additional investment of ₹ 2,400 crores to be infused by Reliance.

11. Aggrieved thereby, Amazon initiated arbitral proceedings (in which the presently impugned orders have been passed) under Clause 25.2.1 of the FCSHA, on 5th October 2020, under the aegis of the Singapore International Arbitration Centre (SIAC). Though there was no direct contractual relationship between Amazon and FRL, the primary contention of Amazon, in the said arbitral proceedings, were that (i) the FCSHA, FCSSA and FRSHA constituted a single integrated transaction, (ii) Amazon had special protective rights in FRL through FCL and (iii) the prior consent of Amazon had not been obtained before sale or disposal of the retail assets of FRL. Resultantly, Amazon sought, from the learned Arbitral Tribunal, a restraint against FRL from proceeding in terms of the SOA. The prayer clause in the Statement of Claim filed by Amazon before the Learned Arbitral Tribunal reads thus:

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

"For the reasons set out in this Statement of Claim, the Claimant makes the following requests for Relief and asks that the Tribunal issue by way of an Award:

(i) A declaration that the board resolution purported to be passed by the FRL Board on 29 August 2020 to approve the Impugned Transaction is in breach of the Agreements;

ii) A permanent prohibitory injunction restraining the Respondents from transferring, encumbering, divesting, or disposing of, directly or indirectly, the Retail Assets to the MDA Group or entities controlled by the MDA Group/its affiliates under the Composite Scheme of Arrangement, or any Restricted Person in any manner or form whatsoever;

(iii) A permanent mandatory injunction directing the Respondents to rescind and/or withdraw and/or annul all actions, including but not limited to: (a) the resolution passed by the FRL Board on 29 August 2020; and (b) any and all actions taken consequent to the resolution passed by the FRL Board on 29 August 2020 relating to the Composite Scheme of Arrangement, including any and all regulatory approvals which were obtained contrary to the Agreements and in violation of the EA Order;

(iv) A permanent prohibitory injunction restraining the Respondents from directly or indirectly transferring or disposing of the Retail Assets in any manner or form whatsoever without the Claimant's consent;

(v) A permanent prohibitory injunction restraining the Respondents, whether by themselves or through entities controlled by them, from transferring/issuing securities of FRL or obtaining any financing, directly or indirectly, from the MDA Group or any Restricted Person in any manner or form whatsoever;

(vi) A permanent prohibitory injunction restraining the Respondents from transferring or disposing of, directly or indirectly, the shares held in FRL by Respondent No.(s) 1, 3-13 in any manner or form whatsoever without the Claimant's consent;

(vii) A permanent mandatory injunction directing the Respondents to take steps to comply with provisions of Section 17.2(i) of the FCPL SHA such that Promoter FRL Securities constituting at least 16.18% of the issued and paidup share capital of FRL shall be procured, maintained and shall remain free from Encumbrances of any nature;

(viii) A declaration that the board resolution purported to be passed by the board of directors of FCPL on 29 August 2020 to

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

grant consent to the Impugned Transaction is *ultra vires*, *non-est* and *void*;

(ix) Compensation in addition to the injunctive reliefs sought above, to be particularised and quantified at a subsequent stage;

(x) In the alternative to the reliefs set out at (i) to (ix), award the Claimant compensation for losses resulting from the fundamental breaches of the Agreements committed by the Respondents, which are to be particularised and quantified at a subsequent stage;;

(xi) Pre-Award Interest and Post Award Interest, to be particularised and quantified at a subsequent stage;

(xii) Costs of the Arbitration, including the Claimant's legal fees and costs; and

(xiii) Such other and further relief(s) as the Tribunal may deem just and proper."

12. Simultaneously, an application for emergency reliefs was also filed in the arbitral proceedings.

13. On 25th October 2020, an interim order came be passed by the Emergency Arbitrator. By the said order, the Emergency Arbitrator restrained FCL and FRL from proceeding with the SOA with Reliance.

14. Therefrom, four sets of proceedings emanated. They may be individually noted thus:

CS (Comm) 493/2020

15. FRL filed CS (Comm) 493/2020 before this Court to restrain Amazon from interfering with the SOA between FRL and Reliance.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

16. On 21st December 2020, a learned Single Judge of this Court (Hon'ble Ms. Justice Mukta Gupta) came to pass an interim order in CS (Comm) 493/2020, whereby the learned Single Judge rejected the application for interim relief filed by FRL.

OMP (Enf) (Comm) 17/2021

17. Amazon filed OMP (Enf) (Comm) 17/2021, under Section 17(2)[2] of the 1996 Act, to enforce the order dated 25th October, 2020 passed by the learned Emergency Arbitrator.

18. *Vide* order dated 2nd February 2021, a learned Single Judge of this Court passed an interim order, directing *status quo* to be maintained. This order was confirmed on 18th March 2021, but was later stayed by the Division Bench of this Court *vide* order dated 22nd March 2021.

19. This stay came to be vacated by the Supreme Court *vide* a detailed judgment dated 6th August 2021. The Supreme Court in the said judgment opined, *inter alia*, that the orders of the learned Single Judge dated 2nd February 2021 and 18th March 2021 were not

[2] **17. Interim measures ordered by arbitral tribunal**. –

*****

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

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

amenable to appeal before a Division Bench of this Court.

20. In view thereof, FCL challenged the order dated 2nd February 2021 of the learned Single Judge of this Court before the Supreme Court by way of SLP (C) 13547-13548/2021.

21. By judgment dated 1st February 2022, the Supreme Court set aside the order dated 2nd February 2021 of the learned Single Judge, and remanded OMP (Enf) (Comm) 17/2021 to be heard by the Single Judge. This petition is presently pending.

Arb A (Comm) 63/2021 and Arb A (Comm) 64/2021

22. On 11th March 2021, FRL filed an application before the learned Arbitral Tribunal, seeking vacation of the order dated 25th October 2020 of the learned Emergency Arbitrator.

23. The response filed by FCL, to the said application of FRL, was permitted by the learned Arbitral Tribunal to be treated as an independent application for vacation of the Emergency Arbitrator's order dated 25th October 2020. Thus, vacation of the order dated 25th October 2020 came be sought, before the learned Arbitral Tribunal, both by FCL and FRL.

24. By order dated 21st October 2021, the learned Arbitral Tribunal dismissed both the applications seeking vacation of the order dated 25th October 2020 and confirmed the directions contained in the said order passed by the learned Emergency Arbitrator.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

25. FCL and FRL both challenged the said order dated 21st October 2021 of the learned Arbitral Tribunal, by way of Arb A (Comm) 63/2021 and Arb A (Comm) 64/2021 respectively. Side by side, FCL and FRL also sought stay of operation of the said order dated 21st October 2021 passed by the learned Arbitral Tribunal by way IA 14257/2021 and IA 14285/2021 respectively.

26. By order dated 29th October 2021, the learned Single Judge of this Court dismissed IA 14285/2021 and, thereby, declined stay of operation of the order dated 21st October 2021, passed by the learned Arbitral Tribunal.

27. This order dated 29th October 2021 was challenged by the FCL before the Supreme Court by way of SLP (C) 18089/2021 which, consequent to grant of leave, was renumbered CA 864/2022.

28. By the judgment dated 1st February 2022, to which allusion has already been made hereinbefore, the Supreme Court also set aside the order dated 29th October 2021 of the learned Single Judge and remanded IA 14285/2021 to this Court for a decision on merits.

29. As such, IA 14285/2021 as well as IA 14257/2021, filed by FRL and FCL respectively, seeking stay of operation of the order dated 21st October 2021 of the learned Arbitral Tribunal, have to be reheard by this Court. They are also pending.

30. There are, therefore, presently pending, before this Bench (as all

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

matters relating to the proceedings have, consequent to order dated 1st February 2022 passed by the Supreme Court followed by an administrative order dated 3rd February 2022 of Hon'ble the Chief Justice, been directed to be listed before me) four proceedings relating to the orders passed by the learned Arbitral Tribunal, i.e. CS (Comm) 493/2020, OMP (Enf) (Comm) 17/2021, Arb A (Comm) 63/2021 and Arb A (Comm) 64/2021.

Further developments

31. While this Court was hearing arguments in CS (Comm) 493/2020, OMP (Enf) (Comm) 17/2021, Arb A (Comm) 63/2021 and Arb A (Comm) 64/2021, two major developments took place.

32. The first was that the secured creditors of FRL voted against the SOA, as a result of which SOA collapsed.

33. Prior thereto, however, RIL took over 835 retail assets of FRL, which were subject matter of the FRL/Reliance SOA. Aggrieved thereby, Amazon moved the Supreme Court by way of IA 40429/2022. The Supreme Court, *vide* order dated 6th April 2022, directed this Court to deal with IA 40429/2022, as other cognate issues were pending before this Court. As a result, IA 40429/2022 has been added to the list of applications which this Court is considering.

34. Indeed, given the aforesaid developments, over the last few dates when the above batch of matters was listed before this Bench and arguments took place, they were mainly restricted to IA

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

40429/2022, as the main grievance that survives insofar as Amazon is concerned, is with the taking over the retail assets by Reliance, allegedly in the teeth of the interim Award dated 25th October 2020 of the learned Emergency Arbitrator. This Court heard arguments of learned Senior Counsel on a number of occasions on the said IA. Thereafter, however, parties have, *ad idem* been seeking adjournments on the ground that they are attempting to arrive at an out of Court settlement in the matter.

35. In the meanwhile, there have been still further developments, which have resulted in the present proceedings being instituted by the petitioners.

Competition Commission of India (CCI) order dated 17th December 2021

36. Section 6(2)[3] of the Competition Act, read with Regulation 9(1)[4] of the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations 2011 ("the Combination Regulations") requires every transaction which amounts to a "combination" within the meaning of Section 5 of

[3] **6. Regulation of combinations**. –

*****

(2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of –

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of Section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of Section 5 or acquiring of control referred to in clause (b) of that section.

[4] **9. Obligation to file the notice**. –

(1) In case of an acquisition or acquiring of control of enterprise(s), the acquirer shall file the notice in Form I or Form II, as the case may be, which shall be duly signed by the person(s) as specified under Regulation 11 of the Competition Commission of India (General) Regulations, 2009.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

the Competition Act, to be notified to the CCI. Section 6(2A)[5] of the Competition Act, envisages transactions which result in a combination as coming into effect, only after they are so notified to the CCI, and CCI either approves the transaction or fails to raise any objection despite expiry of the stipulated time provided in that regard.

37. Amazon applied *vide* Notice dated 23rd September 2019 to the CCI, under Section 6(2) of the Competition Act, for approval of the Combination comprising the following three transactions (reproduced *verbatim* from the order of the CCI):

> "(i) Transaction I: The issue of Nine Million One Hundred and Eighty Three Thousand Seven Hundred and Fifty-Four (9,183,754) Class A voting equity shares of FCPL to Future Coupons Resources Private Limited (FCRPL). Prior to, and immediately post issuance of such equity shares, FCPL will be a wholly owned subsidiary of FCRPL, and
>
> (ii) Transaction II: The transfer of Thirteen Million Six Hundred and Sixty Six Thousand Two Hundred and Eighty Seven (13,666,287) shares of FRL held by FCRPL (represented Two decimal five Two Percent (2.52%) of the issued, subscribed and paid-up equity share capital of Future Retail Limited (FRL), on a Fully Diluted Basis) to FCPL; and
>
> (iii) Transaction III: The acquisition of the Subscription Shares representing Forty Nine percent (49%) of the total issued, subscribed and paid-up equity share capital of FCPL (on a Fully Diluted Basis) by Amazon, by way of a preferential allotment."

Amazon, disclosed, in the Notice, only the factum of execution of the FCSHA and the Commercial Arrangements (BCAs) in relation to the Combination, while seeking approval thereof.

38. The CCI granted approval to the aforesaid Combination, as

[5] (2-A) No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under Section 31, whichever is earlier.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

sought by Amazon, on 28th November 2019, as already noted hereinbefore.

39. FCL, thereafter, filed a complaint to the CCI under Section 43A, 44 and 45 of the Competition Act on 25th March 2021, contending that Amazon had, while obtaining the said approval, concealed, from the CCI, the FRSHA and the BCAs.

40. Pursuant thereto, the CCI issued a notice to Amazon on 4th June 2021, to show cause as to why the approval granted to Amazon on 28th November 2019 be not withdrawn.

41. Adjudicating the said Show Cause Notice, the CCI, *vide* order dated 17th December 2021, upheld the objection of FRL that Amazon had concealed, from the CCI, while applying for approval for the Combination, the FRSHA and the BCAs. As a result, the CCI directed Amazon to furnish a fresh notice in Form II for approval of the Combination within 60 days of the order of the CCI, till which time the approval granted *vide* order dated 28th November 2019, to the Combination, was directed to remain in abeyance. Para 80 of the order dated 17th December 2022 of the CCI, may, for this purpose be reproduced thus:

> "80. Given that the Combination is between players who are known in the online marketplace and offline retailing and they have contemplated strategic alignment between their businesses, the Commission considers it necessary to examine the combination afresh based on a notice to be given in Form II with true, correct and complete information, as required therein. Accordingly, in exercise of the powers conferred under sub-section (2) of Section 45 of the Act, the Commission hereby directs Amazon to give notice in Form II within a period of 60 days from the receipt of this order, and, till disposal of such notice, the approval granted *vide*

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Order dated 28th November, 2019, in Combination Registration No. C-2019/09/688, shall remain in abeyance."

Proceedings against FRL under the Insolvency and Bankruptcy Code, 2016 (IBC)

42. In the meanwhile, Bank of India, one of FRL's creditors, moved the learned National Company Law Tribunal (NCLT), initiating Corporate Insolvency Proceedings against FRL under Section 7(1)[6] of the IBC. A moratorium, under Section 14(1)[7] of the IBC, came to be put in place, by the NLCT, in the said proceedings, on 20th July 2022, between the passing of the orders 28th June 2022 and 11th October 2022, by the learned Arbitral Tribunal, forming subject matter of

[6] **7. Initiation of corporate insolvency resolution process by financial creditor**. –

(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified[25] by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred:

Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6-A) of Section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

[7] **14. Moratorium**. –

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely –

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

challenge in CM (M) 1141/2022 and CM (M) 1140/2022 respectively.

Application of the petitioners under Section 32(2)(c) of the 1996 Act

43. In the wake of the aforesaid order dated 17th December 2022 of the CCI, the petitioners applied, to the learned Arbitral Tribunal, under Section 32(2)(c) of the 1996 Act, seeking termination of the arbitral proceedings. Inasmuch as this Court is not entering into the merits of the impugned order dated 28th June 2022, whereby the said application was dismissed by the learned Arbitral Tribunal, it would not be appropriate for this Court to detail the rival contentions of the parties in that regard. Suffice it to state that the petitioners' contention was that, with the approval contained in the order dated 28th November 2019, granted by the CCI to the Combination having been placed in abeyance by the subsequent order dated 17th December 2021 of the CCI, the FCSHA and FCSSA and FRSHA could no longer be acted upon and that, therefore, that no dispute survived for adjudication in the arbitral proceedings. In that view of the matter, the petitioners contended that the arbitral proceedings were required to be terminated under Section 32(2)(c) of the 1996 Act.

44. Further, contended FRL, were the learned NCLT to admit the application filed by Bank of India under Section 7 of the IBC, a moratorium would invariably be put in place in terms of Section 14(1) of the IBC. Any such moratorium, if put in place, would render further continuance of the arbitral proceedings illegal and impermissible. On this ground, too, therefore, FRL sought termination of the arbitral proceedings under Section 32(2)(c).

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Impugned Order dated 28th June 2022 of the learned Arbitral Tribunal

45. The learned Arbitral Tribunal has rejected the said application by the impugned order dated 28th June 2022.

46. Though, till then, no moratorium in terms of Section 14(1) of the IBC had been put in place by the learned NCLT, the learned Arbitral Tribunal, in para 161 of the impugned order dated 28th June 2022, rejected FRL's submissions, observing that, even if a moratorium under Section 14(1) of the IBC were to be imposed by the learned NCLT, such a moratorium would operate only against FRL and not against the Biyanis who could continue to participate in the proceedings. As such, the learned Arbitral Tribunal opined that the imposition of such a moratorium would not amount to an interdiction, on the learned Arbitral Tribunal, concluding hearings and passing an Award, and would in any case remain in force only till it was in place.

47. The learned Arbitral Tribunal further expressed the view that the effect of the order dated 17th December 2021 of the CCI on the FCSHA, FCSSA and FRSHA were matters which are required to be examined in detail, and could not constitute a justifiable basis to terminate the arbitral proceedings midway under Section 32(2)(c). The CCI order dated 17th December 2021, according to the learned Arbitral Tribunal, could not be said to have rendered the continuation of the arbitral proceedings "unnecessary" or "impossible", being the only two exigencies statutorily envisaged by Section 32(2)(c), in which the arbitral proceedings could be terminated.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

48. Paras 164 and 165 of the impugned order dated 28th June 2022 of the learned Arbitral Tribunal, which contains its concluding findings in the above regard, read thus:

> "164. For the reasons given in [125]-[162] above, the Tribunal finds that the continuation of these proceedings has not been rendered unnecessary or impossible under Section 32(2)(c) of the Arbitration Act. Accordingly, there is no ground for the termination of these proceedings under Section 32 of the Arbitration Act.
>
> 165. This Decision does not finally decide and is not dispositive of any issue on the merits of the case. Accordingly, for the avoidance of doubt, this Decision does not constitute an award within the meaning of Section 2(1)(c) of the Arbitration Act."

Moratorium introduced *vide* order dated 20th July 2022 of the learned NCLT

49. On 20th July 2022, the learned NCLT put in place a Moratorium under Section 14(1) of the IBC, in the proceedings initiated against FRL under Section 7 thereof, whereby the learned NCLT prohibited "the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority".

Addendum dated 11th August 2022, filed by Amazon and the petitioners' response

50. Consequent to the above developments, Amazon filed an Addendum on 11th August 2022, under Section 23(3)[8] of the

[8] **23. Statements of claim and defence**. –
*****

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Arbitration Act read with Rule 20.5[9] of the Singapore International Arbitration Centre, 2016 ("the SIAC Rules"). By the said addendum, Amazon contended that, with the cessation of the vesting of the retail assets of FRL in FRL, and their vesting in Reliance, the order of injunction dated 25th October 2020 passed by the learned EA had been breached. These acts, contended Amazon, amounted to "repudiatory breaches" of all the Agreements between the parties. As a result, the prayers in the original SOC, insofar as they sought specific performance of the said agreements, it was contended, had become incapable of being granted. However, the addendum contended that the repudiatory breaches of the agreements, by FRL and Reliance, allegedly acting in tandem, had entitled Amazon to repudiatory damages.

51. Para 132 of the application, therefore, sought further reliefs, in addition to those reliefs sought in the SOC which survived, in the following terms:

> "132. For the reasons set out in the Statement of Claim read with the present Addendum, the Claimant makes the following requests for relief, which are in addition to the reliefs which survive in the Statement of Claim, and prays that the Tribunal issue by way of an Award:
>
> a) A declaration that the Retail Assets have ceased to vest in FRL, in repudiatory breach of the Agreements;
>
> b) An order allowing rescission of the FCPL SHA in light of the repudiatory breaches committed by the Respondents;

---

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

[9] **20.5** A party may amend its claim, counterclaim or other submissions unless the Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim or counterclaim may not be amended in such a manner that the amended claim or counterclaim falls outside the scope of the arbitration agreement.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

c) An Award granting the Claimant damages resulting from the rescission of the FCPL SHA, as Quantified in the Supplementary Expert Report of Mr Howard Rosen;

d) A declaration that the proceedings initiated by the Respondents before the NCLT (for seeking approval of the Impugned Transaction) and the High Court of Delhi, as well as actions undertaken in breach of the EA Order and Tribunal Order, constitute breach of the Arbitration Agreement;

e) An Award granting damages to the Claimant for the costs incurred by it and the losses suffered by it in resisting and initiating proceedings in view of the Respondents' breaches of Arbitration Agreement, as quantified in the Supplementary Expert Report of Mr Howard Rosen.

f) Grant of Pre-Award Interest pendente lite and Post Award Interest, as set out in the Supplementary Expert Report of Mr Howard Rosen.;

g) Costs of the Arbitration, including the Claimant's legal fees and wasted costs; and

h) Such other and further relief(s) as the Tribunal may deem just and proper."

52. Before the learned Arbitral Tribunal, the petitioners contended that the Addendum application of Amazon, to supplement the SOC, was not maintainable. It was contended that, by the said Addendum, Amazon was seeking to introduce an entirely new case, which had nothing to do with the case originally set up in the SOC filed before the learned Arbitral Tribunal. This, submitted the petitioners, was impermissible in law, as the learned Arbitral Tribunal was bound by the terms of reference of the arbitration before it. The original reliefs sought by Amazon before the learned Arbitral Tribunal having, even as per the Addendum, become incapable of being granted, the petitioners contended that Amazon could not substitute the reliefs originally sought with entirely new reliefs, predicated on events which

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

took place after the arbitral proceedings had been set in motion, and which were not even foreseen at that point of time. Section 23(3)(c) of the 1996 Act, contended FRL, did not permit this. Assuming, without admitting, that any repudiatory breach of the agreements had taken place, FRL contended that they could only be ventilated by Amazon by means of a fresh arbitral process, and not by adding new prayers to those with which the learned Arbitral Tribunal was already concerned.

Impugned Procedural Order No. 10 dated 11th October 2022, of the learned Arbitral Tribunal

53. FRL's objections have been rejected and Amazon's application has been allowed by the impugned procedural order No. 10 dated 11th October 2022. Paras 60 and 61 of the impugned order dated 11th October 2022, which set out its decision, read thus:

> "60. For the reasons set out above, the Tribunal directs and orders that:
>
> 60.1. the Application is allowed;
>
> 60.2. the Addendum is taken on record; and
>
> 60.3. the costs of this PO No. 10 are reserved for determination at a subsequent stage of the proceedings.
>
> 61. For the sake of clarity, the Tribunal is not closing the door on any of the points made by the Majority Respondents by way of substantive defences, as it has only dismissed them as not operating as a bar to granting Claimant's request for an amendment of its claims. In other words, the Tribunal's findings in this Decision do not in any way amount to a decision as to the substantive merits of the matters raised by Claimant in its Addendum. These are matters to be dealt with at a subsequent stage of these proceedings. However, the Tribunal has given some indication of its thinking on those points which have been dismissed at this interlocutory stage, and more will be needed for it to be persuaded that they will have significance as substantive

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

defences at the hearing stage."

The present petitions

54. These two petitions, under Article 227 of the Constitution of India, as already noted, assail the aforesaid order dated 28th June 2022, passed by the learned Arbitral Tribunal on the petitioners' application under Section 32(2)(c) of the 1996 Act and the procedural order No. 10 dated 11th October 2022 passed by the learned Arbitral Tribunal on Amazon's application under Section 23(3) of the 1996 Act.

Rival Contentions

55. Inasmuch as, in my opinion, the present petitions are not maintainable, any detail allusion to the rival contentions as advanced before me would be a mere superfluity. A brief reference thereto would, therefore, suffice.

Submissions of petitioners and FRL

56. Mr. Mukul Rohatgi and Mr. Dayan Krishnan, learned Senior Counsel for the petitioners submitted that, having acknowledged, in so many words, that specific performance of the FCSHA, as was sought in the SOC filed before the learned Arbitral Tribunal could no longer be granted, Amazon now sought to urge a completely new case of repudiatory breach and consequent repudiatory damages. They submit that the law did not permit such a wholesale substitution of the case originally urged before the learned Arbitral Tribunal by an entirely new case. Once Amazon admitted that, by reason of

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

supervening developments, its original claim in the arbitral proceedings stood frustrated, learned Senior Counsel would submit that, under Section 32(2)(c) of the 1996 Act, the proceedings had to terminate. The new reliefs that Amazon sought to introduce by way of the addendum, they submit, were predicated on a new cause of action, i.e. the taking over of the retail assets by reliance which, according to Amazon, constituted a repudiatory breach. The arbitral proceedings having been premised on the cause of action on which they were originally instituted, learned Senior Counsel submit that, in the same proceedings, new reliefs based on an entirely new cause of action could not be introduced. What Amazon was seeking, in essence, submit learned Senior Counsel, was not adding of further reliefs, but wholesale substitution of its original claim by a new claim. The new claim being based on a new cause of action and forming no part of the cause of action on which the arbitral proceedings had originally been instituted, learned Senior Counsel would submit that the learned Arbitral Tribunal was acting in manifest excess of its jurisdiction in entertaining the said claims and would, in fact, if it continued with the proceedings, be *coram non judice*. Once Amazon had acknowledged that its original claims for specific performance and consequent damages did not survive for consideration, learned Senior Counsel would submit that the only option with the learned Arbitral Tribunal was to terminate the arbitral proceedings under Section 32(2)(c) of the 1996 Act. It could not, within the realm of the jurisdiction vested in it, allow Amazon to withdraw its earlier claim and substitute the claim with a new claim. The terms of reference of the learned Arbitral Tribunal were, as Mr. Rohatgi sought to phrase it "the *Lakshman rekha*", within which alone the learned Arbitral

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Tribunal could peregrinate. The claim for repudiatory damages that Amazon now sought to introduce by way of the Addendum was beyond the terms of reference of the learned Arbitral Tribunal and, therefore, were within outside its jurisdiction. With the abandonment, by Amazon, of its original prayers of specific performance and consequent damages, the learned Arbitral Tribunal, according to the learned Senior Counsel, had been rendered *functus officio*.

57. In support of the contention that the learned Arbitral Tribunal was acting in excess of its jurisdiction in continuing with the proceedings, learned Senior Counsel also seek to press, into service, the Moratorium put in place by the learned NCLT on 20th July 2022 under Section 14 of the IBC. The observation, of the learned Arbitral Tribunal, that the said moratorium applied only against FRL and not against the Biyanis, submit learned Senior Counsel, went against the very grain of the case that Amazon had sought to set up before the learned Arbitral Tribunal, and accepting which the learned Emergency Arbitrator had, *vide* order dated 25th October 2020, put injunctive directions against the petitioners in place. Learned Senior Counsel points out that the learned Emergency Arbitrator had proceeded on the premise that all transactions were integrated. Once such a concept of "integrated transactions" had been invoked – and that too, at the instance of Amazon – then, when it came to examining the consequences of the moratorium put in place by the learned NCLT, learned Senior Counsel submit that the learned Arbitral Tribunal could not treat the Biyanis and FRL as independent for that purpose. Even otherwise, submit learned Senior Counsel, once the learned Arbitral Tribunal had accepted that the moratorium at least applied in the case

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

of FRL, there could be no question of continuing with the arbitral proceedings, as that would amount to continuing with the proceedings in part, which was not permissible in law.

58. The arbitral proceedings, as they were continuing, submit learned Senior Counsel, were, therefore, a nullity. No other remedy being available with the petitioners to halt the continuance of the arbitral proceedings and keeping in mind the fact that the learned Arbitral Tribunal was continuing with the proceedings without jurisdiction, learned Senior Counsel submit that the case eminently deserves interdiction by this Court under Article 227 of the Constitution of India, by "clipping the arbitral wings". This, therefore, submits learned Senior Counsel, cannot be treated as a case in which alternate or other remedies were available with the petitioners. The case, submits learned Senior Counsel, does not fall within any of the exigencies envisaged by Section 34[10] of the 1996

[10] **34. Application for setting aside arbitral award**. –
(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
(2) An arbitral award may be set aside by the Court only if –
(a) the party making the application establishes on the basis of the record of the arbitral tribunal that –
(i) a party was under some incapacity; or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
(b) the Court finds that –
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Act. In this context, learned Senior Counsel have also invited my attention to Section 16(6)[11] of the 1996 Act.

59. Learned Senior Counsel further submit that, with the passing, by the learned CCI of its order dated 17th December 2021, further continuance of the arbitral proceedings was in any event impossible, as the arbitration agreement between Amazon and FCL had itself been rendered a nullity. Learned Senior Counsel would submit that, even if, *arguendo*, the arbitration clause in the agreement were to survive the evisceration of the agreement itself, the arbitral proceedings were being continued in *vacuo*, as there was nothing to enforce. Learned Senior Counsel also submits that the order dated 17th December 2021 of the CCI was subsequently upheld by the learned National Company Law Appellate Tribunal (NCLAT) on 13th June 2022, and that the appeal against the said decision is pending before the Supreme Court.

60. Learned Senior Counsel submit that the learned Arbitral Tribunal was fundamentally in error in rejecting the petitioner's submission that on the ground that these were ultimately issues which

---

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1. – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2. – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

[11] **16. Competence of arbitral tribunal to rule on its jurisdiction**. –

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

went into the merits of the case and had to be disposed of with the usual way with all other connected issues. Learned Senior Counsel would submit that, with the passing of the CCI order, there is no question of survival of any further scope of examination into the merits of the case. They also submit, in this regard, that *vide* order dated 6th April 2022, the Supreme Court had directed the learned Arbitral Tribunal to decide the petitioners' application for termination of the arbitral proceedings, and not to defer the decision to a later stage. As such, by deferring the decision on the question of termination of arbitral proceedings, under Section 32(2)(c) of the 1996 Act, to a later stage, learned Senior Counsel would submit that the learned Arbitral Tribunal was acting in defiance of the order passed by the Supreme Court.

61. In support of their submissions, learned Senior Counsel placed reliance on the judgement of the Supreme Court in ***Indian Oil Corporation Ltd v. S.P.S. Engineering Ltd***[12] and of this Court in ***U.O.I. v Indian Agro Marketing Cooperative Ltd***[13], ***Telecommunications Consultants India ltd v B.R. Sukale Construction***[14] and ***Raghuvir Buildcon Pvt Ltd v. Ircon International Ltd***[15].

Submissions of Amazon

62. Responding to the aforesaid submissions of the learned Senior Counsel for the petitioners, Mr. Subramanium and Mr. Nayar, learned

[12] (2011) 3 SCC 507
[13] (2022) 3 HCC 279 (Del)
[14] 2021 SCC OnLine Del 4863
[15] 2021 SCC OnLine Del 2491

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Senior Counsel for Amazon, submit that CCI had not, by its order dated 17th December 2021, annulled the agreements between the parties, but had, rather, clarified that it was not concerned with the pending arbitral proceedings. Mr. Subramanium contends that the present proceedings are, in fact, abusive of the process of law. He has drawn my attention, in this context, to the orders dated 4th April 2022 and 6th April 2022, passed by the Supreme Court in SLP(C) 1705-1706 of 2022.

63. The order dated 4th April 2022, passed by the Supreme Court read thus:

> "1. Heard Mr. Gopal Subramanium, Mr. Ranjit Kumar and Mr. Aspi Chinoy, learned Senior counsel appearing on behalf of the petitioner as also Mr. Harish Salve, learned Senior counsel appearing on behalf of the respondents and Mr. Rakesh Diwvedi, learned Senior counsel appearing on behalf of the intervenor/Bank of India.
>
> 2. The intervention application filed on behalf of the applicant/intervenor – Bank of India is permitted to be withdrawn without prejudice to the rights and contentions of the applicant.
>
> 3. It is stated and agreed by both the parties that they wish to appear before the Singapore International Arbitration Centre and request that the proceedings, pending adjudication before it, be expedited on the issues agreed upon between them.
>
> 4. Towards this purpose, both the parties are directed to file a Joint Memo of Consent Terms by 05.04.2022.
>
> 5. List these matters on 06.04.2022."

In terms of the direction, issued by the Supreme Court, the following Joint Memo of terms was filed:

> "**MEMO ON BEHALF OF THE PARTIES**
>
> 1. The present Special Leave Petitions ("**SLPs**") seek leave to appeal from an order dated 5 January 2022 passed by a Division Bench of the Hon'ble High Court of Delhi in a Letters Patent

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Appeal (**LPA 7 / 2022**) filed by Respondent Nos. 1 to 12. The Letters Patent Appeal in turn arose out of a petition filed by Respondent Nos. 1 to 12 against various orders of the Arbitral Tribunal in SIAC Arbitration No. 960/2022 ("**Arbitration**").

2. The parties have agreed that the following order may be made by this Hon'ble Court by consent:

a. The parties will approach the Tribunal to resume the arbitration proceedings, on an understanding that the Tribunal will hear and dispose off the Termination Application dated 23.12.2021 filed by Respondent Nos. 1 to 12 (**"Termination Application"**), in priority to other matters and pass orders.

b. In the event the Termination Application is dismissed, then the Tribunal may continue with the Arbitration and conclude the hearings and publish an award."

Thereafter, having perused the aforesaid joint memo of terms filed before it, the Supreme Court disposed of the aforesaid appeals by order dated 6th April 2022 which reads thus:

"O R D E R

Leave granted.

2. Heard Mr. Gopal Subramanium and Mr. Ranjit Kumar, learned Senior counsel appearing on behalf of the petitioner as well as Mr. K.V. Viswanathan and Mr. Mukul Rohatgi, learned Senior counsel appearing on behalf of the respondents.

3. It is agreed to by the learned counsel for the parties that since the proceedings are going on before the learned Single Judge of the Delhi High Court, I.A.No.40429/2022 in SLP(C)Nos.1669-1670/2022 may be transmitted to the learned Single Judge.

4. We, accordingly, transmit I.A.No.40429/2022 in SLP(C)Nos.1669-1670/2022 to the learned Single Judge of the Delhi High Court to decide the same in accordance with law after hearing learned counsel for the parties.

5. I.A.No.40429/2022 in SLP(C)Nos.1669-1670/2022 stands disposed of accordingly.

6. Vide order dated 04.04.2022, both the parties were directed to file a Joint Memo of Consent Terms by 05.04.2022.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

7. In compliance of the said order, Joint Memo of Consent Terms have been filed by the parties.

8. Having heard learned senior counsel for the rival parties and on carefully perusing the Joint Memo of Consent Terms filed by the parties, we deem it appropriate to pass the following order by consent of the parties:

(a) Order dated 5th January, 2022 passed by a Division Bench of the High Court of Delhi in LPA No.6 of 2022 and CM Application No.569 of 2022 in LPA No.6 of 2022 and LPA No.7/2022 and CM Application No.572/2022 in LPA No.7/2022 is set aside.

(b) The parties will approach the Arbitral Tribunal to resume the Arbitration Proceedings, on an understanding that the Arbitral Tribunal will hear FRL's Termination Application and the Termination Application filed by respondent Nos.2 to 13 under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 in priority to other matters and pass orders.

(c) The Arbitral Tribunal may continue with the Arbitration Proceedings and conclude the hearings and pass an order or award as the case may be.

9. The appeals stand disposed of accordingly.

10. As a sequel to the above, pending interlocutory applications also stand disposed of."

64. Having, thus, agreed for continuation of the arbitral proceedings and passing of the award, learned Senior Counsel for the respondents would submit that the petitioners have clearly abused the judicial process by seeking to interdict continuance of the proceedings by means of the present petition.

65. Insofar as Section 32(2) of the 1996 Act is concerned, learned Senior Counsel would submit that the present case does not attract any of the clauses of the sub-sections (a) to (c). The claim for damages, it

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

is pointed, was already included as an alternative claim in the original SOC filed by Amazon before the learned Arbitral Tribunal. Specific performance had been sought on the presumption that the agreements between the parties, and their sanctity, would be preserved during the continuance of the arbitral proceedings. The petitioners having themselves wilfully breached the terms of the Agreements, learned Senior Counsel for the respondents would submit that they have become liable to pay damages under Section 73[16] of the Indian Contract Act, 1872 for repudiatory breach of the Agreements and cannot, therefore, now pick at straws to defeat Amazon's additional claims. In view of the repudiatory breaches committed by FRL, Amazon submitted that, by its additional claims, it was essentially seeking return of the amount of ₹ 1,431 crores, which was by way of continuation of the original claim and could not be treated as a new cause of action. Learned Senior Counsel submit that, so long as the power of the learned Arbitral Tribunal to allow amendment of the claim could not be disputed, and the claim was itself within the arbitration clause in the agreement, the learned Arbitral Tribunal was possessed of the jurisdiction to adjudicate on it. That jurisdiction, submits learned Senior Counsel, stood vested by Section 23(3) of the 1996 Act.

66. The learned Arbitral Tribunal had, submits learned Senior Counsel, examined all the contentions of the petitioners, as well as the

[16] **73. Compensation for loss or damage caused by breach of contract**. – When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

scope and ambit of the expression "unnecessary" and "impossible" as implied in Section 32(2)(c) of the 1996 Act. No scope for interference with such a decision, under Article 227 of the Constitution of India, they submit, exists. In this context, learned Senior Counsel have invited my attention to the use of the phrase "disputes which have arisen or may arise"[17] in Section 7 of the 1996 Act. Adverting to Section 23, learned Senior Counsel submits that Section 23(3) is referable to Section 23(1)[18] of the 1996 Act, and it is nobody's case that the dispute does not survive.

67. The breaches alleged by Amazon in its original SOC, as filed before the learned Arbitral Tribunal, according to learned Senior Counsel, were sufficient to embrace the repudiatory breach which had taken place consequent to taking over of the retail assets of FRL by Reliance. Even in the Addendum, submits learned Senior Counsel, they had not given up the original SOC *in toto*. Paras 1 to 292 of the original SOC, it is pointed out, were surviving and were maintained and asserted by Amazon. There was, in this context, a distinction between the jurisdiction of the learned Arbitral Tribunal to allow the amendment of the SOC and the subject matter of the amendment itself. Section 23(3) of the 1996 Act read with Rule 2.5 the SIAC Rules, it is submitted, required the proposed amendment to be rejected only if it was belated.

---

[17] **7. Arbitration agreement**. –
(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

[18] **23. Statements of claim and defence**. –
(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

68. In any event, learned Senior Counsel submitted that, even if it were to be assumed that the amendment was beyond the scope of reference to arbitration, it was always open to the petitioners to challenge any final award, if it were to be passed in the arbitral proceedings to their prejudice, on that ground, under Section 34(2)(a)(iv) of the 1996 Act. Applying the law laid down by the Supreme Court in ***S.B.P. & Co. v. Patel Engineering Ltd.***[19] and as followed by this Court in ***Easy Trip Planners Ltd. v. One97 Communications Ltd.***[20], ***VRS Natarajan v. Oyo Hotels & Homes (P) Ltd.***[21] and ***Siddhast Intellectual Property Innovations (P) Ltd. v. Controller General of Patents, Designs and Trademarks***[22], therefore, learned Senior Counsel submit that no occasion arise for the petitioners, to challenge the interlocutory order of the learned Arbitral Tribunal under Article 227 of the Constitution of India.

69. The case was not, therefore, one of absence of jurisdiction on the part of the learned Arbitral Tribunal or the learned Arbitral Tribunal having usurped jurisdiction for itself, as would justify the interference under Article 227 of the Constitution of India.

70. Learned Senior Counsel emphasized that there was no real change in the dispute between the parties. Repudiatory breach of the agreements was something which the original SOC also envisaged. All that had happened, was that because of such repudiatory breach, some of the reliefs sought in the original SOC, had become impossible

---

parties have otherwise agreed as to the required elements of those statements.

[19] **(2005) 8 SCC 618**
[20] **2022 SCC OnLine Del 2186**
[21] **2022 SCC OnLine Del 2755**
[22] **2022 SCC OnLine Del 2556**

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

to grant. The commission of repudiatory breach by the petitioners, they submit, entitled Amazon to repudiatory damages on that score. In claiming the said damages by way of addendum, therefore, they had not travelled outside the scope of original SOC or the terms of reference of the learned Arbitral Tribunal. In this context, learned Senior Counsel have invited my attention to paras 301 to 307 of the original SOC, which read thus:

> "301. In addition to specific performance in the form of permanent injunctive relief under Section 38 read with Section 10 of the SRA, the Claimant seeks compensation under Section 21(1) read with Section 21(3) of the SRA on account of the wilful and material breaches of the Agreements committed by the Respondents.
>
> 302. The factual matrix, as set out in section VIII above, conclusively establishes that the Respondents have committed wilful breaches of the Agreements. Further, the Respondents have refused to even comply with the directions in the EA Order and continued to pursue the approval for the Impugned Transaction to the grave prejudice of the Claimant. In addition, FRL filed the Anti-Arbitration Suit in breach of the Arbitration Agreement to interdict and interfere with this Arbitration and defeat the rights of the Claimant. This conduct of the Respondents has caused the Claimant to suffer losses including but not limited to wasted costs incurred in resolving the ongoing dispute; wasted costs suffered on account of the diversion of management time; and costs in adopting legal representation and legal advisory in relation to additional regulatory exposure created on account of the actions of the Respondents.
>
> 303. As the Claimant continues to incur losses, the Claimant craves leave to claim such appropriate losses at a subsequent stage in this Arbitration.
>
> **B. The Claimant's alternative claim for compensation**
>
> 304. Without prejudice to its primary claim for specific performance of the Agreements and compensation in addition to specific performance under Section 21(1) read with Section 21(3) of the SRA, the Claimant submits its claim in the alternative for compensation in the event that specific performance cannot be granted.
>
> 305. This claim is being pleaded only by way of abundant

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

caution and in view of the mandate of Section 21(5) of the SRA.

> 306. As set out at section VIII above, the Respondents have fundamentally vitiated the substratum of the Claimant's investment of INR 14,310,000,000 (Indian Rupees Fourteen Billion Three Hundred and Ten Million) by entering into the Impugned Transaction which results in the cessation of FRL and the transfer of its Retail Assets to a Restricted Person viz. the MDA Group. Consequently, each and every aspect of the principal understanding between the Parties, which is reflected through several fundamental terms in the Agreements, has been vitiated. The Respondents have thus, through their grave, wilful and material breaches of the Agreements, effectively renounced their obligations under the Agreements. The actions of the Respondents constitute wilful and material breaches of the Agreements, which entitle the Claimant to seek reasonable compensation under Indian law.
>
> 307. In light of the above, the Claimant seeks compensation arising out of the material and wilful breaches of the Respondents, which have resulted in the total failure of consideration and resulted in the loss of the entire bargain set out in the Agreements. The Claimant submits that such compensation, which is not limited to liquidated damages, ought to account for the loss resulting from the unraveling of the transaction, including but not limited to (i) loss of investment; (ii) loss of Retail Assets; (iii) loss of call option; and (iv) loss of synergistic profits."

71. In these circumstances, learned Senior Counsel submit that the present petitions are not maintainable and cannot be allowed.

Analysis

72. The present petitions, in my considered opinion, do not lie under Article 227 of the Constitution of India. The pronouncements of the Supreme Court in ***SBP***[19] and ***Bhaven Constructions v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd.***[23] are clear and unequivocal in that regard.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

73. ***SBP***[19], rendered by a Bench of seven Hon'ble Judges of the Supreme Court, declared the law thus:

> "45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. *Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal.* This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. *We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.*
>
> 46. *The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."*
>
> (Italics and underscoring supplied)

74. The *ratio decidendi* that emerges from para 45 of ***SBP***[19] is clear and unequivocal. Challenges to orders/awards passed in arbitral proceedings have either to be under Section 37(2)[24] or under Section

---

[23] **(2022) 1 SCC 75**

[24] **37. Appealable orders**. –

*****

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

34(1) of the 1996 Act. Section 37(2) permits challenges against orders passed at the interlocutory stage in the arbitral proceedings either where a plea under Section 16(2) or (3)[25] of the 1996 Act is allowed or where a prayer for grant of interim measure under Section 17(1)[26] is allowed or refused. In the first case, the appeal would lie under Section 37(2)(a), whereas in the second, the appeal would lie under Section 37(2)(b).

75. An interlocutory order of an Arbitral Tribunal would also be susceptible to challenge, under the 1996 Act, where it is an "interim award", as the definition of "arbitral award", in Section 2(c)[27] of the 1996 Act, includes an "interim award". The 1996 Act does not, however, define the expression "interim award" and, to comprehend

---

(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.

[25] **16. Competence of arbitral tribunal to rule on its jurisdiction**. –
*****
(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

[26] **17. Interim measures ordered by arbitral tribunal**. –
(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal –
(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
(ii) for an interim measure of protection in respect of any of the following matters, namely –
(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
(b) securing the amount in dispute in the arbitration;
(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
(d) interim injunction or the appointment of a receiver;
(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,
and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

[27] (c) "arbitral award" includes an interim award;

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

the concept, one has to turn to the decision in ***Indian Farmers Fertilizers Coop. Ltd. v. Bhadra Products***[28]. Paras 7 and 8 of the report in ***Bhadra Products***[27] demystify the concept thus:

> "**7.** As can be seen from Section 2(*c*) and Section 31(6), except for stating that an arbitral award includes an interim award, the Act is silent and does not define what an interim award is. We are, therefore, left with Section 31(6) which delineates the scope of interim arbitral awards and states that the Arbitral Tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award.
>
> **8.** The language of Section 31(6) is advisedly wide in nature. A reading of the said sub-section makes it clear that the jurisdiction to make an interim arbitral award is left to the good sense of the Arbitral Tribunal, and that it extends to "any matter" with respect to which it may make a final arbitral award. The expression "matter" is wide in nature, and subsumes issues at which the parties are in dispute. It is clear, therefore, that any point of dispute between the parties which has to be answered by the Arbitral Tribunal can be the subject-matter of an interim arbitral award. However, it is important to add a note of caution. In an appropriate case, the issue of more than one award may be necessitated on the facts of that case. However, by dealing with the matter in a piecemeal fashion, what must be borne in mind is that the resolution of the dispute as a whole will be delayed and parties will be put to additional expense. The Arbitral Tribunal should, therefore, consider whether there is any real advantage in delivering interim awards or in proceeding with the matter as a whole and delivering one final award, bearing in mind the avoidance of delay and additional expense. Ultimately, a fair means for resolution of all disputes should be uppermost in the mind of the Arbitral Tribunal."

76. Interim awards of Arbitral Tribunals are, therefore, amenable to challenge under Section 34 of the 1996 Act, without waiting for the final award to be passed. Else, challenges to interlocutory orders have to be restricted to clauses (a) and (b) of Section 37(2); the former applying where the learned Arbitral Tribunal has allowed an application under Section 16(2) or (3) and the latter where it has refused to grant an interim measure of protection under Section 17.

---

[28] **(2018) 2 SCC 534**

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

77. Interlocutory orders passed in arbitral proceedings are otherwise immune from challenge under the 1996 Act.

78. ***SBP***[19], thus, keeps, completely outside the reach of Article 227 of the Constitution of India, interlocutory arbitral orders.

79. ***Bhaven Constructions***[23] envisages, however, one more circumstance in which an interlocutory order of an Arbitral Tribunal could be challenged under Article 227 of the Constitution of India, which is where the order is assailed on the ground of want of good faith. Save and except for this limited caveat – which is unlikely to apply in a majority of cases – ***Bhaven Constructions***[23] reinforces the law enunciated in ***SBP***[19], by holding that Article 227 of the Constitution of India would be available to a litigant aggrieved by an interlocutory arbitral order only where, but for Article 227, the aggrieved litigant is remediless. Dealing with a contention, advanced before it, that the 1996 Act, being an instrument of parliamentary legislation, could not curtail the constitutional remedy envisaged by Article 227, ***Bhaven Constructions***[23] clarified the position thus:

> "18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In ***Nivedita Sharma v. Cellular Operators Association of India***[29], this Court referred to several judgments and held:
>
> > "11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, *quo warranto* and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary

[29] **(2011) 14 SCC 337**

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

legislation – ***L. Chandra Kumar v. Union of India***[30]. However, *it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy.* Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. *This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.*

*****

20. In the instant case, Respondent No. 1 has not been able to show exceptional circumstance or 'bad faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. *No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage.* It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by the Respondent No. 1 in a separate Section 34 application, which is pending."

(Italics and underscoring supplied)

80. ***Bhaven Constructions***[23], therefore, in a sense clarifies ***SBP***[19] by restricting the amenability to challenge under Article 227 of the Constitution of India, or interlocutory arbitral orders, to cases where, either, want of good faith is pleaded, or the party is otherwise

[30] **(1997) 3 SCC 261**

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

remediless.

81. It is important to understand, in this context, what the Supreme Court intended to convey by the use of the word "remediless", as it is often sought to be contended – as has also been contended before me in the present case – that, as the 1996 Act does not contain any provision whereunder the impugned interlocutory order could be challenged, the party is, in fact, remediless. The mere fact that there is no statutory provision under which, *at that stage*, the aggrieved litigant could challenge the interim Award of the Arbitral Tribunal, is not sufficient to regard the litigant as remediless against the said order. ***SBP***[19] and ***Bhaven Construction***[23], read conjointly, make it clear that, even if the challenge to the impugned order can be made one of the grounds of challenge to the final Award which may come to be passed, that suffices as a remedy for the aggrieved litigant. In such a case, the litigant has to wait till the final Award is passed and, only thereafter, can vent his grievances, both against the interlocutory as well as against the final Award.

82. Mr Rohatgi sought to contend that, while Section 16(6) of the 1996 Act provided for a remedy, under Section 34, against an order passed under Section 16, there is no remedy available, under the 1996 Act, against an order passed under Section 32(2)(c). Against an order rejecting an application under Section 32(2)(c) of the 1996 Act, therefore, Mr Rohatgi would seek to contend that the party is, in fact, "remediless".

83. For the aforesaid reasons, and with all due respect to Mr

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Rohatgi, the contention does not appear, to me, to merit acceptance. What the argument overlooks is that the impugned order does not *allow* an application under Section 32(2). It *dismisses* it. The order does not, therefore, *terminate* the arbitral proceedings. Had it allowed the application of the petitioners under Section 32(2), then, perhaps, Amazon might have had a remedy under Article 227, on the ground that the arbitral proceedings had come to an end, and there was no provision in the 1996 Act, whereunder the order could otherwise be challenged. In such a case, Amazon would be "remediless". Where, however, as in the present case, the application of the petitioners, under Section 32(2)(c) of the 1996 Act has been dismissed, the arbitral proceedings continue. The remedy under Section 34, to challenge the final award in the arbitral proceedings, therefore, subsists. Among the grounds of challenge – if, assuming, the award was against the petitioners and they chose to challenge it – could be included the grounds on which the petitioners seek to assail the impugned orders as well. Thus, the petitioners are not "remediless". They *have* a remedy, but they have to bide their time.

84. Clipping of arbitral wings is against the basic ethos of the 1996 Act. Allowing free flight to arbitration is the very *raison d'etre* of the reforms that the UNCITRAL arbitral model sought to introduce. The 1996 Act, founded as it is on the UNCITRAL model, is pervaded by the same philosophy.

85. I have, in ***Easy Trip Planners***[20]***, Siddhast Intellectual Property Innovations***[22] ***and VRS Natarajan***[21], among others, consistently followed the decisions in ***SBP***[19] and ***Bhaven***[23] to hold that an

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

interlocutory order in arbitral proceedings, which does not terminate the arbitration or bring it to an end, cannot be challenged under Article 227 of the Constitution of India.

86. In ***Indian Agro Marketing Coop. Ltd.***[13], on which learned Senior Counsel for the petitioners chose to rely, only reinforces the position. the arbitral proceedings were terminated by allowing of an application filed under Section 16 of the 1996 Act. An application, seeking recall of the said order, was also dismissed by the learned Arbitral Tribunal. In that case, as the arbitral proceedings did not survive any further, and the order under challenge brought the proceedings to an end, I had entertained a petition under Article 227 of the Constitution of India.

87. Mr Rohatgi also cited my decision in ***MS Vag Educational Services v. Aakash Educational Services Ltd***[31]. That, again, was an extreme case, clearly distinguishable on facts and in law. In the said case, *after terminating the arbitral proceedings*, the learned arbitrator, *suo motu*, recalled his order and revived the proceedings. It was in these circumstances that I held that, *as the arbitral proceedings stood terminated by the arbitrator himself, and as he had no powers to recall such an order of termination*, the case merited interference under Article 227 of the Constitution of India.

88. In the present case, the learned Arbitral Tribunal has not terminated the arbitral proceedings; rather, it has dismissed the petitioners' application for terminating the proceedings. ***Vag***

[31] **2022 SCC OnLine Del 3401**

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Educational Services[31], therefore, does not help the petitioners.

89. In fact, I had, at the very outset of proceedings, queried of learned Senior Counsel for the petitioners as to how these petitions would be maintainable under Article 227 of the Constitution of India.

90. Extensive arguments were advanced, over several days, which, in due deference to the stature of learned Senior Counsel arguing the matter, I heard. At the end of the day, I am no wiser than I was at the start. Though learned Senior Counsel, at the very outset, sought to submit that, in the peculiar facts of the present case, these petitions ought to be entertained under Article 227, I am, having heard learned Senior Counsel, unable to discern any such peculiarity.

91. The orders under challenge are, plainly, interlocutory orders. The order dated 28th June 2022, forming subject matter of challenge in CM (M) 1141/2022, rejects the petitioners' application under Section 32(2)(c) of the 1996 Act, seeking termination of the arbitral proceedings. In case the arbitral proceedings deserved to be terminated in law, it would always be open to the petitioners to so urge, if ever an occasion arose for them to invoke Section 34 against any final Award that the learned Arbitral Tribunal may come to pass.

92. The subsequent Procedural Order No. 10, dated 11th October 2022 is, if I may say so, "even more interlocutory" in nature, as it merely permits an application, by Amazon, to augment the reliefs original sought by them in the SOC. There are two reasons it would be clearly inappropriate for this Court, under Article 227 of the

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

Constitution of India, to interfere with the said order. The first is that the findings returned by the learned Arbitral Tribunal, on the petitioners' applications under Section 32(2)(c) are clearly interlocutory in nature, as is manifest by the following observation, contained in para 135 of the 28th June 2022 order:

> "This argument goes to the merits of the Respondent's defence to Amazon's claims in this arbitration and, accordingly, *the Tribunal considers that the matters urged by the Respondents in their Termination Applications should be addressed in a final award on the merits by the Tribunal after all Parties have been granted an opportunity to be heard and to fully present their arguments on all the issues in dispute*."
>
> (Emphasis supplied)

The second reason is that, as Mr Nayar rightly submitted, Section 34(2)(a)(iv) of the 1996 Act specifically envisages challenge, to a final arbitral award, on the ground that the award dealt with a dispute outside the terms of reference to arbitration. The precise argument that Mr Rohatgi and Mr Krishnan have sought to canvass before me is, therefore, available, to them, as a specific ground to challenge the final award which may come to passed in the arbitral proceedings; assuming, of course, that it is prejudicial to their clients. Mr Subramanium, needless to say, staunchly defends the proceedings as continuing well within the scope of the jurisdiction vested in the learned Arbitral Tribunal. In view of Section 34(2)(a)(iv), however, these are matters which would have to be deferred to a later stage, should occasion so arise.

Orders dated 4th April 2022 and 6th April 2022 passed by the Supreme Court

93. The reliance, by Mr. Subramanium, on the orders dated 4th April 2022 and 6th April 2022, passed by the Supreme Court in

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

SLP(C) 1705-1706/2022, as reproduced in para 63 supra, is also, in my view, apt. Consequent to the direction issued on 4th April 2022, a Joint Memo had been filed by the parties before the Supreme Court, one of the terms of consent being that, in the event of dismissal, by the learned Arbitral Tribunal, of the Termination Application filed by the petitioners and FRL, *the learned Arbitral Tribunal could continue with the arbitration, conclude hearing and publish the award*.

94. The order dated 6th April 2022, passed by the Supreme Court, subsequently, specifically disposed of SLP(C) 1705-1706/2022, *in terms of the said Joint Consent terms*, which were reproduced *in extenso* in the said order. Any interdiction with the progress of the arbitral proceedings by this Court would, therefore, be no less than an affront to the order dated 6th April 2022 passed by the Supreme Court, and would operate to dilute its effect. Article 144 of the Constitution of India enjoins on all judicial authorities to act in aid of the Supreme Court. Even for that reason, therefore, the challenge of the petitioners, in these petitions, cannot be entertained.

Conclusion

95. Given the view that I have taken, any reference to the merits of the impugned orders, would be both inapposite and inappropriate.

96. Reserving liberty with both sides to urge the contentions advanced in these petitions at the appropriate stage, therefore, these petitions are dismissed as not maintainable. Miscellaneous applications also stand disposed of.

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00

97. It is clarified that I have not expressed any opinion on the merits of the controversy between the parties and that the arbitral proceedings may continue unimpeded and uninfluenced by any observation contained in this judgment.

98. There shall be no orders as to costs.

C. HARI SHANKAR, J.

NOVEMBER 22, 2022
kr/rb/*dsn*

Signature Not Verified
Digitally Signed
By:SUNIL SINGH NEGI
Signing Date:22.11.2022
14:57:00