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

% ***Reserved on: 20.11.2020***
Pronounced on: 22.02.2021

\+ O.M.P. (EFA)(COMM) 5/2019 & E.A. Nos.374, 375 & 524/2019 and 841/2020

RISHIMA SA INVESTMENTS LLC ... Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Raj Shekhar Rao, Mr. Rajender Barot, Mr. Abhimanyu Chopra, Ms. Anshika Mishra & Mr. Prabhav Shroff, Advocates

versus

SHRISTI INFRASTRUCTURE DEVELOPMENT CORPORATION LIMITED & ANR. .... Respondents

Through: Mr. Amit K. Mishra, Mr. Harshad Pathak, Mr. Shivam Pandey & Mr. Mohit Singh, Advocates for R-1.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

1. Present petition has been filed under Sections 44 to 49 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') seeking enforcement and execution of partial Award dated 30.04.2019 passed by the Arbitral Tribunal in ICC Case No.21674/CYK/PTA/ASB /HTG under 2012 Rules of Arbitration of the International Chamber of Commerce (hereinafter referred to as 'ICC').

2. When the petition was filed and was taken up on the first date of hearing, Respondents had raised a preliminary objection on the territorial jurisdiction of this Court to entertain the petition. Vide order dated 30.05.2019, this Court had expressed a *prima facie* view that the Delhi High Court would have territorial jurisdiction to entertain the petition and had directed Respondent No.1 to file an affidavit of its assets in Form 16A Appendix E of Code of Civil Procedure, 1908 and had restrained the Respondents from creating any third party interest or parting with possession of the hotel in question. The order was carried in appeal to the Supreme Court in Civil Appeal Nos.5696-5697/2019. While affirming the injunction granted by this Court, Supreme Court directed that the question of jurisdiction be decided first and the direction to file an affidavit of assets would be subsequent thereto, if the Court came to a conclusion that it had jurisdiction to entertain the petition. In this context and pursuant to the orders of the Supreme Court, the present petition was taken up for hearing on the question of territorial jurisdiction of this Court to entertain the petition. Arguments were heard by the Court limited to the jurisdiction and accordingly, judgment was reserved only on the issue of maintainability of this petition.

3. Shorn of unnecessary details, the brief facts that need to be encapsulated for the limited purpose of deciding the maintainability are that Respondent no.1 / Shristi Infrastructure Development Corporation Ltd. set up Respondent No.2 / Shristi Hotel Private Limited (now known as Sarga Hotel Pvt. Ltd.) as a Special Purpose Vehicle to construct and operate a Hotel namely 'The Westin Kolkata – Rajarhat', Kolkata, West Bengal, a five star hotel. Petitioner is a Group Company of SUN-Apollo

Ventures, a joint venture between the SUN Group predominantly focusing on projects in India and Apollo Real Estate Advisors, a foreign based fund / company (hereinafter referred to as 'JV').

4. On 07.08.2008, the Petitioner and the Respondents entered into a 'Share Subscription and Shareholders Agreement' (hereinafter referred to as 'SSHA'). As per the terms formulated in the SSHA, the Petitioner acquired 35% shareholding in Respondent No.2 pursuant to an investment of Rs.80 Crores, while the Promoter / Respondent No.1 acquired balance 65% shareholding in Respondent No.2.

5. The following two Clauses are significant for the present controversy in the SSHA, which entitled the petitioner to exit from the SSHA :

> *"14.2 In the event the Investor is unable to sell the Equity Shares and other Investor Securities held by it in the Company in the manner set out in Clauses 13 above on terms satisfactory to it or if the Company does not undertake an IPO on terms satisfactory to the Investor, and the Investor continues to hold any shares or Investors Securities after an expiry of a period of fifty four (54) months from the First Tranche Completion Date, then for a period of two hundred and seventy (270) days therefrom ('Exit Put Option Period'), the Investor shall have the right, but not the obligation to sell all the Shares and Investor Securities ('Exit Securities') that it then holds in the Company and require the Promoter to purchase such Exit Securities at the FMV Price, or cause the Company to undertake a buy back of the Shares and Investor Securities, subject to Applicable Law, at the option of the Promoters as determined in accordance with Clause 14.5 of this Agreement ('Exit Put Option') by issuing a notice to the Promoter to purchase such Exit Securities in accordance with this Clause 14.2 ('Exit Put Option Notice').*

17.2 Consequence of default

(a). Upon the occurrence of an Event of Default by the Promoter or Promoter 1, the Investor shall have the right to sell all the Equity Shares and other Investor Securities of the Company owned or controlled by the Investor and its Affiliates and the Promoter shall have the obligation to buy all the Equity Shares and other Investor Securities of the Company owned or controlled by the Investor and its Affiliates at a price being an amount equivalent to the outstanding Investor Total Investment (i.e. the pro-rata Investor Total Investment representing the Equity Shares and other Investor Securities subscribed by the Investor under this Agreement and still held by the Investor at the time of the Investor exercising this right) plus an IRR of 25% compounded annually on the outstanding Investor Total Investment and the sale and purchase of the Equity Shares and other Investor Securities of the Investor shall be completed within 30 (thirty) days from the date of exercise by the Investor of its right (by issuing a written notice to this effect) to sell such Equity Shares and securities to the Promoter. Provided that if the Investor has received any distributions pursuant to Clause 12.1 the said amount will be deducted from outstanding Investor Total Investment referred to in this Clause while calculating the amount payable by the Promoter to the Investor for the purchase of the Investor Securities in accordance with the terms of this Clause 17.2 (a).

(b). Where the Investor seeks to sell its Equity Shares and other Investor Securities in accordance with Clause 17.2(b), and such Equity Shares and other Investor Securities are subject to a lock-in under Applicable Law, then such locked-in Equity Shares and Investor Securities shall be purchased by the Promoter immediately on the expiry of such lock-in restriction at the price calculated in accordance with Clause 17.2 (b)."

6. According to the Petitioner, there was a breach of the terms of the SSHA by the Respondents, including Respondent No.1's obligations under Clauses 17.2 and 14.2 and thus the Petitioner initiated Singapore-seated Arbitration against the Respondents herein on 11.02.2016 under the 2012 Rules of ICC in terms of Clause 24.2 contained in the SSHA with respect to Dispute Resolution Mechanism.

7. The Arbitral Tribunal rendered a partial Award on 30.04.2019 and issued several directions. The four directions relevant for the present petition are as follows :-

> *"684 (1). Shristi Infrastructure Development Corporation Limited is ordered, by way of specific performance, to pay to Rishima SA Investments LLC within 28 days of this Award, the sum of INR 761 crores pursuant to clause 17.2 of the Share Subscription and Shareholders Agreement, as at March 31, 2019.*
>
> *(2). The Tribunal orders, by way of specific performance, Shristi Infrastructure Development Corporation Limited to pay to Rishima SA Investments LLC within 28 days of this Award a further sum pursuant to clause 17.2 of the Share Subscription and Shareholders Agreement, being 25% IRR to the date of this Award in an amount to be agreed between the parties, or, failing agreement, to be determined by the Tribunal.*
>
> *(3). Upon payment of the sums in (1) and (2), Rishima SA Investments LLC shall deliver to Shristi Infrastructure Development Corporation Limited executed transfers and any other title documents relating to its shares in Shristi Hotel Private Limited.*
> *(4). If for any reason the awards in (1) and / or (2) above are declared unenforceable in whole or in part by any court or tribunal, Shristi Infrastructure Development Corporation Limited shall pay to Rishima SA Investments LLC the sum of*

INR 160.2 crores pursuant to clause 14.2 of Share Subscription and Shareholders Agreement (or such lesser sum as shall be sufficient to satisfy the awards in (1) and (2) above, after taking account of any amounts paid by Shristi Infrastructure Development Corporation Limited pursuant thereto) upon delivery by Rishima SA Investments LLC to Shristi Infrastructure Development Corporation Limited of executed transfers and any other title documents relating to its shares in Shristi Hotel Private Limited."

8. Petitioner seeks enforcement and execution of the above mentioned directions in the present petition alongwith certain other reliefs detailed in the prayer clause of the petition. At this stage, it is important to note certain developments which occurred during the pendency of the present petition. The National Company Law Tribunal, Kolkata Bench (NCLT) by an order dated 12.08.2020 admitted a petition seeking commencement of insolvency proceedings against Respondent No.2 at the instance of a purported operational creditor, for failure to pay a claim of Rs.2.3 Crores and Moratorium was declared. Alleging that the NCLT proceedings were collusive in nature between Respondent No.2 and the operational creditor, the Petitioner herein assailed the said order, by filing an Appeal being Company Appeal (AT)(Insolvency) No.800/2020, before the National Company Law Appellate Tribunal (NCLAT). The prime ground raised in the Appeal was that the NCLT proceedings were collusive and designed to frustrate and defeat the Award. By an order dated 21.09.2020, NCLAT directed the IRP, appointed by the NCLT to ensure that Respondent No.2 remains a going concern and to continue to take assistance of the Board of Directors. The Committee of Creditors was directed not to take any decision until the next date of hearing.

Respondent No.1 herein was arrayed as party respondent before the NCLAT.

9. Faced with this situation and on an objection raised by learned counsel for Respondent No.1 that the Enforcement Petition could not proceed on account of the IBC proceedings, the Petitioner filed an additional affidavit stating that the Petitioner would not pursue the above petition against Respondent No.2 pending the moratorium, without prejudice to its rights, claims and contentions and reserving the right and seeking liberty to initiate / continue proceedings at the appropriate time and stage. A detailed reply was filed by Respondent No.1 to the additional affidavit opposing the continuation of the present proceedings on the ground of moratorium, in addition to the objection to territorial jurisdiction.

10. It is averred in the petition that the arbitration proceedings were seated in Singapore and the venue of the final hearing was in London, United Kingdom. The Award has recorded the place of arbitration as Singapore, which has been notified by the Central Government as a reciprocal territory for purpose of Section 44 of the Act. The Award is thus a foreign Award under Chapter I, Part-II of the Act. Under Singapore Law, Section 19B of the International Arbitration Act, an Award made by an Arbitral Tribunal is binding on the parties. It is averred that Article 34 (6) of the ICC Rules of Arbitration provides that every Award shall be binding on the parties and by submitting the disputes to arbitration under the ICC Rules, parties undertake to carry out any Award without delay and shall be deemed to have their right to any form of recourse in so far as such waiver can validly be made.

11. Since Respondent No.1 has raised a preliminary objection of territorial jurisdiction and the Supreme Court has directed to decide the said issue at the threshold, it is necessary to capture the objections taken by Respondent No.1 in this context. Mr. Amit K. Mishra learned counsel for Respondent No.1 arguing in support of the objections contends that the subject-matter of the partial Award is specific performance of Clauses 14.2 and 17.2 pertaining to Put Options. Under Clause 28.12 of the SSHA, parties had specifically agreed that only a Court of competent jurisdiction can decree a suit for specific performance and that Court can only be the court at Kolkata for the following reasons :

(a). Respondent No.1 is a company incorporated under the provisions of Companies Act, 1956, having its registered office at Kolkata;

(b). Sarga is a company incorporated under the Companies Act having its registered office at Kolkata;

(c). The SSHA under which the contractual arrangement between the parties was crystallized, was executed at Kolkata;

(d). On account of the arrangement under the SSHA, Petitioner holds 35% shares in Sarga. The dispute pertains to Put Options and thus relates to these very shares of Sarga and the shares have a situs at Kolkata;

(e). For subscribing to the 35% shareholding, Petitioner paid a consideration of Rs.80 Crores, which amount was received in the bank account maintained and operated at Kolkata;

(f). The SSHA was entered into with an objective of construction and operation of a five star hotel at Kolkata;

(g). The operative portion of the partial Award contemplates specific performance of Put Options, which will necessarily include transfer of

shares. Under Clauses 2.9 and 2.10 (c) of SSHA, transfer of shares is to be mandatorily effectuated from the Registrar of Companies, Kolkata including completion of subscription of the shares;

(h). Petitioner had itself filed an application under Section 9 of the Act before the High Court of Calcutta at Kolkata, which fact has been concealed by filing the present petition and in the said petition, Petitioner has stated on an affidavit that it was the Calcutta High Court which exercised territorial jurisdiction in the matter.

12. Learned Counsel for Respondent No.1 next contended that this Court does not have jurisdiction since the partial Award grants relief in the nature of specific performance and not as a 'money award'. The expression 'questions forming the subject-matter of the Arbitral Award' in Explanation to Section 47 of the Act, as amended, has to be construed by reference to the specific reliefs granted by the foreign Arbitral Award, sought to be enforced. It is argued that reliefs can be in the form of damages that are analogous to a money decree, or alternatively, specific performance of certain provisions of a contract that was subject-matter of arbitration. While few High Courts have interpreted the erstwhile Explanation to Section 47 in cases where 'subject-matter of the arbitral award' was in the form of money, the interpretation of the amended definition of 'Court' under Section 47 of the Act in cases where 'questions forming the subject-matter of the arbitral award' is in the form of specific performance, remains distinct. It is submitted that a perusal of the directions in paragraph 684(1) and 684(2) of the partial Award leave no doubt that the subject matter is not 'money', but 'specific

performance' of contractual obligations under Clauses 17.2 and 14.2 of the SSHA.

13. Elaborating the argument, learned counsel relies on the statement of claim in which the prayers, relevant to the present controversy were as follows :-

> "*172. xxx xxx xxx*
>
> *4. With respect to clauses 17 and 14*
>
> *(i) xxx xxx xxx*
>
> *(ii) an order for specific performance of the First Respondent's obligation to pay the price set out in clause 17.2(a) of the SSHA, being US$70.5 million;*
>
> *(iii) in the alternative, a direction that the First Respondent should pay to the Claimant the maximum price permissible under Indian law, being US$ 24.86 million, and a further sum of US$ 45.6 million as damages/compensation for the Respondents failure to perform their obligations under clause 17.*"

14. Considering the said prayers, the Tribunal in para 283 observed as follows :-

> *"283. In the view of the Tribunal, the consequence of the application of the principle in Sudbrook Estates Ltd. V. Eggleton is that the remedy is not damages equivalent to the fair value less present value, but an order, by way of specific performance, for payment of the price against delivery of the shares. Such a remedy is included in the Claimant's catalogue of possible remedies and is plainly the right one."*

15. In light of the above, it is further argued that under the Explanation to Section 47 of the Act with respect to specific performance, an Enforcement Petition can only lie in Courts within whose jurisdiction the Award-debtor resides or where the assets, which are subject-matter of the Award are situated, which in this case are the shares of Sarga. In the present case, both are within the jurisdiction of High Court of Calcutta. Further, as per para 684(3) of the partial Award, subject-matter of specific performance are certainly the shares of Sarga. The situs of the shares of a company can only be the registered office as that is the only place where the shares can be effectively dealt with.

16. Learned counsel relies on the judgment of the High Court of Bombay in the case of ***Tata International Ltd. v. Trisuns Chemical Industry Limited, 2002(2) Mh. L.J.,*** wherein it was held that 'subject-matter of the award' must be determined by reference to the reliefs awarded in the Award and considered the relief of specific performance to be distinct from that of money. With respect to the situs of the shares, counsel relied on the judgment of the Supreme Court in ***R. Viswanathan and Ors. Vs. Rukn-Ul-Mulk Syed Abdul Wazid since deceased and Ors. AIR 1963 SC 1*** where the Court observed as follows :-

> *"The situs of the shares in any question between the Company and the holders thereof was the registered office of the Company."*

17. Reliance is also placed on the judgment in ***Vodafone International Holdings BV. Vs. Union of India and Anr. (2012) 6 SCC 613*** and the paras relied upon are as under:-

"140. At the outset, we do not wish to pronounce authoritatively on the Companies Law of the Cayman Islands. Be that as it may, under the Indian Companies Act, 1956, the situs of the shares would be where the company is incorporated and where its shares can be transferred. In the present case, it has been asserted by VIH that the transfer of the CGP share was recorded in the Cayman Islands, where the register of members of CGP is maintained. This assertion has neither been rebutted in the impugned order of the Department dated 31-5-2010 nor traversed in the pleadings filed by the Revenue nor controverted before us. In the circumstances, we are not inclined to accept the arguments of the Revenue that the situs of the CGP share was situated in the place (India) where the underlying assets stood situated.

x x x

*347. Situs of the CGP share stands where, is the next question. Law on situs of share has already been discussed by us in the earlier part of the judgment. Situs of shares situates at the place where the company is incorporated and/or the place where the share can be dealt with by way of transfer. The CGP share is registered in the Cayman Islands and materials placed before us would indicate that the Cayman Islands law, unlike other laws does not recognise the multiplicity of registers. Section 184 of the Cayman Islands Act [**Ed.**: Reference is to the provisions of the Companies Law (2007 Revision) (Law 13 of 2006) of the Cayman Islands which has since been replaced by the Companies Law (2011 Revision).] provides that the company may be exempt if it gives to the Registrar, a declaration that "operation of an exempted company will be conducted mainly outside the Island". Section 193 of the Cayman Islands Act [**Ed.**: Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011] expressly recognises that even exempted companies may, to a limited extent trade within the Islands.*

Section 193 permits activities by way of trading which are incidental of offshore operations, also all rights to enter into the contract, etc.

348. The facts in this case as well as the provisions of the Cayman Islands Act would clearly indicate that the CGP (CI) share situates in the Cayman Islands. The legal principle on which situs of an asset, such as share of the company is determined, is well settled. Reference may be made to the judgments in Brassard v. Smith [1925 AC 371 (PC)] , London and South American Investment Trust Ltd. v. British Tobacco Co. (Australia) Ltd. [(1927) 1 Ch 107] Erie Beach Co. Ltd. v. Attorney General for Ontario [1930 AC 161 (PC)] R. v. Williams [1942 AC 541 : (1942) 2 All ER 95 (PC)] . Situs of the CGP share, therefore, situates in the Cayman Islands and on transfer in the Cayman Islands would not shift to India."

18. Counsel thus contends that for the purposes of the Explanation to Section 47 which confers jurisdiction on a Court 'having original jurisdiction to decide the questions forming the subject-matter of the arbitral Award if the same had been the subject-matter of a suit' the Court would be the Court within whose jurisdiction the situs of the shares would lie, which in the present case is the High Court of Calcutta.

19. It is next contended that in the light of the expression 'if the same had been the subject-matter of a suit' a Court presented with an application seeking enforcement of an Award, whose subject-matter is specific performance of transfer of shares, would have to necessarily keep in mind the ingredients of Section 20 of Code of Civil Procedure, 1908 and in the present case under no provision of Section 20 can the petition be filed in this Court. To substantiate the argument reliance is placed on

the judgment by the High Court of Calcutta in ***Smithkline Beecham Consumer Health Ltd. Vs. Manju Golcha, (2013) 1 Cal LJ 473*** and by the Supreme Court in ***Hungerford Investment Trust Limited vs. Haridas Mundhra and Ors., (1972) 3 SCC 684***.

20. In the alternative to the above submission, Mr. Mishra contends that this Court does not have jurisdiction in view of the amended definition of 'Court' in the Explanation to Section 47 of the Act. The un-amended Explanation defined 'Court' as the Court 'having jurisdiction over the subject-matter of the Award if the same had been subject-matter of a suit'. However, by the 2015 Amendment, this was substituted by the expression 'having original jurisdiction to decide the questions forming the subject-matter of the arbitral Award if the same had been the subject-matter of a suit on its original civil jurisdiction'. The Amended Explanation refers to a Court that has territorial jurisdiction to decide the dispute / issues forming the subject-matter of the foreign Award sought to be enforced, as opposed to any other High Court within whose jurisdiction the Award-debtor may have assets. Any other interpretation, it is argued, will render the Amendment redundant and the interpretation suggested by the Petitioner would render the phrase 'questions forming the subject-matter of the Arbitral Award' as otiose. Learned counsel relies on the judgments in the case of ***Davis vs. Sebastian, (1999) 6 SCC 604*** and ***State of Rajasthan vs. Leela Jain and Ors., AIR 1965 SC 1296*** in support of the proposition that words in a Statute must be given their natural ordinary meaning and nothing should be omitted, added or deleted therefrom.

21. Quite apart from the objection to the territorial jurisdiction, in view of the developments during the pendency of the petition, counsel for Respondent No.1 strenuously argued that even otherwise the present proceedings cannot be prosecuted further by the Petitioner on account of the proceedings pending in the NCLT, where a Resolution Professional has been appointed by the COC of Sarga and moreover, the Resolution Professional has not been impleaded as a party in the present case. It is also argued that continuation of the present Enforcement Petition without Sarga, considering the subject-matter of the partial Award would amount to indirectly proceeding against the shares of Sarga, which would clearly violate the moratorium imposed under Section 14 of the IBC, which is impermissible in law. Counsel relies on the judgment of the Supreme Court in ***Innoventive Industries Ltd. Vs. ICICI Bank and Anr. (2018) 1 SCC 407*** and ***Swiss Ribbons Pvt. Ltd. And Anr. Vs. Union of India and Ors., (2019) 4 SCC 17*** to argue that Courts have repeatedly emphasized that object of the IBC is to maximize the assets of the Corporate Debtors while balancing the rights of the stakeholders and that CIRP under the Code is a time-bound process and speed is of essence to complete the process. Provisions of Insolvency and Bankruptcy Code, 2016 have an overriding effect on any other law, including the Arbitration Act by virtue of Section 238 of the said Code.

22. Last but not the least, Mr. Mishra argued that the Petitioner has filed an additional affidavit stating that considering the moratorium it will not pursue the enforcement proceedings against Sarga, however, the Scheme of the Act does not contemplate a mechanism under Section 47 to seek enforcement of separate paras of a foreign Award. There cannot

be, in law, a severable execution of an Award, by permitting execution of some portions and not permitting execution of the balance unenforceable portions of an Award. While this indulgence can be granted at the stage of Section 49 of the Act, after traversing through the stages under Sections 47 and 48, but is not available to a party at the stage of Section 47. Hence, by a corollary, the relief sought by the Petitioner to continue proceedings at an appropriate stage, later cannot be allowed.

23. Mr. Rajiv Nayar, learned Senior Counsel for the Petitioner per contra, arguing in response to the first preliminary objection submits that this Court has the territorial jurisdiction to entertain the present petition and enforce the partial Award. The Award is a Foreign Award under the New York Convention and thus its enforcement would be governed by Part-II of the Act. Attention of the Court is drawn to Explanation to Section 47 which defines 'Court'.

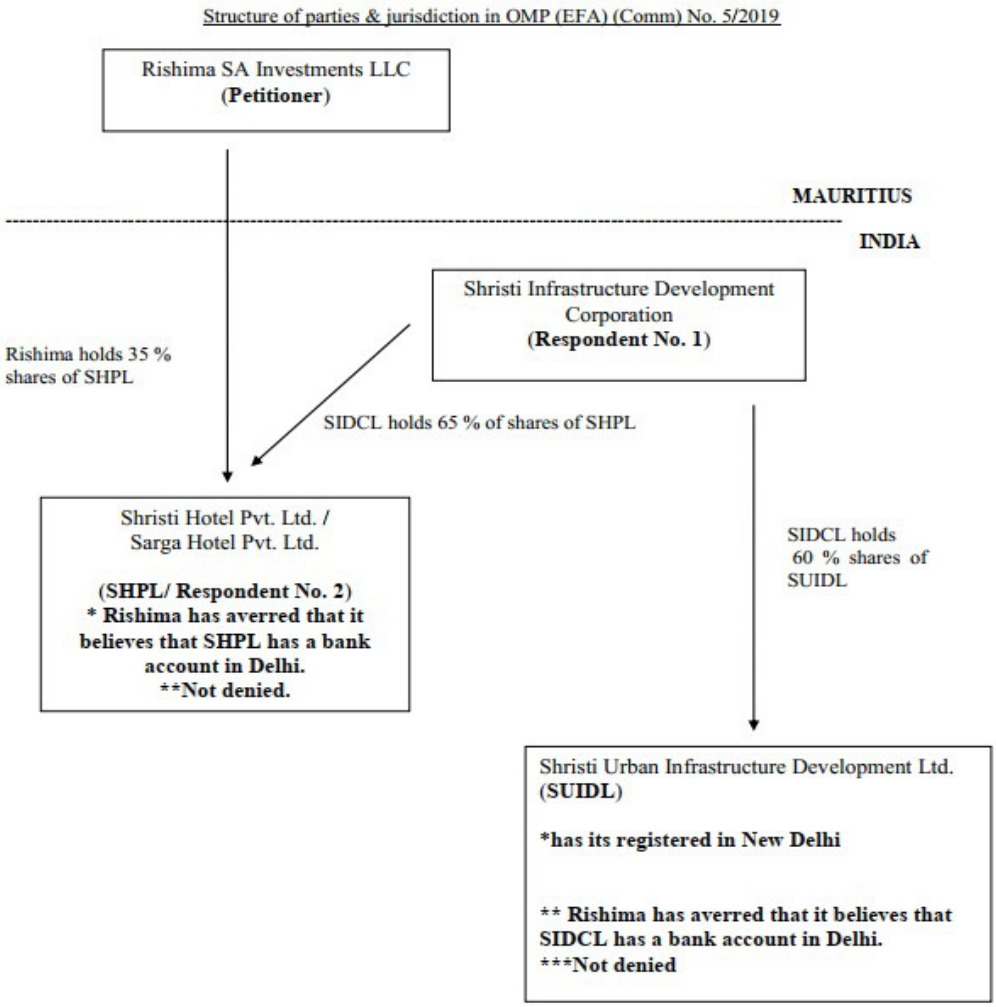
24. Mr. Nayar argues that though it is not disputed that Respondent No.1 has its registered office in Kolkata but it is equally true that it holds assets within the jurisdiction of this Court. The Petitioner seeks to enforce the partial Award against the assets of Respondent No.1 which are within the jurisdiction of this Court based on the following :

(a). Respondent No.1 holds shares in a subsidy known as Shristi Urban Infrastructure Development Ltd. (SUIDL), whose registered office is in Delhi. Therefore, Respondent No.1's assets being shares of SUIDL are sited in Delhi;

(b). Respondent No.1 claims to work for gain in Delhi, having an office at D-2, 5th Floor, Southern Park, Saket Place, Saket, New Delhi; and

(c). Petitioner has averred that Respondent No.1 has a bank account in Delhi which is an uncontroverted position, not having been denied by Respondent No.1.

25. In support, Mr. Nayar places reliance on a diagrammatic chart to show the structure of parties and their respective shareholdings. For ready reference, the chart is scanned and is placed below :



26. It is further submitted that in EA-375 of 2019 wherein SIDCL has challenged the jurisdiction of this Court, it is not denied that the said

assets are in Delhi and likewise in the appeal before the Supreme Court being Civil Appeal No.5696 of 2019 no statement was made controverting the existence of the assets in Delhi.

27. Learned Senior Counsel next contends that various Courts have repeatedly held that a foreign Award can be enforced under Section 47 of the Act by a Court within whose jurisdiction the judgment debtor has assets. In support of this proposition, which is the fulcrum of the argument of the Petitioner, learned Senior Counsel relies on the judgment of this Court in ***Motorola INC vs. Modi Wellvest, 2005 (79) DRJ 173***. Reliance is placed on the judgment of the Bombay High Court in ***Tata International*** (**supra**). It is submitted that the Bombay High Court also clearly noted the distinction between the term 'Court' as used in Section 2(1)(e) of the Act and Section 47. In ***Wireless Developers Inc. vs. India Games Ltd. 2012 (2) ALL MR 790,*** the Bombay High Court reaffirmed ***Tata International (supra)*** and held that a Foreign Award for money is analogous to a money decree and is enforceable where the assets are located. The above line of judgments, it is argued follow the principle laid down by the Supreme Court in ***Brace Transport Corporation of Monrovia, Bermuda vs. Orient Middle East Lines Ltd., Saudi Arabia and Ors., 1995 Supp (2) SCC 280***, even prior to the enactment of the Act. The proposition laid down in ***Brace Transport (supra)*** was reiterated in the context of the Act in ***Sundaram Finance Ltd. Vs. Abdul Samad and Anr., (2018) 3 SCC 622*** where it was held by the Supreme Court that the Arbitration Act transcends all territorial barriers and enforcement of an Award through execution can be anywhere in the country where the decree can be executed. While this judgment is with respect to an Award

under Part-I of the Act, the principles shall equally apply to proceedings under Part-II of the Act.

28. Responding to the argument of Respondent No.1 that post the 2015 Amendment to the Act, the position that the Award holders can enforce the Award where the judgment debtors assets are sited is no longer valid, Mr. Nayar argues that the said argument is based on the understanding of Respondent No.1 that the Amendment has the effect of making the Section 2(1)(e) 'Court' and Section 47 'Court' the very same Court, however, this understanding is flawed and contrary to the provisions of law. It is submitted that according to Respondent No.1, 'questions forming the subject-matter of the Award', as used in Section 47, cannot mean the relief granted, as no question can arise in relation to it. Thus, the questions forming will relate back to the cause of action i.e. breach of the contractual provisions, resulting in the Award. Premised on this interpretation, it is argued by Respondent No.1 that the Calcutta High Court would be the Court of jurisdiction since it is that court which will be entitled to entertain a suit in relation to questions forming subject-matter of the arbitration i.e. contractual breaches by Companies registered in Kolkata viz. Respondent Nos.1 and 2.

29. Mr. Nayar submits that this argument by the Respondent obliterates the distinction between the phrases 'subject-matter of the Award' and 'subject-matter of the Arbitration' and this difference has been explained in ***Tata International (supra)*** and ***Balco (supra)*** and is crucial. Under Section 47 of the Act, the 'questions forming the subject-matter' of a money Award would simply the questions of availability of assets within the jurisdiction of the executing Court and not as to where

the contract was signed or parties resided, etc. If no assets are available, the decree cannot be executed by such a Court. Secondly, the purpose of 2015 Amendment was simply to ensure that the 'Court' in International Commercial Arbitrations would be a High Court and not a Subordinate Court.

30. Learned Senior Counsel for the Petitioner relies on a judgment of the Bombay High Court in ***Trammo DMCC vs. Nagarjuna Fertilizers and Chemicals Ltd., 2017 SCC Online Bom 8676*** where the post Amendment language of the Sections came up for consideration and the Court held that when neither the arbitration nor the Award would fall under Section 2(1)(e) of the Act, there cannot be any applicability of the said provision, thus Section 9 Court would be the Court having jurisdiction under Section 47 of the Act i.e. where assets are located because the cause of action was now the foreign Award and its enforcement. Reliance is also placed on a recent judgment of this Court in case of ***Glencore International AG vs. Hindustan Zinc Ltd., O.M.P. (EFA)(COMM) 9/2019***, decided on 08.06.2020, where objection to the territorial jurisdiction of this Court was *prima facie* rejected on the principle that award holder is free to engage in 'Forum hunting' and file for enforcement where assets of the judgment debtors are located.

31. On the argument of Respondent No.1 that the relief granted in the Award is in the nature of specific performance, the response of Mr. Nayar is that the argument rests on a mis-reading of the partial Award. Under paras 684(1) and (2) of the partial Award, the direction is to pay money to the Petitioner and the amounts are quantified. The direction in para 3 for return of the title deeds is a sequential obligation and not a reciprocal one

and is to come into effect after receipt of money by the Petitioner from Respondent No.1. The words 'specific performance' appearing in paras 684(1) and (2) of the Award, on which heavy reliance is placed by Respondent No.1, cannot be read out of context and have to be read in the background of the direction to make payment. Respondent No.1 in fact understands the direction and therefore in its pleadings in the Set-Aside proceedings before the Singapore High Court, the Chief Financial Officer of SIDCL had stated on an affidavit that SIDCL's liability is one for payment of monies.

32. Mr. Nayar argues that the mere fact that the Petitioner had approached the Calcutta High Court by filing an application under Section 9 of the Act, cannot take away the jurisdiction of this Court to enforce the partial Award. Section 42 of the Act on which Respondent No.1 has placed reliance is inapplicable to Part-II of the Act and this has been so held by the High Court of Bombay in ***Eitzen Bulk A/S vs. Ashapura Minachem Ltd., 2011 SCC Online Bom 1329*** and this view was affirmed by the Supreme Court.

33. On the aspect of the moratorium with respect to Respondent No.2 and non impleadment of the IRP in the present proceedings, it is argued by learned Senior Counsel that since the Petitioner has filed an affidavit stating that it is not proceeding against Respondent No.2 at this stage, this objection is irrelevant. On the question of seeking leave to continue proceedings against Respondent No.2 at an appropriate stage, Mr. Nayar argues that Respondent No.1 is not entitled to take objections on this ground as this issue concerns Respondent No.2 and moreover the submission is based on the selective and self-serving reading of the

affidavit. Any leave has to be granted in accordance with law. It is submitted that the Petitioner cannot be prevented from taking recourse to a remedy that may become available in future due to change of circumstances such as the NCLT order is struck down or a settlement is arrived at between Respondent No.2 and the alleged creditor. IBC contemplates and permits by virtue of Section 60 (6) that in computing the period of limitation by or against a Corporate debtor for which an order of moratorium has been made, the period of moratorium shall be excluded. No law has been cited by Respondent No.1 to suggest that if a moratorium is declared against one party Respondent, legal proceedings cannot continue against the other Respondents, who are unaffected by the moratorium.

34. Learned Senior Counsel distinguishes the three judgments relied upon by counsel for Respondent No.1 by arguing that the judgments deal with the principle that proceedings against a corporate debtor cannot continue in view of a moratorium and while this principle cannot be disputed in law but the judgments have no applicability in the present case. It is argued that the Petitioner has stated on oath that it is not proceeding against Respondent No.2 at this stage and secondly, the subject-matter of the Award is not the shares of Respondent No.2 but it is the obligation of Respondent No.1 to make payment to the Petitioner which is recognized by the directions in the operative part of the partial Award. The direction to return the title documents is only a consequential direction. Thirdly, in any event, the shares are the assets of the Petitioner and not of Respondent No.2 and therefore, it cannot be argued that any

coercive measures are being taken through enforcement of the Award qua Respondent No.2.

35. Lastly, it is argued that Respondent No.1 has on one hand delayed the present proceedings and on the other hand, is actively dissipating its assets, to defeat the partial Award. Mr. Nayar has placed on record details of how according to him Respondent No.1 has been selling its shareholdings in different Companies, including a commercial space in the Westin Hotel, without the Petitioner's approval which is required under the SSHA. The risk of the Petitioner has aggravated with the insolvency petition having been admitted against Respondent No.2, the owner of Westin Hotel, which was the only security available with the Petitioner. It is thus prayed that the present petition be entertained as this Court has the territorial jurisdiction over the assets of Respondent No.1 which are indisputably located at Delhi.

36. Arguing in rejoinder, Mr. Mishra reiterates the submissions made in support of the preliminary objection as well as the pendency of the IBC proceedings. Learned counsel distinguishes the judgments relied upon by the Petitioner. With respect to the judgments in ***Trammo (supra)*** and ***Glencore (supra)***, it is submitted that the said cases pertain to arbitral Award whose subject-matter is money in form of damages and not specific performance of the contractual obligations. In both the cases, the Courts were not called upon to interpret the phrase 'questions forming' in the Amended Explanation to Section 47 of the Act.

37. I have heard learned senior counsel for the Petitioner and counsel for Respondent No.1.

38. On account of the preliminary objection raised by Respondent No.1 on the maintainability of the petition, the first and foremost issue that this Court is called upon to decide is whether this Court has territorial jurisdiction to entertain the present petition. Reading of the order of the Supreme Court indicates that before proceeding further in the matter the issue of territorial jurisdiction has to be decided. In view of this, the objection to the maintainability is taken up for consideration.

39. To answer the said question, the Court would require to examine and interpret the word 'Court' in Section 2(1)(e) of the Act as well as in Explanation to Section 47 of the Act, which defines 'Court' for the purposes of dealing with Foreign Awards. It would be thus appropriate at this stage to extract the relevant provisions as under :-

> *"2. Definitions- (1) In this Part, unless the context otherwise requires,-*
>
> *…. …*
>
> *(e) "Court" means-(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*
>
> *(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court."*

47. The Explanation defining the 'Court' under Section 47 reads thus:—
"47. Evidence- (1).... … …
(2) .. … …
(Explanation-In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of Courts subordinate to such High Court.)"

40. I may at this stage usefully allude to the various International Conventions which were brought in to deal with problems faced in International Arbitration particularly relating to recognition and enforcement of an Arbitral Award made in one country by the Courts of other countries. The first such International Convention was the Geneva Protocol on arbitration clauses, 1923, popularly known as '1923 Protocol'. This, however, proved to be inadequate and thus, the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 was brought in. India became a signatory to both the Conventions. To give effect to the 1923 Protocol and the 1927 Convention, the Arbitration (Protocol and Convention) Act, 1937 was enacted in India. However, there were certain limitations in its application and in 1953 the International Chamber of Commerce proposed a new treaty which finally led to the adoption of the Convention on the recognition and enforcement of Foreign Arbitral Awards at New York in 1958, popularly known as the New York Convention. This came into force on 07.06.1959 and India

became a State Signatory to the Convention on 13.07.1960. To give effect to the Convention, the Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted. This was preceded by the enactment of the Arbitration Act, 1940 and after the 1961 Act, the Arbitration & Conciliation Act, 1996 was enacted.

41. The objects and reasons of the Act shows that the Act consolidated and amended the law relating to Domestic and International Commercial Arbitration and the law of enforcement of Foreign Arbitral Awards and is based on the UNCITRAL Model Law and Rules. The Scheme of the Act divides it into four parts. Part I is under the heading 'Arbitration'; Part II deals with Enforcement of certain Foreign Awards; Part III is for conciliation and Part IV contains supplementary provisions. The present case concerns itself with provisions under Part I and Part II only.

42. Under Section 2(1)(e) of the Act which is in Part I, Court has a reference to the questions forming subject-matter of the Arbitration if the same had been the subject-matter of a suit and also includes the High Court. In ***Balco (supra)*** the Supreme Court clearly held that the words subject-matter of arbitration in Section 2(1)(e) gives jurisdiction to the Court where the arbitration takes place which otherwise would not exist. It was also observed that the phrase cannot be confused with subject-matter of the suit as it has a reference and connection with the process of dispute resolution. The provision in Section 2(1)(e) of the Act has to be construed keeping in view provisions in Section 20 of the Act which give recognition to party autonomy. The legislature had intentionally given jurisdiction to two Courts i.e. the Court which would have jurisdiction

where cause of action is located and the Court where arbitration takes place. Relevant para is as follows :-

> *"96. Section 2(1)(e) of the Arbitration Act, 1996* reads *as under:*
>
> > *2. Definitions.-(1) In this Part, unless the context otherwise requires—*
> > *(e) 'Court' means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes;"*
>
> *We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi,*

(Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located."

43. The Supreme Court distinguished 'Court' under Section 47 of the Act in Part II from 'Court' in Section 2(1)(e) of the Act and observed as follows :-

"97. The definition of Section 2(1)(e) includes "subject-matter of the arbitration" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "court" as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India."

(emphasis supplied)

44. In ***Tata International (supra)***, the Petitioners had a Foreign Award in their favour and had applied to the Court under Section 47 of the Act for enforcement of the Award as a deemed decree under Section 49 of the Act. An objection to the maintainability of the petition was raised by the Respondents on the ground that no part of cause of action in respect of the subject-matter of the Award had arisen within the jurisdiction of the said Court. The Court was thus called upon to decide the interplay between the provisions of Section 2(1)(e) and Explanation to Section 47 of the Act. The Court analyzed the meaning of the expression 'subject-matter of the award' and posed a question whether that would mean also subject-matter of the arbitration proceedings and held that the two provisions deal with two different aspects. Under Section 2(1)(e) the expression 'subject-matter of arbitration' means and refers to subjects concerning arbitration and would include contracts. Subject-matter of an Award cannot include a contract as adjudication in respect of the claims under the contract has been done and resulted into an Award. The subject-matter of the Award could therefore be construed only to mean the relief finally awarded by the Award. The Court relied on the decision of the Supreme Court in ***Brace Transport (supra)***. Relevant para in ***Tata International (supra)*** is as follows :-

> "*4. We then come to the issue as to the meaning of the expression subject matter of the Award and whether that would mean also subject matter of the arbitration proceedings. This is important because under Section 2(e) the expression with reference to the expression Court means the subject matter of the arbitration. The subject matter of the arbitration would include contracts. The subject matter of an Award cannot include a contract as adjudication in*

respect of the claims under the contract has been done and has resulted into an award. The subject matter of the Award therefore, is liable to be construed to mean what is the relief finally awarded by the Award. It may be in the form of money, it can be for specific performance, or the like. Under the Foreign Awards (Recognition and Enforcement) Act, 1961, the said issue was in issue before the Apex Court in the case of Brace Transport Corporation of Monrovia Bermuda v. Orient Middle East Lines Ltd. Saudi Arabia and Ors., 1993(4) SCA 33. Two paragraphs from the judgment may be reproduced.

> *"14. It was then submitted by Dr. Ghosh that the subject matter of the award was money and the 1st and 2nd respondents had money in the jurisdiction of the Bhavnagar Court in the form of part of the purchase price of the said vessel payable to them by the 3rd and 4th respondents."*
>
> *"15. This being an award for money its subject matter may be said to be money, just as the subject matter of the money decree may be said to be money."*

It is therefore, clear that in respect of an award for money, subject matter can be said to be money. In other words, therefore, petition for enforcement of the foreign award can be filed in the Court where the party may have money. This is important consideration considering a party need not be tied down as in the case of Part I where the subject matter is the subject matter of the arbitration. In other words, if the party has a foreign award in its favour, it can seek to enforce the award in any part of the country where it is sought to be enforced as long as money is available or suit for recovery of money can be filed. In my opinion, therefore, expression subject matter of the award to the explanation under Section 47 is different from the expression subject matter of the arbitration under Section 2(e) of Part I of the Act.

A foreign award if allowed to be enforced is a deemed decree. It can be enforced anywhere that the respondents may have money. In other words it is in the nature of forum hunting. The expression subject matter of the award and the subject matter of the arbitration agreement are two different and distinct expressions. In respect of a foreign award, if the expression subject matter of the award was to mean the same thing as the subject matter of the arbitration agreement, in most cases there would be no Court available where the award could be enforced as the entire cause of action in respect of the subject matter of the arbitration could be the foreign country. Merely because in the instant case, the contract was entered into in India cannot result in a different interpretation. The expression as the explanation itself permits forum hunting if that expression can be used. After considering all these provisions a similar view was taken in Arbitration Petition Lodg. No. 427 of 2001 in the case of Naval Gent Marline Ltd. v. Shivnath Rai Harnarain (I) Ltd. and Ors., decided on 5th July, 2001 in which at the ad interim stage, apart from other issues, the issue as to the meaning of the expression "subject matter of the award" was in issue and has been similarly answered.

In the instant case, defendants do not have their office or carry on business within the jurisdiction of this Court. The Offices are either at Gandhidham or Ahmedabad. It is not averred in the petition that the respondents have any money within the jurisdiction of this Court. In these circumstances, to my mind in the absence of the subject matter of the Award being within the jurisdiction of this Court, this Court would have no jurisdiction to hear and decide this petition."

45. Issue of territorial jurisdiction of a Court in the context of Sections 47 and 48 of the Act again came up for consideration before the Bombay High Court in ***Wireless Developers (supra)***. Relying on the judgment in case of ***Tata International (supra)***, the Court in clear words observed

that at the stage of arbitration the subject-matter would be a contract and therefore factors such as place where the contract was entered into and related issues would become material to decide the territorial jurisdiction. However, once the arbitration concludes, and enforcement is sought, the only question that needs determination is the subject-matter of the Award as the disputes *inter se* the parties translated into Arbitration proceedings and have culminated into an Award. Therefore, it is with reference to the Award that the jurisdiction of the Court would have to be seen and decided. Relevant part of the judgment is as under :-

> *"8. This concept has been explained by a single Judge of this Court in the case of Tata International Ltd. Vs. Trisuns Chemical Industry Ltd.2002 (2) B.C.R. 88. In that case also a foreign award was sought to be enforced in a Court which the respondent claimed, lacked territorial jurisdiction. In paragraph 2 of the judgment, the Court considered the distinction between the aforesaid two provisions relating to the subject matter of the two aspects: in an arbitration the Court would consider the subject matter of the arbitration; in the enforcement of the award the Court would consider the subject matter of the award as the determining factors. This stands to reason and logic. The subject matter of the arbitration may be a certain contract, a certain property etc., The territorial jurisdiction of the Court would be where the contract was entered into or where the some or all the properties of the respondent would be. Once the arbitration is concluded and has to be enforced it is the subject matter of the award which would have to be seen. That would be whether the award is a money award (analogous to a money decree in a litigation) or a declaration or other relief with regard to a contract or a property. The award would have to be filed for its enforcement in a Court which would be able to enforce that award. It would be futile to file it where a cause of action may have arisen, if the respondent would have no properties in that jurisdiction. Similarly it would be*

of little use to file it where the respondent resided or carried on business. It would have to be filed where the respondent would have properties, movable or immovable, which could be attached and sold in execution of the award."

46. The Act of 1996 underwent an Amendment by the Amendment Act No.3 of 2016 with effect from 23.10.2015 (hereinafter referred to as '2015 Amendment'). The genesis of the said Amendment are the recommendations of the Law Commission in its 246th Report and therefore to understand the effect of the Amendment, it would be profitable to refer to certain paragraphs of the Report, which are relevant to the present issue and are as follows :-

"38. Section 2(2) of the Arbitration and Conciliation Act, 1996 (the "Act"), contained in Part I of the Act, states that "This Part shall apply where the place of arbitration is in India." In comparison, Article 1(2) of the UNCITRAL Model Law provides: "The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State." The central issue, therefore, that was before the two judge Bench of the Supreme Court in Bhatia International v. Interbulk Trading SA, (2002) 4 SCC 105, and before the five-judge Bench in Bharat Aluminum and Co. v. Kaiser Aluminium and Co., (2012) 9 SCC 552 (hereinafter called "BALCO") was whether the exclusion of the word "only" from the Indian statute gave rise to the implication that Part I of the Act would apply even in some situations where the arbitration was conducted outside India.

39. The Supreme Court in Bhatia, held that Part I mandatorily applied to all arbitrations held in India. In addition, Part I applied to arbitrations conducted outside India unless it was expressly or impliedly excluded. While Bhatia was a case arising out of section 9, the same principle was extended by the Supreme Court to sections 11

and 34 as well (in Venture Global v. Satyam Computer, (2008) 4 SCC 190; Indtel Technical Services v. W.S. Atkins, (2008) 10 SCC 308; Citation Infowares Ltd. v. Equinox Corporation, (2009) 7 SCC 220; Dozco India v. Doosan Infrastructure, (2011) 6 SCC 179; Videocon Industries v. Union of India, (2011) 6 SCC 161). As a result, Indian Courts were competent to provide interim relief pending arbitration, appoint arbitrators and set aside arbitral awards even if the arbitration was conducted outside India. These powers existed unless Part I was expressly or impliedly excluded. Further, an implied exclusion was construed not on the basis of conflict of laws principles but in an ad hoc manner. This position now stands overruled following BALCO.

40. The Supreme Court in BALCO decided that Parts I and II of the Act are mutually exclusive of each other. The intention of Parliament that the Act is territorial in nature and sections 9 and 34 will apply only when the seat of arbitration is in India. The seat is the "centre of gravity" of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and, by 24 virtue of section 2(7), the award would be a "domestic award". The Supreme Court recognized the "seat" of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between "seat" and "venue" was, therefore, recognized. In such a scenario, only if the seat is determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable. Even if Part I was expressly included "it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural Law/Curial Law." The same cannot be used to confer jurisdiction on an Indian Court. However, the decision

in BALCO was expressly given prospective effect and applied to arbitration agreements executed after the date of the judgment.

41. While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a 25 practical remedy to the party seeking to enforce the interim relief obtained by it. That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company. (ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned

overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre BALCO."

47. It is thus evident that by virtue of the Amendment, the definition of 'Court' under Section 2(1)(e) of the Act stood amended in relation to International Commercial Arbitration and a Proviso was inserted to Section 2(2) making the provisions of Sections 9, 27 and 37(3) and 37(1)(a) of the Act applicable to International Commercial Arbitrations even if the place of arbitration is outside India and the Arbitral Award is enforceable under Part II of the Act. Significantly, the definition of 'Court' as contained in Explanation to Section 47 of the Act was also amended to confer jurisdiction on the High Court to decide the questions forming the subject-matter of the Award. The object behind the Amendments were evidently to provide an efficacious remedy to a party seeking interim relief against the other party whose assets are located in India and there is a likelihood that the other party may dissipate its assets in the near future.

48. Post the 2015 Amendment the controversy relating to the 'Court' as defined under Section 2(1)(e) of the Act and 'Court' under Explanation to Section 47 of the Act again came up for consideration before the Bombay High Court in ***Trammo (supra)***. The Petitioner in the said case being a holder of a Foreign Arbitral Award sought interim relief by filing a petition under Section 9 of the Act pending enforcement and execution of the Award. The Respondent raised an objection to the territorial

jurisdiction of the Court, referring to the amended provisions of the Act. The exact issue that fell for consideration before the Bombay High Court was whether the 'Court' as referred to in Section 9 of the Act, in case of International Commercial Arbitration which takes place outside India, is a Court as defined under Section 2(1)(e) or as defined in the Explanation to Section 47 of the Act.

49. In the above context, the Bombay High Court framed a question and which in my opinion is extremely relevant and directly answers the issue raised by the Respondent, but in favour of the Petitioner. The question as framed was 'whether Section 2(1)(e)(ii) when it defines 'Court' to mean the High Court having jurisdiction to decide the question forming the subject-matter of the arbitration would create an impediment preventing the Petitioner to invoke Section 9 before this Court'.

50. The Bombay High Court relied on the judgments in ***BALCO (supra), Brace Transport (Supra), Wireless Developers (supra)*** and ***Tata International (supra)*** and reiterated the position of law by holding that once the Tribunal delivered its Award, relevance of the expression 'subject-matter of arbitration' would fade away or lose its colour rendering the definition of Court in Section 2(1)(e) of the Act unworkable. Though in the context of Section 9 of the Act, the Bombay High Court observed that the definition of 'Court' as contained in Section 2(1)(e)(ii) of the Act would create incongruity to enforce the provisions of Section 9 in as much as the Petitioner would be prevented to seek interim measures in enforcing the money award, when the money is lying within the territorial jurisdiction of the Courts, only for the reason that it is not subject-matter of arbitration.

51. Therefore, it is clear from a reading of the provisions of Explanation to Section 47 of the Act and the various judgments referred to above that 'Court' as defined in under Section 47 of the Act is a Court distinct from a Court defined under Section 2(1)(e) of the Act. The position of law in this respect, in my view, is unchanged post the 2015 Amendment to the Act. The Court while enforcing the Foreign Award is concerned, post the Amendment, with the questions forming subject-matter of the 'Award' which can only be construed to mean and connote the 'Relief' given by the Award and can be a direction to pay money or a direction of specific performance etc. Thus, the interpretation and construction of the phrase by the Bombay High Court in ***Tata International (supra)***, in my considered view, continues to hold good despite the Amendment to the phrase and substitution by the words "questions forming' would not make a difference as rightly contended by the Petitioner.

52. Having so held, the next question that begs an answer is what is the subject-matter of the Award in question in the present case i.e. the relief finally awarded by the Arbitral Tribunal. Counsel for Respondent No.1 has raised a serious contention on this issue. While the Petitioner claims that the relief granted by the award in its favour is nothing more than a direction to pay money and is thus a money award, Respondent No.1 asserts that the directions are in the nature of specific performance of the contract. As noted above, the subject-matter of the Award would determine the territorial jurisdiction of this Court in as much as in case the relief is in the nature of a money Award, the place of location of assets of the judgment debtor would give jurisdiction to the Court, while

in case it is in the nature of specific performance then the considerations of the situs of the shares, registered office of the judgment debtor, etc. as argued by Respondent No.1 would be the relevant factors. Counsel for Respondent No.1 has conceded fairly during the course of arguments that in case the Award is a money Award, this Court would have jurisdiction as then the place of location of the assets of the Judgement Debtor shall be the determinative criterion for the territorial jurisdiction of the Court.

53. Before addressing this contentious issue, I may only note that it is no longer *res integra* that in case of a 'money award', the enforcement can lie in the Court where the assets are located and the Foreign Award holder is entitled to 'Forum hunting'. For the sake of record, I may only refer to a few judgments on this aspect of the matter. In ***Brace Transport Corporation (supra)***, Supreme Court held as under :-

> ***"****16. This being an award for money its subject-matter may be said to be money, just as the subject-matter of a money-decree may be said to be money.*
>
> *x x x*
>
> *19. It is now for the appellant to ascertain where the monies were so held and, if they were held within the jurisdiction of the Bhavnagar court, to apply for an amendment of the jurisdiction paragraph of its application to the Bhavnagar court accordingly. The Bhavnagar court would then, after notice to the parties, consider whether or not the amendment should be allowed. It would, ordinarily having regard to the object of the said Act and the fact that these events have transpired after the application to it was filed, allow the amendment. Thereafter it would determine whether the averment in the amendment is correct. In the event that it came to*

the conclusion that the first and second respondents had monies within its jurisdiction, it could be said to have jurisdiction to take the award on file under Section 5 of the said Act and it would proceed thereafter under the subsequent provisions of the said Act."

54. In ***Tata International Ltd (supra)***, Bombay High Court was dealing with a Foreign Award in favour of the Petitioners, who had applied under Section 47 of the Act for enforcement of the Award as a deemed decree under Section 49 of the Act. Respondents had objected to the maintainability of the petition on the ground that no part of cause of action in relation to the subject-matter of the Award had arisen within the territorial jurisdiction of the Court. Deciding on the interplay between the provisions of Section 2(1)(e) and Explanation to Section 47 of the Act, the Court construed the subject-matter of the Award to mean the relief awarded therein and held that in respect of an Award for money, subject-matter being money a petition for enforcement of Foreign Award can be filed in the Court within whose jurisdiction asset/money is located. Relevant part of the judgment is as follows :-

"…It is therefore, clear that in respect of an award for money, subject matter can be said to be money. In other words, therefore, petition for enforcement of the foreign award can be filed in the Court where the party may have money. This is important consideration considering a party need not be tied down as in the case of Part I where the subject matter is the subject matter of the arbitration. In other words, if the party has a foreign award in its favour, it can seek to enforce the award in any part of the country where it is sought to be enforced as long as money is available or suit for recovery of

money can be filed. In my opinion, therefore, expression subject matter of the award to the explanation under Section 47 is different from the expression subject matter of the arbitration under Section 2(e) of Part I of the Act.

A foreign award if allowed to be enforced is a deemed decree. It can be enforced anywhere that the respondents may have money. In other words it is in the nature of forum hunting. The expression subject matter of the award and the subject matter of the arbitration agreement are two different and distinct expressions. In respect of a foreign award, if the expression subject matter of the award was to mean the same thing as the subject matter of the arbitration agreement, in most cases there would be no Court available where the award could be enforced as the entire cause of action in respect of the subject matter of the arbitration could be the foreign country. Merely because in the instant case, the contract was entered into in India cannot result in a different interpretation. The expression as the explanation itself permits forum hunting if that expression can be used. After considering all these provisions a similar view was taken in Arbitration Petition Lodg. No. 427 of 2001 in the case of Naval Gent Marline Ltd. Vs. Shivnath Rai Harnarain (I) Ltd. and Ors., decided on 5th July, 2001 in which at the ad interim stage, apart from other issues, the issue as to the meaning of the expression "subject matter of the award" was in issue and has been similarly answered."

55. In ***Wireless Developers (supra)***, the issue of territorial jurisdiction of a Court in the context of Sections 47 and 48 of the Act again came up for consideration before the Bombay High Court. The Court held that once the arbitration is concluded and has to be enforced, it is the subject-

matter of the Award which would have to be seen and where the subject-matter of the Award which is a money award, is money, then the Court within whose jurisdiction the money is to be found, will have territorial jurisdiction and would be the correct Executing Court in enforcement of a Foreign Award. Relevant paras are as follows :-

> *"13. The case of the parties to this litigation is wholly different. The appellant claims that there is money within the territorial jurisdiction of this Court which would satisfy the foreign award obtained by the applicant in an arbitration proceeding held in the USA. The subject-matter of the award which is a money award, being money is within the territorial jurisdiction of this Court and consequently, under the explanation to section 47 of the Act this Court having jurisdiction over the subject-matter of the award would be the correct Executing Court in enforcement of the foreign award obtained by the appellant under section 48 of the Act.*
>
> *x x x*
>
> *19. It is clear from a reading of the aforesaid provisions defining the Court and the aforesaid two judgments and considering the reason and logic behind the distinction as also the analogous provisions with regard to enforcement of decrees that since the appellant claims that it can execute the award within the territorial jurisdiction of this Court that itself bestows this Court with the territorial jurisdiction, it having within its territorial limits the subject-matter of the award which is money in the form of the bank account. Mr. Dhond on behalf of the appellant contended that it is for the appellant to take its own choice to recover the monies and if the appellant finds that there are no monies in the said*

account the appellant may be constrained to make another application for enforcement of the award, much like another application for execution of a decree under the Civil Procedure Code wherever another property of the respondent may be found for execution and enforcement of the award.

20. This, therefore, settles the territorial jurisdiction aspect under the application for execution made by the appellant. The notice issued under Order 21 Rule 22 would, therefore, be entitled to be issued by this Court having territorial jurisdiction for the enforcement of the award. The impugned order refusing to exercise jurisdiction on the ground that merely because the bank account of the respondent was within its territorial jurisdiction is, therefore, incorrect and must be set aside. This Court would have to exercise its jurisdiction to enforce the award."

56. Useful it would be to refer to para 16 of the said judgment where the Court relied on the judgment in the case of ***Brace Transport (supra)*** quoting from Law and Practice of International Commercial Arbitration by Redfern and Hunter and the said extract is as follows :-

"A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is sometimes expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal attachment or seizure of the defaulting party's assets. Legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of

sale. These legal proceedings must be taken in the State or States in which the property or other assets of the losing party are located."

57. In ***Motorola Inc. (supra)***, a Coordinate Bench of this Court, relying on the earlier judgments, some of which have been alluded to above, held that the relevant factor in execution of a money Award is the location of the assets over the property of the Judgment Debtor and not the Judgment Debtor itself. Relevant paras in this regard are as under :-

"*19. The DH is also right in contending that the present action for execution of the award is not action against personam of the JD and not even against the title of the shares but is for an attachment and sale of the assets of the JD. The only relevant factor is the location of the assets or the property and not the JD itself and in the present case the DH is right in contending that the location of the assets in question, i.e., shares and bank accounts, is in Delhi and this Court thus has jurisdiction.*

20. Finally the position of law now is well settled as per the judgment of the Hon'ble Supreme Court in Brace Transport Corporation's case (supra) wherein it has been held that a party seeking enforcement of an international award will be able to go forum shopping and locate the assets of the losing party for executing the award. Thus it is open to the DH to locate the assets of the losing party that is the judgment debtor which have been found to be in New Delhi in the form of both bank accounts and shares of Spice Communications Ltd.

21. To sum up the conclusions are:

(a) the DH holds a foreign arbitral award against the JD.

(b) the award grants a sum of $33 million in favour of the decree holder and against the judgment debtor.

(c) the JD had bank accounts in Delhi and held shares of a company having a registered office in Delhi.

(d) these amounts and shares are undoubtedly assets of the JD company

(e) a foreign award is executable as a decree

(f) Order XXI Rule 30 of the Code permits the sale of the property of the JD company in execution of a decree."

58. To the same effect is the view taken by the Bombay High Court in a recent decision in ***Trammo (supra)*** and the reference to the said decision is significant as judgement has been delivered taking into consideration the 2015 Amendment of the Act on which heavy reliance is placed by the learned counsel for Respondent No.1. Court has reaffirmed and reiterated the position of law prior to the Amendment and held that 'Court' for the purpose of Section 47 of the Act would be a Court dealing with subject-matter of the Award and therefore where the relief granted by the Arbitral Tribunal is in the form of money, the location of the assets of the Judgment Debtor would determine the territorial jurisdiction of the Court, although as already stated above this was in the context of Section 9 of the Act. This Court has recently in ***Glencore (supra)*** taken a *prima facie* view following the above judgments and held that the location of the assets would give territorial jurisdiction to the Court to enforce a Foreign Award.

59. Coming back to the question whether the relief granted by the Arbitral Tribunal in the present case is a direction of specific performance or is a money Award, this Court would in this context require to examine the Award, although I am conscious of the fact that in an enforcement petition, the Court has a limited jurisdiction and cannot go behind the Award. It is made clear that the analysis of the Award is only for a limited purpose of determining the nature of relief it grants and for no other purpose. Nature of relief would determine the territorial jurisdiction of this Court and has therefore to be examined in view of the objection taken by Respondent No.1.

60. I have perused the Award which was read and re-read by counsels for the parties. It is undisputed between the parties that the Petitioner was an Investor for a Hotel project namely the Westin Kolkata-Rajarhat, at Kolkata and Respondent No.1 being a Joint Venture was a Promoter. Respondent No.2 had been set up as a Special Purpose Vehicle to construct and operate the said hotel. On 07.08.2008 the parties entered into the SSHA which set out the terms of the Petitioner's investment upto 35% in the SPV and following the investment of an aggregate of Rs.80 Crores, the Petitioner became the shareholder of 35% shares in Respondent No.2. This was followed by a Project Management Agreement executed on 23.09.2008 under which Respondent No.1 was appointed as the Project Manager. The SSHA contemplated completion of the Project by December 2010. However, the Project could not be completed within the time schedule agreed upon between the parties. Alleging material breaches of the SSHA, such as failure to complete the Project in a timely manner, improper conduct of Board meetings etc., the

Petitioner invoked arbitration. Amongst other claims, the Petitioner sought the following reliefs :-

> "*(4) With respect to clauses 17 and 14 (i) an award of the highest sum of the prayers sought below: (ii) an order for specific performance of the First Respondent's obligation to pay the price set out in clause 17.2(a) of the SSHA, being US$70.5 million; (iii) in the alternative, a direction that the First Respondent should pay to the Claimant the maximum price permissible under Indian law, being US$24.86 million, and a further sum of US$45.6 million as damages/compensation for the Respondents failure to perform their obligations under clause 17; (iv) in the further alternative, a direction that the First Respondent should pay to the Claimant damages/compensation equivalent to the price set out in clause 17.2(a) for the Respondents' breach of their obligations under clause 17, being US$70.5 million; (v) damages equivalent to the FMV Price, which amounts to US$24.86 million; and, in the further alternative, a direction that the First Respondent should pay to the Claimant such other sums as the Tribunal thinks fit.*
>
> *(5) In the alternative to the relief sought above, the First Respondent be directed to pay to the Claimant a sum of US$70.5 million as damages/compensation for breach of representations and warranties;*
> *xxx xxx xxx*
>
> *(7) In the alternative, an order directing the First Respondent to pay to the Claimant a sum of US$70.5 million, as and by way of restitution; or*
> *xxx xxx xxx*
>
> *(9) Compounded pre-award and post-award interest on all monetary relief at such rate as the Tribunal considers appropriate;"*

61. Some of the observations in the Award relevant to the present controversy are as under :-

> "*337. In any event, on the facts, it has become clear that the December 2010 Notification did not lead to the delay in construction which was caused, not by any regulatory act or omission by the AAI, but rather by events well within the control of the Respondents, such as the late appointment and poor performance of the contractor Mfar. The Tribunal accepts the Claimant's submission that the Respondents have failed to discharge their burden of showing that the alleged force majeure prevented the construction of the Project in time- before the end of December 2011.*
>
> *340. The Tribunal's overall conclusion on the facts relating to the force majeure claim is that the Respondents failed to apply in time, well before the expiry in 2009, for a renewal or revalidation of the 2006 NOC. In any event, based on the E&Y reports, the Board Meetings, the letters mentioned above, and the oral evidence, particularly of Mr Jha and Mr Kalra, the AAI's December 2010 Notification was not the cause of any delay (or any quantifiable delay) to the construction of the Project.*
>
> *341. It follows that it is unnecessary to consider the argument raised by the Respondents that so long as the force majeure event was occurring at the date of the clause 17.2 Notice, compliance was unnecessary, and the Claimant's put option rights under clause 17.2 would not arise until July 2015. However, if it were necessary, the Tribunal would have held that the content of the clause 17.2 put option was repeated after July 20, 2015, in the letter dated March 16, 2016 (CX-67) which, at paras 2 and 11 "repeats and reiterates" the contents of earlier correspondence including the letters dated September 26, 2014 (CX-39), and November 6, 2014 (CX-40), and at para 8 repeats the specific complaint that there was a*

breach of clause 17(b)(iv) and there was a failure to complete the Project by December, 2011. The Tribunal would have accepted, if needed, that this later letter was an effective written notice under clause 17.

342. Accordingly, the Tribunal decides that (1) the Claimant is entitled to rely on the Hotel EOD; (2) if there had been an operative force majeure event, it would have lasted for 3 years, 6 months and 20 days (from December 13, 2010 to July 3, 2014); but (3) the Respondents' breach under clause 17(b)(iv) is not excused.

xxx xxx xxx

368. The Tribunal concludes that the Claimant has established that there were material breaches, amounting to EODs within clause 17.1(a), in relation to the conduct of meetings, the approval of accounts and the appointments of auditors.

369. It follows, considering both the Hotel EOD and the Material Breaches EODs, that triggering events under clause 17 have occurred, entitling the Claimant to exercise its rights under clause 17 .2."

62. Having observed that the Respondents were in breach of the provisions of SSHA, the provisions of Clauses 14.2 and 17.2 were examined by the Tribunal. Clause 14.2 has been extracted above in the earlier part of the judgment and it stipulates that in the event the Investor is unable to sell the equity shares / securities held by it in the SPV in the manner set out in Clause 13 or if the SPV does not undertake an IPO on terms satisfactory to the Investor and the Investor continues to hold the said securities after 54 months from the First Tranche Completion Date for a period of 270 days, the Investor shall have the right to sell the shares and securities it holds in the SPV and require the Promoter to purchase

such exit securities, etc. Clause 17.2 was also examined by the Tribunal which provided for consequences of default and stipulated that on occurrence of an Event of Default by the Promoter, the Investor shall have the right to sell the equity shares / investor's securities of the SPV and the Promoter shall have the obligation to buy them at a price equivalent to the Outstanding Investor Total Investment plus an IRR of 25% Compounded annually. Both the Clauses were Exit Clauses and after construing their provisions, the Tribunal by way of the partial Award directed Respondent No.1 to pay to the Petitioner a quantified sum under Clause 17.2 of the SSHA along with 25% IRR. The Tribunal further directed that upon payment of the said sums of monies, the Petitioner shall deliver to Respondent No.1 executed transfers and any other title documents relating to its shares in Respondent No.2.

63. In my considered opinion, learned Senior Counsel for the Petitioner is right in its argument that the Award in question is a money Award and not an Award for specific performance. The two Clauses referred to above are clearly in the nature of exit clauses which entitled the Petitioner to sell shares in the event of default by the Respondents. This was not dependent on any corresponding / reciprocal obligation on the part of the Respondents and in fact the Respondents were bound by the terms of the clauses to buy back the shares and pay the money to the Petitioner of a value equivalent to the fair market value of the shares plus 25% IRR. The direction to the Petitioner to return the title documents, was only a consequential direction once the shares were sold to Respondent No.1 and the money was received by the Petitioner.

64. Very recently the Supreme Court in the case of ***Kamal Kumar vs. Premlata Joshi and Ors***. in Civil Appeal No.4453 of 2009 decided on 07.01.2019 has reiterated the settled principles of law and the material questions which are required to be gone into for grant of relief of specific performance. Relevant paras are as follows :-

> *"10. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property; Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds.*
>
> *11. In our opinion, the aforementioned questions are part of the statutory requirements (See Sections 16(c), 20, 21, 22, 23 of the Specific Relief Act, 1963 and the forms 47/48 of Appendix A to C of the Code of Civil Procedure). These requirements have to be properly pleaded by the parties in their respective pleadings and proved with the aid of evidence in accordance with law. It is only then the Court is entitled to exercise its discretion and accordingly*

grant or refuse the relief of specific performance depending upon the case made out by the parties on facts."

65. On a plain reading of the material questions framed by the Supreme Court, it is clear that the directions by the Arbitral Tribunal in the Award in the present case do not satisfy the requirements which have to be met in a case relating to relief of specific performance. The two exit clauses 14.2 and 17.2, entitle the Petitioner to a relief of money on sale of shares, which are not conditional on any act or willingness or readiness. No reciprocal obligations are mandated on the part of the Respondents to enable the Petitioner to invoke the exit clause and exercise the right of sale of shares in the SPV. It is thus clear that the relief given in the Award is in the nature of a direction to Respondent No.1 to pay money to the Petitioner and a consequential direction to return the title documents has been issued to the Petitioner.

66. Thus, being a money Award the only issue that now arises for consideration is the location of the assets of Respondent No.1. Petitioner has clearly averred in the petition that this Court has territorial jurisdiction to entertain the petition as Respondent No.1 has assets within the jurisdiction of this Court. It is categorically averred that on the basis of information available in the public domain, Respondent No.1 appears to hold shares in a subsidiary known as Shristi Urban Infrastructure Development Ltd., whose registered office is at Delhi. Additionally, Respondent No.1 has offices in New Delhi as is evident from the letter dated 26.05.2019 where the address of Delhi has been mentioned by Respondent No.1 as its office address. Petitioner has also alleged that Respondent No.1 has bank accounts in Delhi and has also during the

course of arguments relied on a diagrammatic representation showing the structure of the parties involved in the present petition and which has been scanned and placed in the earlier part of the judgment. Relevant para is as under :-

> *"(w). This Hon'ble High Court has territorial jurisdiction to entertain and dispose of this Petition. Respondent No.1 (against whom the Tribunal has, inter alia, passed a direction for payment of monies) has assets within the jurisdiction of this Hon'ble Court. The Petitioner submits that on the basis of information available in the public domain, Respondent No.1 appears to hold shares in a subsidiary known as Shristi Urban Infrastructure Development Ltd., whose registered address is D-2, 5th floor, Southern Park, Saket Place, Saket, New Delhi-110 0017. Additionally, both Respondent No.1 and Respondent No.2 claim to work for gain and have offices in New Delhi. As seen in the letter dated 26.05.2019, Respondent No.1 claims that the following is its Delhi office address : "D-2, 5th Floor, Southern Park, Saket Place, Saket, New Delhi-110 017". Similarly, Respondent No.2 has also issued correspondence citing the same address as its "corporate office" address. By way of illustration, a copy of resolution purportedly passed at a board meeting of Respondent No.2 held on 27.02.2019 lists the address in Delhi of Respondent No.2 as the corporate office at the foot thereof is annexed hereto as Document 10. Further, the Petitioner verily believes that both Respondents operate bank accounts within the jurisdiction of this Hon'ble Court."*

67. Mr. Nayar is right in his contention that none of the averments have been denied by Respondent No.1 and even in EA 375/2019 as well

as in the Civil Appeal No.5696/2019 before the Supreme Court, Respondent No.1 has never controverted the existence of assets in Delhi. Clearly, therefore once the assets of Respondent No.1 are located in Delhi, in view of the various judgments referred to above, and having held that the Award in question is a money Award, I have no hesitation in holding that this Court has the territorial jurisdiction to entertain the present petition. Accordingly, the question of territorial jurisdiction is decided in favour of the Petitioner.

68. In view of the above, Respondent No.1 is directed to file an affidavit of its assets in Form 16-A, Appendix-E of Code of Civil Procedure, 1908 within a period of four weeks from today.

69. In so far as the argument of the counsel for Respondent No.1 with respect to Respondent No.2 is concerned that in the absence of Sarga, the Enforcement Petition cannot continue and that further prosecution of the present proceedings would violate the moratorium imposed under Section 14 of the IBC is concerned, I may only note that this Court has only decided the territorial jurisdiction to entertain the petition and therefore, the issuance of moratorium or the absence of Sarga (represented by Resolution Professional) is irrelevant at this stage. For the sake of record, however, I may take on record the additional affidavit filed by the Petitioner, more particularly, paragraphs 4 and 5, which are extracted hereunder for ready reference :-

> *"4. I further state that, solely in view of the moratorium imposed by the NCLT Order (despite the fact that the foreign partial award dated*

30.04.2019 does not endanger, diminish or adversely impact the assets of Respondent No.2) I confirm that the Petitioner it is not pursuing the above petition against Respondent No.2 herein pending the moratorium, without prejudice to its rights, claims and contentions, all of which are reserved.

5. I also state that the Petitioner also seeks liberty from this Hon'ble Court to be permitted to initiate / continue proceedings against Respondent No.2 with regard to the subject matter of the present proceedings (i.e. enforcement and execution of the foreign partial award dated 30.04.2019) at the appropriate time."

70. It is evident from a reading of the affidavit that at this stage the Petitioner is not proceeding against Respondent No.2. Although it may be completely irrelevant at this stage, however, the Court *prima facie* finds merit in the contention of the Petitioner that the shareholding of the Petitioner in Respondent No.2 is an asset of the Petitioner and Section 18 of the IBC, inter alia, applies to assets over which the Corporate Debtor has ownership rights, besides the fact that the NCLAT order has directed that Respondent No.2 is to continue functioning as a going concern and the Petitioner's shares in any case are dematerialized and not in a physical form and thus do not require an instrument of transfer / share transfer form.

71. Since this Court has held above that this Court has Territorial jurisdiction to entertain the petition, the petition be now listed before the

Roster Bench for further proceedings on 15.03.2021, subject to orders of Hon'ble the Chief Justice.

JYOTI SINGH, J

FEBRUARY 22nd , 2021
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