MAJESTY LEGAL

Advocates & Solicitors

" IMPLICATIONS OF U.S. BANKRUPTCY COURT ORDERS IN INDIAN ARBITRATION PROCEEDINGS"

"UPHEALTH HOLDINGS, INC. V. SYED SABAHAT AZIM"

Hon'ble High Court of Calcutta, in the case of ***Uphealth Holdings, Inc. v. Syed Sabahat Azim***[1], in a revisional application against an order dated 17-01-2024 by Commercial Judge at Rajarhat, North 24 Parganas in an anti-arbitration suit, a Single Judge Bench dismissed application. Hon'ble Court held that suit need not be stayed as reliefs claimed were not covered by Chapter 11 cases in U.S. Bankruptcy Code. During pendency of anti-arbitration suit petitioner filed an application under Section 151 of Code of Civil Procedure, 1908 to stay further proceedings citing a moratorium from U.S. Bankruptcy Court. This application was rejected as U.S. had not been declared a reciprocating territory under Section 44-A of the Code of Civil Procedure, 1908 and Sections 13 and 14 were deemed inapplicable since bankruptcy order was not between parties to suit. Petitioner argued for arbitration under Section 45 of the Arbitration and Conciliation Act, 1996 and that U.S. Bankruptcy Court's order should be respected under ***"Doctrine of Comity of Courts".*** Petitioner contended that order constituted a worldwide temporary stay and was misunderstood by Hon'ble Judge as a decree requiring enforcement in India. Hon'ble Court emphasized that Code of Civil Procedure, 1908 provides specific provisions for stays and a foreign proceeding does not automatically mandate a stay of domestic suits.

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[1] 2024 LiveLaw (Raj) 137

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IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. No. 241 of 2024

Uphealth Holdings, INC.
vs.
Dr. Syed Sabahat Azim & Ors.

For the petitioner : Mr. S.N. Mookherji, Sr. Advocate
Mr. Ratnanko Banerji, Sr. Advocate
Mr. Suddhasatva Banerjee,
Mr. Anand S. Pathak,
Mr. Vijay Purohit,
Mr. Shivam Pandey,
Mr. Avijit Mookherji,
Mr. Anirudhya Dutta,
Ms. Shyra Hoon,
Mr. Nav Dhawan,
Mr. Naman Choudhury

For the opposite party Nos. 1 to 4 : Mr. Abhrajit Mitra, Sr. Advocate
Mr. Krishna Rai Thakkar,
Mr. Debashis Karmakar,
Mr. Sarvapriya Mukherjee,
Ms. Arya Nandi,
Mr. Pijush Agarwal
Mr. Parikshit Lakhotia,
Mr. Satyam Ojha

Heard on: 31.01.2024, 13.02.2024, 20.02.2024
22.02.2024, 26.02.2024, 27.02.2024 & 03.04.2024
Judgment on: 22.05.2024

Shampa Sarkar, J.:-

1. The revisional application is directed against an order dated January 17, 2024, passed by the Learned Commercial Judge at Rajarhat, North 24, Parganas, in Title Suit. No. 17 of 2023.

2. Title Suit. No. 17 of 2023 is an anti-arbitration suit. During the pendency of the said suit, the petitioner/defendant No.1 filed an application under Section 151 of the Code of Civil Procedure, 1908, (hereinafter referred to as the said application) with a prayer for stay of further proceedings of the suit, with liberty to mention, upon expiry of the moratorium in the U.S. Bankruptcy proceeding. In the alternative, prayer was made for adjournment of the said suit for 180 days.

3. The learned Judge rejected the said application, inter alia, holding that the moratorium order of the U.S Bankruptcy Court was not applicable in India. U.S.A had not been declared as a reciprocating territory for the purpose of Section 44A Code of Civil Procedure. The learned court further held that although the moratorium order of the U.S Bankruptcy Court was quite akin to Section 14 of the Indian Bankruptcy Code, 2016 (IBC 2016), but the IBC 2016 was only applicable within the territory of India. In the absence of a Central Government notification in the Official Gazette declaring U.S.A to be a reciprocating territory, the moratorium order would not be automatically enforceable under Section 44A Code of Civil Procedure. The provisions of Section 13 and 14 of the Code of Civil Procedure, were also not applicable in the present factual matrix because the bankruptcy order was not passed in a proceeding between the parties to the suit. The said order of the learned Trial Judge has been assailed on various grounds.

4. The petitioner/defendant No. 1, appeared and filed an application under Section 45 of the Arbitration and Conciliation Act, 1993. Prayer was made for an order to refer the parties to arbitration. When the suit was at the stage of hearing of the application under Section 45, the

petitioner/defendant No. 1, filed the said application and prayed for the following reliefs:-

> "a) A direction to stay further proceedings in the present suit with a liberty to mention, post expiry of the moratorium in the U.S. Bankruptcy Proceedings; or
> b) In the alternative, adjourn the proceedings in the present Anti-Arbitration Suit for 180 days.
> c) Costs.
> d) Pass such further and/or other orders as this Learned Court may deem fit and proper;"

5. According to the petitioner/defendant No. 1, the suit should have been stayed or in the alternative, adjourned at least for 180 days, until the expiry of the moratorium in the U.S. Bankruptcy proceeding. The specific contention of the petitioner was that the order dated October 24, 2023, issued by the Bankruptcy Court of the District of Delaware U.S., under Chapter 11 of the U.S. Bankruptcy Code (hereinafter referred as the said Code), operated as a worldwide temporary stay. As per Section 362 of Chapter 11 of the said Code, the Title Suit could not proceed against the defendants. Chapter 11 of the said Code, governed Corporate Restructuring in the U.S.A. The provisions had been recognized by the Apex Court in various decisions. The proceeding before the U.S. Court was akin to the Corporate Insolvency Resolution Process in India, under IBC 2016, more particularly Section 14 thereof. Section 14 of the IBC 2016 also imposed a moratorium in respect of a corporate debtor. Thus, the Chapter 11 proceeding initiated for asset preservation, had triggered an automatic stay on all legal actions against the petitioner in terms of Section 362 of the said Code. The order also directed the petitioner to take and perform all necessary actions in order to implement and effectuate the relief granted.

Accordingly, the learned Trial Court was approached for implementation of the order of stay. The doctrine of Comity of Courts required that courts of one nation or jurisdiction should respect and recognize the decisions rendered by competent courts of other jurisdictions. The U.S. Bankruptcy Court, being a court of competent jurisdiction, had issued a worldwide stay, inter alia, on all legal proceedings against the petitioner/defendant No. 1. Accordingly, the suit should be stayed till such time that the moratorium was in effect. The stay order was in the best interest of the debtor's estate, the creditors, and other parties having interest. Unless orders were passed as set forth in the said application, the petitioner/defendant No. 1 would suffer irreparable loss and injury. Interference by the Indian Court, during pendency of the proceeding before the U.S. Bankruptcy Court, was contrary to the doctrine of Comity of Courts.

6. Mr. Mookherji, learned Senior Advocate, submitted that the learned Judge misconstrued the doctrine. The learned Judge presumed that a prayer was being made for enforcement of the order of stay in the Indian Court, as if the same was a decree of a foreign court. On such misconception of law, the learned Judge rejected the application by applying Section 44A and Sections 13 and 14 of the Code of Civil Procedure. Neither was the petitioner seeking implementation of the moratorium order, nor did the petitioner suggest that the moratorium order was binding. The petitioner invoked the inherent power of the court for a judicial recognition of the proceedings before the US Bankruptcy Court and the grant of a worldwide stay. As the petitioner was undergoing reorganization under Chapter 11 of the U.S. Bankruptcy Code, under the supervision of a competent foreign

court, the suit should have been stayed. The suit with numerous claims against the petitioner, could not proceed. All claims against the petitioner in any legal proceeding, had been stayed by the U.S. Bankruptcy Court. The Chapter 11 proceedings were initiated on September 19, 2023. Immediately, the moratorium under Section 362 came into effect. The petitioner filed a motion before the Bankruptcy Court, seeking restatement of the moratorium under Section 362. This resulted in the order dated October 24, 2023. It was urged that the learned Trial Judge was bound by the doctrine of Comity of Nations and Comity of Courts, and should have taken cognizance of the order.

7. According to learned Advocate, the moratorium was aimed at value maximization so that the corporate debtor could continue operations during the corporate insolvency resolution process. It was a calm period to enable peaceful negotiations and focused attention on resolving the insolvency. The idea of moratorium was an integral part of the bankruptcy laws around the globe, including India. The law provided preservation of the value of the assets of the corporate debtor, by ensuring that the corporate debtor continued to operate as a going concern. In terms of the moratorium order, there was a clear bar on the continuation of any proceeding or legal action against the petitioner. The timeline for the reorganization process was stipulated in Section 1121 of Chapter 11 of the U.S. Bankruptcy Code and considering the nature of the temporary stay, the right of the plaintiff would not be taken away or eliminated permanently if such stay was granted. The court was vested with the inherent power to take cognizance of similar

orders issued in foreign jurisdictions and respect the same under the principles of Comity of Nations and Courts, also known as Universalism.

8. Principles of Comity of Nations and Courts had been used to recognize cross-border insolvencies in the absence of a statutory mechanism. Referring to the observations in ***McGrath and Ors. vs Ridell and Ors.*** reported in ***(2008) 3 All EC 869***, Mr. Mookherji contended that the principle of universalism has been a golden thread running through English cross-border insolvency laws, since the 18th century. The principle required that the English courts should, so far as it is consistent with justice and public policy of the United Kingdom, co-operate with Courts in the country of the principal liquidation.

9. Relying on the decision of ***Solomon v. Ross , (1764) 1 HBI 131***, Mr. Mookherji, submitted that the English court prepared to reorganize the extraterritorial effects of a foreign bankruptcy, in England. In the said case, trustees in bankruptcy appointed in Amsterdam were allowed to collect assets in England. In a later decision of ***Alivon v. Furnival (1834) 149 ER 1084***, the principle laid down in ***Solomon v. Ross*** was also accepted and it was held that the principle of Comity of Nations should be enforced.

10. According to Mr. Mookherji, most transnational bankruptcies in the United States were historically based on the judicial concept of comity. Reference was made to the Advanced Law Lexicon ***(P. Ramanath Aiyer's 2001 Edition)***. The term Comity had been defined as courtesy and disposition to accommodate, wherein courts of justice in one province or state would, out of comity, enforce the law of another state, when by such enforcement they would not violate their own laws.

11. It was urged that in Canada, prior to the introduction of a statutory provision, comity was found to be increasingly important in the bankruptcy context as internationalization of trade and commerce had increased. Reference was made to the decision of ***Roberts v Picture Butte Municipal Hospital (1999) 4 WWR 43***. New Zealand also placed significant reliance on the principles of comity in circumstances where its statutory scheme did not apply, prior to the enactment of a specific law for cross border insolvencies. The Belgian courts, in ***Turners & Growers Exporters Ltd. vs The Ship "Cornelis Verolme" (1997) 2 NZLR 110***, also recognized a foreign administrator.

12. Mr. Mookherji submitted that one of the key methods through which a court could provide assistance to a foreign insolvency proceeding was by ordering a temporary stay of the local proceedings while the universal process was being carried out in the main proceeding of insolvency in a foreign country. Exercising a stay to assist a foreign court was an example of embracing universalist ideals. The notion that courts could assist by refusing to act during an insolvency proceeding was considered by Lord Dunedin in ***Galbraith v Grimshaw, (1910) AC 508.*** It was held as follows:-

> 13. *"'[So] far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with the process of universal distribution..."*

This notion was also recognised in a Hong Kong case of ***CGIC Finance Ltd Guangdong International Trust, [2005] HKEC 1180***, as follows:-

> *"I propose to exercise my discretion by refusing the application for garnishee order absolute. My primary reason for doing so is because... the... liquidation is being pursued on the basis of a universal collection and distribution of assets and the creditors world-wide are to be paid pari passu with each other subject only to ranking. To have granted the application would have offended the principle of equality in that one of the creditors, CCIC, would have achieved an unfair preference ahead of those others ranking at the same level."*

14. In was further urged that Indian courts consistently recognized the importance of the principles of comity of nations and courts and had routinely respected such orders issued by foreign courts. Reference was made to the decision of ***Toshiaki Aiba as The Bankruptcy Trustee of The Estate of Vipun Kumar Sharma Vs. Vipan Kumar Sharma and Ors.,*** reported in 2022 SCC Online Del 1260**.** The Delhi high Court rejected an application under Order 7 Rule 11 of the Code of Civil Procedure on the principles of comity of courts. The observation of the Delhi High Court had been placed before this court in great detail which was as follows:

> "Next, it is contended on behalf of the defendants that Japan is not a reciprocating territory in respect of Section 44A of the CPC, so there cannot be any proceedings for execution of the decree of a Japanese Court.
> In the opinion of this Court and as stated above, by the way of the present suit, the plaintiff is not seeking execution of the decree of the Japanese Court. The suit has been filed to administer the suit properties of the bankrupt defendant no. 1 towards realization of monies. Therefore, Section 44A of the CPC would have no application."

15. The observation of the Delhi High Court was upheld by the Hon'ble Apex Court. Mr. Mookherjee contended that the ratio of the decision was that, judgments passed by foreign courts had to be respected by Indian courts, unless the same was shown to have fallen under the limited exceptions of Section 13 of the Code of Civil Procedure. The proceedings before the US Bankruptcy Court was a proceeding in rem and binding on

all. In modern times of globalization, foreign creditors could not be treated differently from domestic creditors. Referring to the decision in ***M/s. Alcon Electronic Pvt. Ltd. v Celem S.A. OF Fos 34320 Roujan, France & Anr.,*** it was submitted that the Hon'ble Apex Court executed an order of an English Court and directed payment of interest on cost, despite deletion of Section 35(3) of The Code of Civil Procedure. It was held as follows:

> "It is to the reciprocal advantage of the Courts of all nations to enforce foreign rights as far as practicable. To this end, broad recognition of substantive rights should not be defeated by some vague assumed limitations of the Court. When substantive rights are so bound up in a foreign remedy, the refusal to adopt the remedy would substantially deprive parties of their rights. The necessity of maintaining the foreign rights outweighs the practical difficulties involved in applying the foreign remedy. In India, although the interest on costs are not available due to exclusion of Section 35(3), the same does not mean that Indian Courts are powerless to execute the decree for interest on costs. Indian Courts are very much entitled to address the issue for execution of the interest amount. The right to 8% interest as per the Judgments Act, 1838 of UK can be recognized and as well as implemented in India."

16. The National Company Law Tribunal (NCLT), Chennai Bench also recognized the principle in ***M/s Stanbic Bank Ghana Limited vs M/s Rajkumar Impex Pvt. Limited*** and admitted an application seeking initiation of corporate insolvency resolution process, based on a foreign decree and observed as here under:

> "We hereby admit the petition as the petitioner has made out a prima facie case and also proved that there is debt due payable by the Principal Borrower and there is decree made against the Respondent/Guarantor. This Tribunal has no jurisdiction to enforce the foreign decree; however, there is no bar in it taking cognizance of the foreign decree."

The National Company Law Appellate Tribunal (NCLAT) dismissed the appeal from such order and the appeal before the Hon'ble Apex Court was also dismissed.

17. The NCLAT also recognized the Insolvency Resolution Protocols prepared by the Indian and Dutch Administrations of ***Jet Airways, in the matter of Jet Airways India Ltd. vs. State Bank of India and Ors.,*** and acted in furtherance of those principles by recognising the convenience of having coordinated proceedings. The Bankruptcy Code in 2019 recognized an insolvency proceeding under the aegis of the Adjudicatory Authority at NCLT Chandigarh Bench ***in Re, SEL Manufacturing Co. Ltd*** and imposed a moratorium in the United States.

18. Reliance was also placed in the decision of ***Gildersleeve vs. Gildersleeve, 88 Conn. 689.*** It had been held that Rules of Comity may not be departed from in certain cases, for the purpose of necessary protection to the citizens or to enforce some paramount rules of public policy, The laws of one country as a general principle, would by whatever term be recognized and executed in another, where the rights of individuals were concerned. Further reliance was placed on the decisions of ***Hilton vs Guyot*** reported in ***159 U.S. 113, Y. Narasimha Rao and Ors. vs. Y. Venkata Lakshmi and Anr.*** reported in ***(1991) 3 SCC 451, N.P.A.K.Muthiah Chettiar (died) and ors. Vs K.S.Rm. Firm Shwebo, Burma, by its partner and Receiver K.S.Rm. Vr.Rm Veerappa Chettiar and Ors.*** decided in ***A.A.O No. 85 of 1951, Swiss Ribbons Pvt. Ltd. and Anr. vs Union of India and Ors.*** reported in ***(2019) 4 SCC 17***, and ***Felixstowe Dock and Railway Co. vs. United States Lines Inc. and related applications*** reported in ***(1988) 2 All ER 77***, to substantiate that the doctrine of comity conveyed something more than courtesy or good will.

19. Mr. Abhrajit Mitra, learned Senior Advocate appearing on behalf of the plaintiffs/opposite parties submitted that Section 9 of the Code of Civil Procedure, would be applicable in case of hearing of the suit. The provision of Section 151 of the Code could not be invoked in this case. The moratorium order of the U.S. Bankruptcy Court would apply to creditors and not to the plaintiffs. The plaintiffs had filed an anti-arbitration suit. The plaintiffs did not initiate an insolvency proceeding in the Indian Court. Applicability of the doctrine of Comity of Nations and Comity of Courts was essentially a sovereign function. It was for the government to decide whether the doctrine would be applicable or not, by bringing in proper legislation.

20. The suit proceeded in terms of section 9 of the Code of Civil Procedure. Apart from Sections 13, 14 and Section 44A of the Code of Civil procedure, the doctrine has not been legislatively recognized. With regard to arbitration laws, The New York Convention and Geneva Convention had been recognized in Chapter II of Part- II of The Arbitration and Conciliation Act, 1996. Neither are there any treaties nor conventions nor legislations which recognized the moratorium proceedings in the U.S. Bankruptcy Court. The same was not binding in an Indian proceeding. A final decree of a court could be executed in the Indian courts if there was reciprocity with the said country in terms of notification of the central government. Section 44A of the Code of Civil Procedure recognized such a principle. For non-reciprocal nations, Sections 13 and 14 would be applicable. Reciprocity had to be recognized by Parliament. As the definition of decree also included 'order' of a court, an order of a court of a foreign country with which India has reciprocity, could also be executed as a decree in terms of section 44A of

the Code of Civil Procedure. In other cases, where there is no reciprocity, the party seeking enforcement of such an order or decree would have to file a regular suit under section 13 and 14. Moreover, the order of the moratorium of the U.S. Bankruptcy Court only provided that the applicant could make a request to the other courts to take cognizance of the order passed on October 24, 2023. Under the IBC 2016 also no country had been notified by the Central Government in exercise of power under Section 234. Although the IBC 2016 recognized the concept of reciprocity, yet the notification was yet to be made.

21. Arbitration proceedings had been initiated by the petitioner against the opposite parties in the International Chamber of Commerce, International Court of Arbitration, USA and the proceedings were continuing at the instance of the petitioner. Such proceedings were challenged in the suit with the relevant prayers that the Arbitration proceedings were barred by law.

22. Mr. Mitra further submitted that the decision of NCLT Chandigarh ***in Re, SEL Manufacturing Co. Ltd.***, was passed in a corporate insolvency proceeding and not in a civil suit for declaration and injunction. Distinguishing the decision in ***in Re Sel Manufacturing Co. Ltd.,*** Mr. Mitra, submitted, that all that was decided was that the Indian proceeding was a foreign proceeding under Section 11 of the U.S. Code, but no moratorium had been granted by the U.S. Court.

23. Distinguishing the decision of ***Y. Narasima Rao (supra),*** Mr. Mitra, urged that paragraph 11 of the said judgment would indicate that the Hon'ble Apex Court held that no country could sacrifice its internal unity,

stability, tranquillity for the sake of uniformity of rules and Comity of Nations. Reliance was placed on the decision of ***N.P.A.K.Muthiah Chettiar (supra)***, in which it was held that as Burma ceased to be a reciprocating territory, Section 44A of the Code of Civil Procedure would no longer be applicable for the execution of any decree passed by a Burmese court. It was held that the only other method by which a successful party could realize the fruits of a foreign judgment, was to sue upon the judgment, within the period allowed under Article 117 of the Limitation Act, in which case the judgment would be conclusive only if the requisites under sub-clauses A to F of Section 13 of the Code of Civil Procedure, were fully complied with.

24. Having considered the rival contentions of the parties, this Court finds that the inherent power of the Court was invoked for stay of the suit, although the Code of Civil Procedure has a specific provision for stay of a suit. Even assuming that nomenclature would not be of any consequence and the application could be treated as an application for stay, the explanation to Section 10 somewhat answers the issue.

25. The Court was not bound to stay the suit only because the proceeding was going on in a foreign country. Section 10 along with the explanation is quoted below:-

> "**10. Stay of suit.-** No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India have jurisdiction to grant the relief claimed, or in any Court beyond the limits of 1[India] established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

> Explanation.--The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

26. Secondly, the proceedings before the suit court was not an insolvency proceeding. The foreign judgments which have been relied upon by Mr. Mookherji were rendered on the principle of globalization of commercial relationships and recognition of moratoriums granted by foreign courts; they were all in respect of insolvency proceedings. The philosophy behind such a recognition was that courts should assist insolvency proceedings. Moreover, the moratorium in this case was granted in Chapter 11 cases which deal with insolvency, reorganization, restructuring, etc. The suit does not fall under any of those categories.

27. The plaintiff filed the anti-Arbitration suit and prayed for declarations and permanent injunctions. The reliefs claimed for were as follows :-

> "The Plaintiffs therefore pray for dispensation with the requirement of pre suit mediation under Section 12A of the Commercial Court Act, 2015 for filing the present suit and claim:
>
> a. Declaration that the Agreement for Arbitration embodied in clause 14 of the Share Purchase Agreement dated 30th October 2020 (ANNEXURE - "D") is barred by law;
>
> b. Direction that the Agreement for Arbitration embodied and/or contained in clause 14 of the Share Purchase Agreement dated 30th October 2020 (ANNEXURE - "D") be delivered up and cancelled;
>
> c. Declaration that disputes arising out of and/or in any manner touching and/or concerning the management, administration, shareholding, and control of the Plaintiff No.4 company, is non-arbitrable.
>
> d. Declaration that the initiation, prosecution, conduct and continuation of arbitration proceedings against the Plaintiffs [pursuant to the alleged Notice of Arbitral Dispute dated 24th October 2022 (ANNEXURE "A/31"), Request for Arbitration dated 4th November 2022 (ANNEXURE-"A/48"), and Statement of Claim dated 22 June 2022 (ANNEXURE-"A/63") inter alial, is void in ab initio,

illegal, non est, inoperable, null and void, without jurisdiction and not binding on the Plaintiffs;
e. Declaration that the constitution of the Arbitration Tribunal [pursuant to the alleged Notice of Arbitral Dispute dated 24th October 2022 (ANNEXURE- ""A/31"), Request for Arbitration dated 04th November 2022 (ANNEXURE - "A/48"), and statement of claim dated 22 June 2022 (ANNEXURE "A/63") inter alia), is void in ab initio, illegal, non est, inoperable, null and void, without jurisdiction and not binding on the Plaintiffs.

f. Declaration that the alleged Agreement for Arbitration embodied in the Share Purchase Agreement (ANNEXURE - "D") in so far as they provide for or are being relied on for arbitration of claims and disputes between the parties arising out of and/or in any manner touching and/or concerning administration, the management, shareholding and control of the Plaintiff No.4 company, are void ab initio, nonest, inoperative, unenforceable in India, contrary to public policy of India and contrary to the applicable laws of India (including but not limited to the Companies Act 2013).

g. Declaration that all matters concerning administration, the management, shareholding, and control of the plaintiff No.4 company are governed by the Companies Act, 2013 and that the National Company Law Tribunal, Kolkata Bench has exclusive jurisdiction to entertain, try and determine all disputes arising out of and/or touching and/or concerning the management, administration, shareholding, and control of the plaintiff No.4 Company.

h. Declaration that any and every order or direction or award passed by any arbitrator / arbitral tribunal in the arbitration proceedings [pursuant to the alleged Notice of Arbitral Dispute dated 24th October 2022 (ANNEXURE - "A/31"), Request for Arbitration dated 04th November 2022 (ANNEXURE "A/48") and the Claim Statement dated 22 June 2023 (ANNEXURE - "A/63")], - is illegal, null and void, without jurisdiction and not binding on the Plaintiffs.
i. Declaration that the International Chamber of Commerce has no jurisdiction or authority to entertain the arbitration arising out of and/or in connection with the said Agreement for Arbitration embodied and/or contained in clause 14 of the Share Purchase Agreement dated 30th October 2020 (ANNEXURE - "D");

j. Declaration that any order passed and/or award made in the pending arbitration proceedings before the International Chamber of Commerce being Case No.27329 PDP is illegal, void ab initio, non-est, null and void;

k. Declaration that the order dated 16th November 2022 passed by the Emergency Arbitrator in Case No.27329 PDP (EA), International Chamber of Commerce (ANNEXURE "A/37") is invalid, void ab initio,

non- est, illegal, null and void and the same does not in any manner whatsoever bind or affect the plaintiffs;

1. Declaration that the International Chamber of Commerce and / or the Arbitral Tribunal has no jurisdiction to suo moto and / or unilaterally extend the timeline agreed upon by the parties and that the said Case No.27329 PDP is in any event barred by expiration and efflux of time

m. Permanent injunction restraining the defendant No.1 and/or their men, servants and agents or anyone claiming through and under it, from performing, giving effect to and/or acting in terms of and/or in furtherance of the alleged Agreement for Arbitration embodied and/or contained in clause 14 of the Share Purchase Agreement dated 30th October 2020 (ANNEXURE - "D");

n. Permanent injunction restraining the defendant No.1 and their men, servants and agents or any person claiming under through or under it, from initiating, prosecuting, proceeding with, conducting, continuing and/or pursuing any arbitration or related proceedings[including but not limited to via the alleged Notice of Arbitral Dispute dated 24th October 2022 (ANNEXURE "A/31", Request for Arbitration dated 04th November 2022 (ANNEXURE - "A/48"), and the Claim Statement dated 22 June 2023 (ANNEXURE "A/63")], before any Forum whether in India or abroad;

o. Permanent injunction restraining the defendant No.1 and its men, servants and agents or any person claiming under through or under it, from taking any steps in furtherance and/or pursuing any arbitration or related proceedings [including but not limited to via the alleged Notice of Arbitral Dispute dated 24th October 2022 issued by the Defendant No.1 (ANNEXURE "A/31", Request for Arbitration dated 04th November 2022 filed by the Defendant No.1 (ANNEXURE "A/48") and the Claim Statement dated 22 June 2023 (ANNEXURE "A/63")], before any Forum whether in India or abroad.

p. Permanent injunction restraining the defendant No.1 and/or their men, servants and agents or any person claiming under through or under it, from initiating, prosecution, proceeding with, conducting, continuing and/or pursuing the arbitration being Case No.27329 PDP pending before the International Chamber of Commerce;

q. Receiver,

r Injunction;

s. Attachment;

t. Costs;

u. Further and other reliefs."

28. Section 9 of the Code of Civil Procedure states as follows:-

> "**9.Courts to try all civil suits unless barred**.- The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

29. Although reliance was placed on Section 14 of the IBC, 2016, the said provision applies to claims of creditors and matters related thereto, against corporate debtors within the jurisdiction of the tribunals under the IBC-2016.

30. The issue of cross-border insolvency has been emerging under several jurisdictions, due to an increase in transnational transactions and establishment of various branches and offices in different countries. Recognition of foreign proceedings has assumed prime importance in an effective cross-border insolvency regime. While the Indian courts do recognize foreign judgments and decrees of some reciprocating countries such as the UK and Singapore, no recognition has been accorded to foreign proceedings, particularly with regard to insolvency proceedings such as reorganizations.

31. While the IBC 2016 presents opportunities for improving the domestic insolvency system in the country, India has not yet come up with a comprehensive framework dealing with cross-border insolvency under the Code.

32. In the decision of the ***Surya Vadanan vs State of tamil Nadu and Ors.*** reported in ***(2015) 5 SCC 450,*** it was held that the principle of Comity

of Court was essentially a principle of self-restraint. Thus, if an order was passed in a earlier proceeding by a foreign court, by adopting the principle of judicial discipline and self-restraint, the domestic court should recognize and should follow such orders and apply them as far as possible. The decision recognized the first strike principle. The relevant paragraphs are quoted below:-

> "**46.** The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very good reasons not to do so.
> ****
> **56.** However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:
> (a) The nature and effect of the interim or interlocutory order passed by the foreign court.
> (b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.
> (c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. [Arathi Bandi v. Bandi Jagadrakshaka Rao, (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.
> (d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

33. In ***Nithya Anand Raghavan vs State (NCT OF DELHI) and Anr.*** reported in ***(2017) 8 SCC 454***, the Hon'ble Apex Court held that the principle of first strike would not be applicable and pre-existing orders of foreign courts was one of the factors to be looked into by the domestic court while deciding a list. The relevant paragraphs are quoted below:-

> "**61.** In Surya Vadanan [Surya Vadanan v. State of T.N., (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94] , the minor girls were again British citizens by birth. The elder daughter was 10 years of age and the younger daughter was around 6 years of age. They lived in the UK throughout their lives. In a petition for issuance of a writ of habeas corpus, the Court directed return of the girls to the UK also because of the order passed by the court of competent jurisdiction in the UK to produce the girls before that Court. The husband had succeeded in getting that order even before any formal order could be passed on the petition filed by the wife in Coimbatore Court seeking a divorce from the appellant husband. That order was followed by another order of the UK Court giving peremptory direction to the wife to produce the two daughters before the UK Court. A penal notice was also issued to the wife. The husband then invoked the jurisdiction of the Madras High Court for issuance of a writ of habeas corpus on the ground that the wife had illegal custody of the two daughters of the couple and that they may be ordered to be produced in the Court and to pass appropriate direction thereafter. The said relief was granted by this Court. After the discussion of law in paras 46 to 56 of the reported decision, on the basis of precedents adverted to in the earlier part of the judgment, in para 56 the Court opined as under : (Surya case [Surya Vadanan v. State of T.N., (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94] , SCC p. 474)
>
> "56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:
>
> (a) The nature and effect of the interim or interlocutory order passed by the foreign court.
>
> (b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.
>
> (c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it

cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. [Arathi Bandi v. Bandi Jagadrakshaka Rao, (2013) 15 SCC 790 : (2014) 5 SCC (Civ) 475] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

62. As regards clauses (a) to (c) above, the same, in our view, with due respect, tend to drift away from the exposition in Dhanwanti Joshi case [Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112] , which has been quoted with approval by a three-Judge Bench of this Court in V. Ravi Chandran (2) [V. Ravi Chandran (2) v. Union of India, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] . In that, the nature of inquiry suggested therein inevitably recognises giving primacy to the order of the foreign court on the issue of custody of the minor. That has been explicitly negated in Dhanwanti Joshi case [Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112] . For, whether it is a case of a summary inquiry or an elaborate inquiry, the paramount consideration is the interests and welfare of the child. Further, a pre-existing order of a foreign court can be reckoned only as one of the factor to be taken into consideration. We have elaborated on this aspect in the earlier part of this judgment.

63. As regards the fourth factor noted in clause (d) of para 56, Surya Vadanan case [Surya Vadanan v. State of T.N., (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94] , we respectfully disagree with the same. The first part gives weightage to the "first strike" principle. As noted earlier, it is not relevant as to which party first approached the court or so to say "first strike" referred to in para 52 of the judgment. Even the analogy given in para 54 regarding extrapolating that principle to the courts in India, if an order is passed by the Indian Court is inapposite. For, the Indian Courts are strictly governed by the provisions of the Guardians and Wards Act, 1890, as applicable to the issue of custody of the minor within its jurisdiction.

64. Section 14 of the said Act plainly deals with that aspect. The same reads thus:

"14. Simultaneous proceedings in different courts.—(1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more courts than one, each of those courts shall, on being apprised of the proceedings in the other court or courts, stay the proceedings before itself.

(2) If the courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

(3) In any other case in which proceedings are stayed under sub-section (1), the courts shall report the case to, and be guided by such orders as they may receive from, their respective State Governments."

65. Similarly, the principle underlying Section 10 of the Code of Civil Procedure, 1908 can be invoked to govern that situation. The Explanation clarifies the position even better. The same reads thus:

"10. Stay of suit.—No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation.—The pendency of a suit in a foreign court does not preclude the courts in India from trying a suit founded on the same cause of action."

(emphasis supplied)

66. The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi case [Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112] , in relation to non-Convention countries is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. While considering that aspect, the court may reckon the fact that the child was abducted from his or her country of habitual residence but the court's overriding consideration must be the child's welfare."

34. It is also important to mention here that the present suit was a prior suit and an application had been filed by the petitioner/defendant No. 1 under Section 45 of the Arbitration and Conciliation Act, 1996. During the hearing of the said application, the moratorium order was passed by the U.S. Court on October 24, 2023. It was also not a pre-existing order of a

foreign court. All that was required by the suit court was to take note of such proceeding in the U.S. Bankruptcy Court.

35. ***Toshiaki Aiba (supra)*** is also a decision on an insolvency proceeding where properties of the corporate debtor in India was sought to be administered by filing a suit. A suit was filed for administration of the assets in India of a corporate debtor or a person against whom insolvency proceeding was going on in a foreign country. In such a suit, an application for rejection of the plaint was filed and the Hon'ble Delhi High Court held that the plaint could not be rejected at the very initial stage, upon noting the pendency of an insolvency proceeding in a foreign country. The Hon'ble Apex Court clarified in SLP (Civil) Diary No. (s) 20381 of 2023 that the order was confined to the application under Order 7 Rule 11 of the Code of Civil Procedure.

36. ***M/s. Alcon Electronic (supra)*** is distinguishable on facts and law. An order of a foreign court of a reciprocating country, was sought to be executed. The relevant paragraphs are quoted below:-"

> "19. The principles of comity of nation demand us to respect the order of English Court. Even in regard to an interlocutory order, Indian Courts have to give due weight to such order unless it falls under any of the exceptions under Section 13 CPC. Hence we feel that the order in the present case passed by the English Court does not fall under any of the exceptions to Section 13 CPC and it is a conclusive one. The contention of the appellant that the order is the one not on merits deserves no consideration and therefore liable to be rejected. Accordingly, Issue (i) is answered.
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> In re: Issue (ii)
>
> 20. The next ground put forth by the appellant is that the order being an interlocutory order does not have the shades of a "judgment" to be executed before the Indian Court and hence the order not being a "decree" is unexecutable. To appreciate this, it is appropriate to have a look at Section 44-A CPC

"44-A. Execution of decrees passed by courts in reciprocating territory.—(1) Where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13.

Explanation 1.—"Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior courts", with reference to any such territory, means such courts as may be specified in the said notification.

Explanation 2.—"Decree" with reference to a superior court means any decree or judgment of such court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect to a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment."

21. As far as the explanation with regard to reciprocal territory is concerned, there is no dispute that England is a reciprocating territory for the purpose of above section. Section 44-A CPC indicates an independent right conferred on a foreign decree-holder for enforcement of a decree/order in India. Section 44-A was inserted by Section 2 of the Civil Procedure Code (Amendment) Act, 1937 (8 of 1937). This section is meant to give effect to the policy contained in the Foreign Judgments (Reciprocal Enforcement) Act, 1933. It is a part of the arrangement under which on one part decrees of Indian Courts are made executable in United Kingdom and on the other part, decrees of Courts in the United Kingdom and other notified parts of Her Majesty's dominions are made executable in India. It is to be seen that as United Kingdom is a reciprocating territory and the High Court of Justice, Chancery Division, England being a recognised superior court in England. Therefore, the order passed by that Court is executable in India under Section 44-A CPC.

22. Now we come to the next limb of the argument put forth by the appellant that the order passed by the English Court does not amount to a decree and hence it is not executable. It is no doubt correct,

Section 44-A CPC deals with "execution of decrees passed by courts in reciprocating territory". Before we further decide this issue it is appropriate to have a look at how decree, order and foreign judgment are defined under the CPC.

23. As per Section 2(2) CPC, "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144 CPC but shall not include (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default.

24. Then a "foreign judgment" is defined under Section 2(6) as judgment of a foreign court. "Judgment" as per Section 2(9) CPC means the statement given by the Judge on the grounds of a decree or order. "Order" is defined under Section 2(14) CPC as a formal expression of any decision of the civil court which is not a "decree". Then Explanation 2 to Section 44-A(3) says "decree" with reference to a superior court means any "decree" or "judgment". As per the plain reading of the definition "judgment" means the statement given by the Judge on the grounds of decree or order and order is a formal expression of a court. Thus "decree" includes judgment and "judgment" includes "order". On conjoint reading of "decree", "judgment" and "order" from any angle, the order passed by the English Court falls within the definition of "order" and therefore, it is a judgment and thus becomes a "decree" as per Explanation to Section 44-A(3) CPC. In this case, the Court at England, after following the principles of natural justice, by recording reasons and very importantly basing on the application of the appellant itself, has conclusively decided the issue with regard to jurisdiction and passed the order coupled with costs. Hence in our considered opinion, the order passed by the foreign court is conclusive in that respect and on merits. Hence executable as a decree and accordingly the issue is answered."

37. The conclusion arrived at by the learned trial judge by applying Section 44A and 13 and 14 of the Code of Civil Procedure was with regard to enforcement of foreign decrees and orders of foreign courts with which India did not have reciprocity. However, it cannot be ignored that the principle of Comity of Nations and Comity of Courts had been recognized by the Indian Courts by giving adequate weightage to or considering existence of such order or decree of a foreign court while deciding any proceeding in the

domestic court. In the case in hand, however, the plaint case and the reliefs claimed do not indicate that there is any money claim or any other claim which would be covered by Chapter 11 cases in the U.S. Bankruptcy Code and thus the suit can continue. The suit is therefore, not required to be stayed.

38. The suit was at the stage of hearing of application of Section 45 of the Arbitration and Conciliation Act and the injunction hearing has not yet taken place. The order of the U.S Bankruptcy Court is one of the factors which may be looked into by the learned court if the court deems it necessary. The said order could not bind the learned trial judge to stay the suit. A reading of the moratorium order indicates that the order operates in the field of Chapter 11 cases under the said code, especially with regard to money claim or claims which would result in depletion of assets.

39. Moreover, the distinguishing factor with the moratorium order of the U.S. Court is that by the said order, the management of the petitioner has not been superseded. The management continues. The management can always contest the suit.

40. The revisional application is dismissed. The suit will proceed.

41. There will be no order as to costs.

42. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)