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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO. 1074 OF 2019

Hindustan Construction Company Limited …Petitioners
& Anr.

Versus

Union of India & Ors. …Respondents

WITH
WRIT PETITION (CIVIL) No.1276 of 2019
WITH
WRIT PETITION (CIVIL) No.1310 of 2019
WITH
M.A. NOS.2140-2144 OF 2019
IN
CIVIL APPEAL NOS. 2621-2625 OF 2019

J U D G M E N T

R.F. NARIMAN, J.

1. This set of Writ Petitions seek to challenge the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996

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(hereinafter referred to as the “Arbitration Act, 1996”) as inserted by Section 13 of the Arbitration and Conciliation (Amendment) Act, 2019 (hereinafter referred to as the “2019 Amendment Act”) and brought into force with effect from 30.08.2019. They also seek to challenge the repeal (with effect from 23.10.2015) of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the “2015 Amendment Act”) by Section 15 of the 2019 Amendment Act. Apart from the aforesaid challenge, a challenge is also made to various provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “Insolvency Code”) which, as stated by the Petitioners, result in discriminatory treatment being meted out to them.

2. The facts relevant for the determination of these matters may be gleaned from Writ Petition (Civil) No.1074 of 2019. The Petitioner No.1 therein, i.e. Hindustan Construction Company Limited, is an infrastructure construction company involved in the business of construction of public-utilities and projects like roads, bridges, hydropower and nuclear plants, tunnels and rail facilities. The

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Petitioner company, *inter alia*, undertakes these building projects as a contractor for government bodies such as the National Highways Authority of India ("**NHAI**", i.e. Respondent No.5 in the Writ Petition), NHPC Ltd. ("**NHPC**", i.e. Respondent No.6), NTPC Ltd. ("**NTPC**", i.e. Respondent No.8), IRCON International Ltd. ("**IRCON**", i.e. Respondent No.7) and the Public Works Department ("**PWD**"). Such projects are allotted to the Petitioner through the public tendering system. As Government bodies are owners and beneficiaries of such projects, cost overrun is almost invariably disputed by these bodies, leading to huge delays in the recovery of the legitimate dues of the petitioners. Also, these dues can only be recovered through civil proceedings or through arbitrations.

3. Arbitration awards that are in favour of the Petitioner company are invariably challenged under Sections 34 and 37 of the Arbitration Act, 1996, and on average, more than 6 years are spent in defending these challenges. The major problem in the way of the Petitioners is that the moment a challenge is made under Section

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34, there is an 'automatic-stay' of such awards under the Arbitration Act, 1996.

4. The Petitioners are then subjected to a double-whammy. Government bodies other than Government companies are exempt from the Insolvency Code because they are statutory authorities or government departments. Even if they can be said to be operational debtors - which is not the case - the moment a challenge is filed to an award under Section 34 and/or Section 37 of the Arbitration Act, 1996, such debt becomes a 'disputed debt' under the judgments of this Court, and proceedings initiated under the Insolvency Code at the behest of the Petitioner company, not being maintainable in any case, would be dismissed at the threshold. Huge sums of money are therefore due from all these companies/government/government bodies to the Petitioners.

5. On the other hand, in order that the Petitioner company continue to operate, the Petitioner owes large sums to operational creditors for supplying men, machinery and material for the projects. It is stated in the Writ Petition No.1074 of 2019 that Demand Notices

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have been issued to the Petitioner by a large number of operational creditors for sums amounting to over a hundred crores.

6. Dr. Abhishek Manu Singhvi, learned Senior Advocate appearing on behalf of the Petitioner No.1 in Writ Petition No.1074 of 2019, has argued that the Arbitration Act, 1996 is based upon the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985) (hereinafter referred to as the "UNCITRAL Model Law"), Article 36(2) of which specifically refers to applications for setting aside or suspension of an award, in which the other party may provide appropriate security. Contrary to Article 36 of the UNCITRAL Model Law, Section 36 of the Arbitration Act, 1996 has been construed by judgments of this Court as granting an 'automatic-stay' the moment a Section 34 application is filed within time. According to the learned Senior Advocate, from the plain language of Section 36, automatic-stay does not follow, and the judgments of this Court which have so held would require a revisit by this larger bench. In any case, the 246th Report of the Law

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Commission of India titled, 'Amendments to the Arbitration and Conciliation Act, 1996' (August, 2014) (hereinafter referred to as the "246th Law Commission Report") recommended that Section 36 be amended, which was in fact done by the 2015 Amendment Act, so that automatic-stays are now things of the past. However, despite the fact that the 2015 Amendment Act made large-scale changes to the Arbitration Act, 1996, keeping in view the objects of the Arbitration Act, 1996 of minimum judicial intervention, speedy determination and recovery of amounts contained in arbitral awards, yet, another 'High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India' headed by Retd. Justice B.N. Srikrishna by its report dated 30.07.2017 (hereinafter referred to as the "Srikrishna Committee Report") opined that the 2015 Amendment Act should not apply to pending court proceedings which have commenced after 23.10.2015 (i.e. the date of the 2015 Amendment Act coming into force), but should only apply in case arbitral proceedings have themselves been commenced post 23.10.2015, which would include court proceedings relating thereto. He argued that the Government of India issued a Press Release on

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07.03.2018 to enact a new Section 87 in accord with what the Srikrishna Committee Report had opined, which was pointed out to this Court before it decided the case of **BCCI v. Kochi Cricket Pvt. Ltd.** (2018) 6 SCC 287 (which was decided on 15.03.2018). Despite the fact that this Court specifically opined in the said judgment that the aforesaid provision would be contrary to the object of the 2015 Amendment Act, and despite the fact that the judgment was specifically sent to the Ministry of Law and Justice and to the learned Attorney General for India, Section 87 was enacted, reference being made only to the Srikrishna Committee Report, without even a mention of the aforesaid judgment of this Court in **BCCI** (supra). Consequently, the learned Senior Advocate argued that since the basis of a judgment of the Supreme Court can only be removed if there is a pointed reference to the said judgment, obviously the judgment of this Court has been sought to be directly overturned without removing its basis. Further, Section 87 flies in the face of not only the object of the Arbitration Act, 1996 as a whole and the objects for enacting the 2015 Amendment Act, but is also contrary to Section 35 of the Arbitration Act, 1996. He has stated

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that it is amazing that in a Civil Court where a full-blooded appeal is filed, Order XLI Rule 5 of the Code of Civil Procedure, 1908 (hereinafter referred to as the "CPC") is to apply, there being no automatic-stay of a money decree; whereas in a summary proceeding under Section 34 of the Arbitration Act, 1996, where the court does not sit in appeal over the award – and if the view of the arbitrator is a possible view, it passes muster – there is an automatic-stay of an arbitral award on the mere filing of Section 34 application, which in turn takes years for final disposal.

7. Dr. Singhvi then trained his guns against Section 87, stating that it is violative of Articles 14, 19(1)(g), 21 and 300-A of the Constitution of India, as it is contrary to the object of the principal Arbitration Act, 1996 itself; takes away the vested right of enforcement and binding nature of an arbitral award; and without removing the basis of the **BCCI** judgment (supra), acts in the teeth of the said judgment, making the said section unreasonable, excessive, disproportionate as well as arbitrary. He then argued that in effect, the 2019 Amendment Act reverses the beneficial effects of

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the 2015 Amendment Act which remedied the original mischief contained in the Arbitration Act, 1996, that too after a period of more than 19 years. To bring back this mischief of automatic-stays would result in manifest arbitrariness, rendering the provision constitutionally infirm. He argued that the Srikrishna Committee Report also did not take into account the enforcement of the Insolvency Code. On the one hand, arbitral awards for crores of rupees will get automatically stayed through the application of Section 87, and on the other hand, non-payment of any amount beyond INR one lakh by the Petitioner to its operational creditors would render it open to being declared insolvent. The absurd consequence of this is that the fruits of an award are denied to the Petitioner, resulting in financial hardship, which in turn results in applications being filed against the Petitioner under the Insolvency Code for lesser amounts than what is due to it as an award-holder. Further, the retrospective resurrection of the automatic-stay provision allows award-debtors who have challenged arbitral awards before the Courts, and who have in fact made payments to award-holders, to now claim the aforesaid sums back from such award-

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holders. For all these reasons, it is contended that Section 87 is constitutionally infirm. Also, according to Dr. Singhvi, since almost all the arbitration clauses with Government/Government Bodies state that the Arbitration Act, 1996 together with its amendments shall apply, this would make the 2019 Amendment Act applicable to its pending arbitral awards, resulting in wholly arbitrary consequences.

8. So far as the challenge to the Insolvency Code is concerned, Dr. Singhvi exhorted us to read 'corporate person', as defined by Section 3(7) of the Insolvency Code, to include Government Bodies other than Government Companies (which are already included). This was based on the argument that *qua* the object sought to be achieved by the Insolvency Code, it makes no difference as to whether the person sued as a corporate person is a government company or a body corporate set up under a statute. He exhorted us to either delete the words 'limited liability' contained in Section 3(7) of the Code, or read Section 3(23)(g) of the Code into Section 3(7), and relied upon judgments which stressed the 'positive' aspect of Article 14 of the Constitution of India, which permit such

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interpretation. He then pointed out that whereas 'financial position' (as defined under Section 5(9) of the Insolvency Code) mandates taking into consideration the financial information and balance sheets, such financial position is irrelevant at the stage of triggering the Insolvency Code, and only becomes relevant at the stage of declaring such position to prospective resolution applicants, which itself makes the provision manifestly arbitrary. He then argued as to the omission of initiation of the resolution process by a creditor in Section 6 of the Insolvency Code, together with the absence of a mechanism for forcing debtors of a corporate debtor to make payments to avoid insolvency of such corporate debtors. He then referred to the principle of '*casus omissus'* and how the modern view is that such *casus omissus* can be supplied by the Courts, so as to save the provisions of the Insolvency Code from the vice of manifest arbitrariness. He also argued that there is no level playing field so far as his client is concerned, as a statutory authority can initiate the resolution process against persons like his client, but not *vice-versa*. He then made an impassioned plea that, in any event, this Court ought to follow its earlier judgments and restate the principle that

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payment of a money-decree under an award, even when under challenge, is the rule - stay being the exception. Also in cases like the present, even if deposits are made as a condition of stay of money-decrees, withdrawal ought to be permitted - not on onerous conditions such as bank guarantees - but on other conditions such as corporate guarantees and the like, so that such monies are available for payment to other creditors, including operational creditors, who are free to invoke the Insolvency Code against the Petitioner.

9. Dr. Singhvi then argued that his client was forced to avail of the NITI Aayog's Office Memorandum No.14070/14/2016-PPPAU dated 05.09.2016 (hereinafter referred to as the "NITI Aayog Scheme") given the fact that the moment arbitral awards were passed in his client's favour, they were challenged under Section 34 of the Arbitration Act, 1996 as a result of which, there was an automatic-stay. Thus, under the said NITI Aayog Scheme, his client in order to retrieve amounts payable under such awards, was able to get 75% of a "pay-out amount", which is the amount for which the

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award has been announced, plus payment of interest. This can only be done against a bank guarantee of the equivalent amount. However, apart from such bank guarantee, an additional bank guarantee of 10% per year on the pay-out amount would also have to be given, which is then compounded annually. According to him, given the fact that 75% of such pay-out amount can only be released on the bank guarantee of the equivalent amount, asking for anything over and above this would amount to an arbitrary exercise of power, which is liable to be struck down. Dr. Singhvi contended that this extra amount of 10% per annum, being severable, can be struck down without otherwise impacting the NITI Aayog Scheme.

10. Shri Neeraj Kishan Kaul, also appearing for Hindustan Construction Company, reiterated some of the submissions of Dr. Singhvi and argued, based on a reading of Section 87 as introduced by the 2019 Amendment Act and Section 26 of the 2015 Amendment Act, that Section 87 is nothing but a re-hash of Section 26 and this being so, is therefore a direct attack on the judgment of this Court in **BCCI** (supra), without removing its basis. He also

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added that since there is no set-off mechanism provided by the Insolvency Code, the provisions of the Insolvency Code will have to be held to be manifestly arbitrary so far as his client is concerned, to this extent.

11. Shri C.A. Sundaram, learned Senior Advocate appearing for M/s Patel Engineering Ltd. in I.A. No. 157742 of 2019 in W.P (C) No. 1074 of 2019, reiterated the submissions that Section 87, being directly contrary to this Court's judgment in **BCCI** (supra), needs to be set aside. He also argued that it retrospectively removes a vested right in the petitioner, as is reflected in paragraph 62 and 63 of the **BCCI** judgment (supra).

12. Shri Ritin Rai, learned Senior Advocate appearing for M/s Gammon Engineers and Contractors Private Limited, i.e. the Petitioner No.1 in W.P.(C) 1276 of 2019, pointed out various paragraphs of the Counter-Affidavit of the Union of India to show that there is no real answer to the submission that Section 87 directly interferes with the judgment of this Court in **BCCI** (supra), and that the introduction of Section 87 is manifestly arbitrary. In any

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case, he relied upon Section 6 of the General Clauses Act, 1897 to save the application of Section 36 as amended by the 2015 Amendment Act. When it came to the provisions of the Insolvency Code, he referred to this Court's judgment in **Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.** (2018) 1 SCC 353 and stated that Section 5(6) of the Insolvency Code, which defines 'disputes', read with Section 8(2) of the Insolvency Code, would make it clear that there is no bar to applying an Order VIII-A of the CPC type procedure to proceedings under the Insolvency Code, so that when his client's sub-contractor triggers the Insolvency Code against his client, his client in-turn should be able to make its principal employer a party to such proceedings, so that the sub-contractor may then recover these amounts from the principal employer directly, thereby absolving his client from the clutches of the Insolvency Code.

13. Shri Nakul Dewan, learned Senior Advocate appearing on behalf of M/s Gangotri Enterprises Limited, i.e. the Petitioner No.1 in W.P. (C) No. 1310 of 2019, referred copiously to the UNCITRAL

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Model Law and stated that under the UNCITRAL Model Law, in case an award were to be passed, whether domestic or international, in the same country, two bites at the cherry would be available: one at the time of setting aside the award, and one at the time of recognition and enforcement. The Arbitration Act, 1996 has not followed this model and has a far more robust enforcement regime, as Section 36 of the Arbitration Act, 1996 mandates that once an award can be said to be final, it can be executed in the manner provided by the CPC.

14. Mr. Dewan then went on to state that Section 87 destroyed a level playing field in relation to enforcement of arbitral awards, by re-imposing an arbitrary cut-off date *qua* application of the amended Section 36. He then argued that even though Section 15 of the 2019 Amendment Act has deleted Section 26 of the 2015 Amendment Act, this has not changed the basis on which the judgment in **BCCI** (supra) was delivered, as there is no vested right to resist the enforcement of an arbitral award, and that arbitration proceedings and court proceedings are distinct sets of proceedings as

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recognized by Section 87 itself. Further, classification of parties on the basis of this cut-off date has no rational nexus to the object sought to be achieved by the Arbitration Act, 1996. Finally, he urged that the Counter-Affidavit filed by the Union of India, after referring to this Court's judgment, then mouthed the same reasons for introducing Section 87 as were in the Srikrishna Committee Report, which was prior to, and could not have taken into account, this Court's judgment in **BCCI** (supra). Therefore, to state that even after this Court settled the law in **BCCI** (supra) there would still be 'uncertainty' would itself show that the provision contained in Section 87 would be manifestly arbitrary. He then argued, based on a treatise by Ian F. Fletcher on the law of insolvency, that a distinction is made in insolvency law between refusal to pay, and inability to pay. Since the automatic-stay provision would render persons like his client unable to pay debts, his client, though otherwise financially healthy, would suddenly become vulnerable to being declared insolvent under the Insolvency Code.

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15. The learned Attorney General for India, Shri K.K. Venugopal, defended the repeal of Section 26 of the 2015 Arbitration Amendment and the insertion of Section 87 into the Arbitration Act, 1996 by the 2019 Amendment Act. He argued that in **BCCI**'s case (supra), the interpretation of Section 26 of the 2015 Amendment Act is only declaratory in nature. Since the said judgment neither sets aside any executive action, nor any provision of a statute, it does not require a validating act to neutralise its effect. It is open to Parliament, if it finds that a view expressed by the Apex Court does not reflect its original intent, to clarify its original intent through amendment. This is in fact what was done by deleting Section 26 of the 2015 Amendment Act, and inserting Section 87 into the Arbitration Act, 1996. He relied on the clarificatory aspect of the amendment by referring to paragraph 6(vi) of the Statement of Objects and Reasons to the Arbitration and Conciliation (Amendment) Bill, 2019. In any event, even if the principles governing validating acts are applied, the deletion of Section 26 retrospectively removes the basis of the judgment in the **BCCI** case (supra). Further, there is no substance to the challenge to Section

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87 on the ground of the date being fixed as 23.10.2015, as cut-off dates have been upheld in a plethora of cases as being within the exclusive domain of Parliament, and the courts should not normally interfere with the fixation of such cut-off date, unless blatantly arbitrary or discriminatory. He referred to some of our judgments in support of this proposition.

16. Shri Tushar Mehta, learned Solicitor General of India, defending the constitutional challenge to the provisions of the Insolvency Code, argued that a Writ Petition filed under Article 32 of the Constitution of India cannot be converted into a recovery proceeding by the Petitioners. According to Shri Mehta, the conduct of the Petitioner No.1 in W.P. (C) 1074 of 2019 is such that the Writ Petition ought to be dismissed at the threshold itself. First and foremost, it was contended that the petitioner has mislead this Court by stating that a sum of INR 6070 crores is liable to be paid by the Government entities mentioned therein, as such sums amount to awards that have not been stayed by any Court. He referred to and relied upon a chart appended to the Counter-Affidavit of the Union of

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India dated 21.10.2019, in which he was at pains to point out that in each of the awards in favour of the Petitioner No.1 in Writ Petition No.1074 of 2019, the contract value was much less than the actual amount paid on completion of work, in addition to which, deposit orders have been passed by courts in all these cases, which have not been appealed against. He further argued that there was a gross suppression of facts and figures by Petitioner No.1, as a result of which the Writ Petition ought to be dismissed at the threshold. He contended that what was deliberately hidden by the Petitioner No.1 was the fact that the Respondent Public Sector Undertakings (hereinafter referred to as "PSUs") have deposited/paid substantial amounts that are due against them under arbitral awards, amounting percentage wise to 83.3%. He also pointed out that insofar as IRCON is concerned, in relation to one particular arbitral award, IRCON has accused the Petitioner No.1 of trying to influence the arbitrator by providing unsolicited facilities to the arbitrator, and actually getting orders drafted on behalf of the arbitrator by the lawyer of the Petitioners and otherwise providing undue favours to the arbitrator; all of which is the subject matter of adjudication

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pending in the Delhi High Court. When it came to the challenge to the Insolvency Code, he argued that except for the sums owing under some arbitral awards, none of the PSUs have any other dues that are owing to the Petitioner No.1. He also pointed out that whether a person is an operational creditor has to be decided based upon the fact situation in each case. The very fundamental basis of the Petitioner's argument that the Insolvency Code is unconstitutional because it does not give the Petitioners a right to recover monies from their debtors - and that the same Insolvency Code gives the debtor a right to recover from the Petitioner No.1 - is flawed, because the Insolvency Code is not a statute for recovery of debts, but is a statute for reorganisation of corporate persons and resolution of stressed assets of corporate persons. According to him, three of the five entities who have arbitral awards against them, namely NTPC, NHPC and IRCON, are Government Companies, which certainly fall within the definition of 'corporate person' and 'corporate debtor' under Section 3(7) and 3(8) of the Insolvency Code. So far as the NHAI is concerned, he referred to the Statement of Objects and Reasons of the National Highways Authority of India

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Act, 1988 (hereinafter referred to as the "NHAI Act") and some sections of the said Act to show that NHAI is a statutory body which functions as an extended limb of the Central Government, and which is to carry out the sovereign function of laying down national highways. Obviously, the Insolvency Code cannot be used against such a statutory body, because no resolution professional or private individual can take over the management of such body, as it performs sovereign functions, nor can such body be driven to insolvency under an Insolvency Code. He also referred to the definitions contained in Section 3(7) and 3(23) of the Insolvency Code, and stated that they are separate and independent of each other, Section 3(7) lifting only two out of seven entities mentioned in Section 3(23). Thus, being mutually exclusive, nothing from Section 3(23) which defines 'person' can possibly be imported into Section 3(7) which defines 'corporate person'. He further argued that this Court's judgment in **K. Kishan v. Vijay Nirman Company Pvt. Ltd.** (2018) 17 SCC 662 made it clear that arbitral awards that are pending adjudication under Section 34 would show that a pre-existing dispute exists in such cases, and therefore would in any

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case be outside the strong arm of the law contained in the Insolvency Code.

17. Ms. Pinky Anand, learned Additional Solicitor General, supported the submissions of both the learned Attorney General and the Solicitor General. She further argued, based on a copious reading of the Counter-Affidavit filed on behalf of the Union of India, that no inroads have been made into the objects sought to be achieved by the 2015 Amendment Act by merely following a particular cut-off date. In any case, the fixing of such cut-off date, being the sole prerogative of the Parliament, cannot be interfered with by the courts as this pertains to policy matters. She also cited some judgments of this Court to buttress her submissions.

Interpretation of Section 36 of the Arbitration Act, 1996

18. At the outset, it is important to advert to Section 36 of the Arbitration Act, 1996 and the judgments interpreting it. Section 36 (prior to the 2015 Amendment Act) stated as follows:

> "36. **Enforcement**.—Where the time for making an application to set aside the arbitral award under section 34 has expired, or such

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> application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

19. The UNCITRAL Model Law is important in understanding the provisions of the Arbitration Act, 1996 as the said Act is explicitly based upon it. The preamble of the Arbitration Act, 1996 specifically states as follows:

> "Preamble. -- WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985; AND
>
> WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;
>
> AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980; AND
>
> WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable

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> settlement of that dispute by recourse to conciliation;
>
> AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;
>
> AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules."

20. As a matter of fact, the judgment in **Chloro Controls (I) Pvt. Ltd. v. Seven Trent Water Purification Inc.** (2013) 1 SCC 641 says as much in paragraph 93 thereof, which reads as under:

> "**93.** As noticed above, the legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the legislature and available for its consideration when it enacted the 1996 Act. Article II of the Convention provides that each contracting State shall recognise an agreement and submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject-matter capable of settlement by arbitration. Once the agreement

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> is there and the court is seized of an action in relation to such subject-matter, then on the request of one of the parties, it would refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of performance."

21. What is important so far as the UNCITRAL Model Law is concerned is Article 36(2) thereof, which states as follows:

> "Article 36. Grounds for refusing recognition or enforcement-
>
> xxx xxx xxx
>
> (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

22. Shri Dewan has argued that under the UNCITRAL Model Law, Articles 34 and 35 provide for two bites at the cherry: (i) in cases in which an award is sought to be set aside, and (ii) thereafter when not set aside, sought to be recognised and enforced in the same country in which it has been made. He is right in stating that

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Section 36 of the Arbitration Act, 1996 does not follow the two bites at the cherry doctrine, for the reason that when an award made in India becomes final and binding, it shall straightaway be enforced under the CPC, and in the same manner as if it were a decree of the Court, there being no recourse to the self-same grounds when it comes to recognition and enforcement. In point of fact, the *raison d'etre* for Section 36 is only to make it clear that when an arbitral award is not susceptible to challenge, either because the time for making an application to set it aside has expired, or such application having been made is refused, the award, being final and binding, shall be enforced under the CPC as if it were a decree of the court. This becomes clear when Section 36 and 35 of the Arbitration Act, 1996 are read together. Section 35 of the Arbitration Act, 1996 reads as follows:

> "35. **Finality of arbitral awards.-** Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively."

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23. However, in **National Aluminum Company Ltd. (NALCO) v. Pressteel & Fabrications (P) Ltd. and Anr.** 2004 1 SCC 540, this Court held:

> "**10**…At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the court below so that the applicant can withdraw it, on such terms and conditions as the said court might permit it to do as an interim measure. But then we noticed from the mandatory language of Section 34 of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible. On facts of this case, there being no exceptional situation which would compel us to ignore such statutory provision, and to use our jurisdiction under Article 142, we restrain ourselves from passing any such order, as prayed for by the applicant.
>
> **11.** However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under Section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute

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> resolution system to which arbitration belongs. We do find that there is a recommendation made by the Ministry concerned to Parliament to amend Section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law."

24. When this court speaks of "the mandatory language of Section 34" of the Arbitration Act, 1996 obviously what is meant is the language of Section 36 of the Arbitration Act, 1996, as noted by **National Buildings Construction Corporation Ltd. v. Lloyds Insulation India Ltd.** (2005) 2 SCC 367 (in paragraph 6). In **Fiza Developers and Inter-trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd. and Anr.** (2009) 17 SCC 796, this Court held:

> "**20.** Section 36 provides that an award shall be enforced in the same manner as if it were a decree of the court, but only on the expiry of the time for making an application to set aside the arbitral award under Section 34, or such application having been made, only after it has been refused. Thus, until the disposal of the application under Section 34 of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect,

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> operates as a stay of the enforcement of the award."

25. To state that an award when challenged under Section 34 becomes unexecutable merely by virtue of such challenge being made because of the language of Section 36 is plainly incorrect. As has been pointed out hereinabove, Section 36 was enacted for a different purpose. When read with Section 35, all that Section 36 states is that enforcement of a final award will be under the CPC, and in the same manner as if it were a decree of the Court. In fact, this is how Section 36 has been read by a three-judge bench in **Leela Hotels Ltd. V. Housing and Urban Development Corporation Ltd.** (2012) 1 SCC 302 as follows:

> "**45.** Regarding the question as to whether the award of the learned arbitrator tantamounts to a decree or not, the language used in Section 36 of the Arbitration and Conciliation Act, 1996, makes it very clear that such an award has to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the court. The said language leaves no room for doubt as to the manner in which the award of the learned arbitrator was to be accepted."

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26. To read Section 36 as inferring something negative, namely, that where the time for making an application under Section 34 has not expired and therefore, on such application being made within time, an automatic-stay ensues, is to read something into Section 36 which is not there at all. Also, this construction omits to consider the rest of Section 36, which deals with applications under Section 34 that have been dismissed, which leads to an award being final and binding (when read with Section 35 of the Arbitration Act, 1996) which then becomes enforceable under the CPC, the award being treated as a decree for this purpose.

27. This also finds support from the language of Section 9 of the Arbitration Act, 1996, which specifically enables a party to apply to a Court for reliefs *"…after the making of the arbitration award but before it is enforced in accordance with Section 36."* The decisions in **NALCO** (supra) and **Fiza Developers and Intra-trade Pvt. Ltd.** (supra) overlook this statutory position. These words in Section 9 have not undergone any change by reason of the 2015 or 2019 Amendment Acts.

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28. Interpreting Section 9 of the Arbitration Act, 1996, a Division Bench of the Bombay High Court in **Dirk India Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd.** 2013 SCC Online Bom 481 held that:

> "**13**….The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement."

29. This being the legislative intent, the observation in **NALCO** (supra) that once a Section 34 application is filed, "*there is no discretion left with the Court to pass any interlocutory order in regard to the said Award…"* flies in the face of the opening words of Section 9 of the Arbitration Act, 1996, extracted above.

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30. Thus, the reasoning of the judgments in **NALCO** (supra), and **Fiza Developers and Intra-trade Pvt. Ltd.** (supra) being *per incuriam* in not noticing Sections 9, 35 and the second part of Section 36 of the Arbitration Act, 1996, do not commend themselves to us and do not state the law correctly.[1] The fact that **NALCO** (supra) has been followed in **National Buildings Construction Corporation Ltd. v. Lloyds Insulation India Ltd.** (supra) does not take us any further, as **National Buildings Construction Corporation Ltd.** (supra) in following **NALCO** (supra), a per incuriam judgement, also does not state the law correctly. Thus, it is clear that the automatic-stay of an award, as laid down by these

[1] In **NALCO** (supra), this Court was concerned with two questions – the second question being whether the appropriate Court, for the purpose of challenging or seeking modification of an award, was the Supreme Court, or the principal Civil Court of original jurisdiction under Section 2(e) of the Arbitration Act, 1996. This Court held, distinguishing **State of M.P. v. Saith and Skeleton (P) Ltd.** (1972) 1 SCC 702 and **Guru Nanak Foundation v. Rattan Singh and Sons.** (1981) 4 SCC 634, that the Court which had jurisdiction to modify and/or set aside the award was not the Supreme Court. On this point, **NALCO** (supra) has subsequently been followed by a number of judgments and continues to be good law. Also, the ratio of the judgment in **Fiza Developers and Intra-trade Pvt. Ltd.** (supra) on the construction of Section 34 of the Arbitration Act, 1996 relating to the framing of issues and pleadings and proof required in Section 34 proceedings remains untouched by the present judgment.

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decisions, is incorrect. The resultant position is that Section 36 - even as originally enacted - is not meant to do away with Article 36(2) of the UNCITRAL Model Law, but is really meant to do away with the two bites at the cherry doctrine in the context of awards made in India, and the fact that enforcement of a final award, when read with Section 35, is to be under the CPC, treating the award as if it were a decree of the court.

31. In any event, on this aspect of the case, the **BCCI** judgment (supra) referred, in paragraph 25 thereof, to the 246th Law Commission Report on Section 36 as follows:

> "**25.** At this point, it is instructive to refer to the 246th Law Commission Report which led to the Amendment Act. This Report, which was handed over to the Government in August 2014, had this to state on why it was proposing to replace Section 36 of the 1996 Act:
>
> "**AUTOMATIC STAY OF ENFORCEMENT OF THE AWARD UPON ADMISSION OF CHALLENGE**
>
> "43. Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition under Section 34 has expired or after the Section 34 petition has been dismissed. In other words, the pendency of a Section 34

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petition renders an arbitral award unenforceable. The Supreme Court, in *National Aluminium Co. Ltd.* v. *Pressteel & Fabrications (P) Ltd.* [*National Aluminium Co. Ltd.* v. *Pressteel & Fabrications (P) Ltd.*, (2004) 1 SCC 540] held that by virtue of Section 36, it was impermissible to pass an order directing the losing party to deposit any part of the award into Court. While this decision was in relation to the powers of the Supreme Court to pass such an order under Section 42, the Bombay High Court in *Afcons Infrastructure Ltd.* v. *Port of Mumbai* [*Afcons Infrastructure Ltd.* v. *Port of Mumbai*, (2014) 1 Arb LR 512 (Bom)] applied the same principle to the powers of a court under Section 9 of the Act as well. Admission of a Section 34 petition, therefore, virtually paralyses the process for the winning party/award creditor.

44. The Supreme Court, in *National Aluminium* [*National Aluminium Co. Ltd.* v. *Pressteel & Fabrications (P) Ltd.*, (2004) 1 SCC 540] , has criticised the present situation in the following words: (SCC p. 546, para 11)

'*11*. However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under Section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the Ministry concerned to Parliament

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> to amend Section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.'
>
> 45. In order to rectify this mischief, certain amendments have been suggested by the Commission to Section 36 of the Act, which provide that the award will not become unenforceable merely upon the making of an application under Section 34."

It then further went on to state:

> "**62**…Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment-debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act."

The Court then commented on this Court's judgment in **NALCO** (supra) as follows:

> "**67.** In 2004, this Court's judgment in *National Aluminium Co.* [*National Aluminium Co. Ltd.* v. *Pressteel & Fabrications (P) Ltd.*, (2004) 1 SCC 540] had recommended that Section 36 be substituted, as it defeats the very objective of the alternative dispute resolution system, and that the section should be amended at the earliest to bring about the

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> required change in law. It would be clear that looking at the practical aspect and the nature of rights presently involved, and the sheer unfairness of the unamended provision, which granted an automatic stay to execution of an award before the enforcement process of Section 34 was over (and which stay could last for a number of years) without having to look at the facts of each case, it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons."
>
> (emphasis supplied)

32. Section 36, as amended by the 2015 Amendment Act, now reads as follows:

> "36. **Enforcement** --(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.
>
> (2) Where an application to set aside the arbitral award has been under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with

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> the provisions of sub-section (3), on a separate application made for that purpose.
>
> (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:
>
> Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)."

Given the fact that we have declared that the judgments in **NALCO** (supra), **National Buildings Construction Corporation Ltd.** (supra) and **Fiza Developers** (supra) have laid down the law incorrectly, it is also clear that the amended Section 36, being clarificatory in nature, merely restates the position that the unamended Section 36 does not stand in the way of the law as to grant of stay of a money decree under the provisions of the CPC.

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Removal of the basis of the BCCI judgment by the 2019 Amendment Act

33. It now falls to be determined as to whether the 2019 Amendment Act removes the basis of the **BCCI** judgment (supra) of this Court.

34. For this purpose, it is necessary to set out the relevant provisions of the 2019 Amendment Act. Section 87 as introduced by Section 13 of the 2019 Amendment Act reads as follows:

> "87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall–
>
> (a) not apply to-
>
> (i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;
> (ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;
>
> (b) apply only to arbitral proceedings commenced on or after the

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> commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings."

By Section 15 of the same Amendment Act, Section 26 of the 2015 Amendment Act was omitted as follows:

> "15. Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 shall be omitted and shall be deemed to have been omitted with effect from the 23rd October, 2015."

Section 26 of the 2015 Amendment Act reads as follows:

> "26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

35. This Court's judgment in **BCCI** (supra) had occasion to deal with the important question as to the true interpretation of Section 26 of the 2015 Amendment Act. This Court, in paragraph 28, referred to the transitory provision contained in Section 85-A as proposed in the 246th Law Commission Report, and thereafter in paragraphs 29 to 31, referred to the debates on the floor of the House. In paragraph

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32, this Court referred to the differences between Section 26 and Section 85-A as proposed, and then held:

> "**33.** What can be seen from the above is that Section 26 has, while retaining the bifurcation of proceedings into arbitration and court proceedings, departed somewhat from Section 85-A as proposed by the Law Commission."

36. Section 26 was then stated to have bifurcated proceedings with a great degree of clarity into two sets of proceedings – arbitral proceedings themselves, and court proceedings in relation thereto. Paragraph 39 of the judgment refers to this and states as follows:

> "**39.** Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been

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> stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force."
>
> (emphasis supplied)

37. The Court was alive to the Srikrishna Committee Report's recommendation of a proposed Section 87, as is clear from footnote 23 appended to paragraph 44 of the judgment. The Court then made a reference to the Statement of Objects and Reasons for the 2015 Amendment Act and stated as follows:

> "**77.** However, it is important to remember that the Amendment Act was enacted for the following reasons, as the Statement of Objects and Reasons for the Amendment Act states:
>
> > "2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been

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noticed. *Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act*. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said Report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22-12-2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and report. The said Committee, submitted its Report to Parliament on 4-8-2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost-effective and expeditious

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disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

4. As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

5. As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was pleased to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely—

(*i*) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(*ii*) to ensure that an Indian court can exercise jurisdiction to grant interim

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measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the Arbitral Tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(*vi*) to provide for a model fee schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of Arbitral Tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act;

(*vii*) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast-track procedure and the award in such cases

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shall be made within a period of six months;

(*viii*) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(*ix*) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost-effective and lead to expeditious disposal of cases."

78. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons,

"… have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act",

and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases

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where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [These amendments have the effect, as stated in *HRD Corpn.* v. *GAIL (India) Ltd.*, (2018) 12 SCC 471 of limiting the grounds of challenge to awards as follows: (SCC p. 493, para 18)"*18*. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705 has been expressly done away with. So has the judgment in *ONGC Ltd.* v. *Western Geco International Ltd.*, (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in *Renusagar Power Plant Co. Ltd.* v. *General Electric Company*, 1994 Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein viz. "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in *Renusagar*, 1994 Supp (1) SCC 644. "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as

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> understood in *Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204. Section 28(3) has also been amended to bring it in line with the judgment of this Court in *Associate Builders*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one."] It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated."
>
> (emphasis supplied)

In paragraph 83, the Court then concluded:

> "83. In view of the above, the present batch of appeals is dismissed. A copy of the judgment is to be sent to the Ministry of Law and Justice and the learned Attorney General for India in view of what is stated in paras 77 and 78 supra."

38. After construing Section 26 in the manner stated in the judgment, this Court cautioned the Government by stating that the immediate effect of enacting the proposed Section 87 would be

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directly contrary to the Statement of Objects and Reasons of the 2015 Amendment Act, which made it clear that the law prior to the 2015 Amendment Act resulted in delay of disposal of arbitral proceedings, and an increase in interference by courts in arbitration matters, which tends to defeat a primary object of the Arbitration Act, 1996 itself. It was therefore stated that all the amendments made by the 2015 Amendment Act, and important amendments in particular that were made to Sections 28 and 34, would now be put on a backburner, which would be contrary not only to what the 246th Law Commission had in mind, but also directly contrary to the salutary provisions that were made to correct defects that were found in the working of the Arbitration Act, 1996.

39. At this point it is important to refer to the relevant paragraphs of the Statement of Objects and Reasons of the 2019 Amendment Act which introduced Section 87. In paragraphs 2 to 6 of the Statement of Objects and Reasons, the Srikrishna Committee Report alone is referred to, and paragraph 6(vi) in particular states as follows:

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> "6. The salient features of the Arbitration and Conciliation (Amendment) Bill, 2019, *inter alia,* are as follows:-
>
> xxx xxx xxx
>
> (vi) to clarify that Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 is applicable only to the arbitral proceedings which commenced on or after 23rd October, 2015 and to such court proceedings which emanate from such arbitral proceedings."

40. Interestingly, no such clarification was made by the 2019 Amendment Act. Instead, Section 26 was omitted with effect from 23.10.2015 and Section 87 introduced.

41. Dr. Singhvi has argued, based on a number of judgments of this Court, that the question of removing the basis of a judgment cannot arise unless and until the judgment is present to the mind of the legislature. He stated that in all the major cases in which a judgment of a court is nullified by removing its basis, the judgment in question has been expressly referred to in the concerned Statement of Objects and Reasons. We are afraid that we cannot agree with this line of argument. What is important is to see whether, in substance, the basis of a particular judgment is in fact removed,

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whether or not that judgment is referred to in the Statement of Objects and Reasons of the amending act which seeks to remove its basis.

42. In **Shri Prithvi Cotton Mills Ltd. and Anr. v. Broad Borough Municipality and Ors.** (1969) 2 SCC 283, this Court held:

> "**4**….Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances."

43. In **State of Tamil Nadu v. Arooran Sugars Ltd.** (1997) 1 SCC 326, this Court after setting out what was held in **Shri Prithvi Cotton Mills** (supra) stated:

> "**16**…The same view was reiterated in the cases of *West Ramnad Electric Distribution Co. Ltd.* v. *State of Madras* [(1963) 2 SCR 747 : AIR 1962 SC 1753] ; *Udai Ram Sharma* v. *Union of India* [(1968) 3 SCR 41 : AIR 1968 SC 1138] ; *Tirath Ram Rajindra Nath* v. *State of U.P.* [(1973) 3 SCC 585 : 1973 SCC (Tax) 300] ; *Krishna Chandra Gangopadhyaya* v. *Union of India* [(1975) 2 SCC 302] ; *Hindustan Gum & Chemicals*

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> *Ltd.* v. *State of Haryana* [(1985) 4 SCC 124] ; *Utkal Contractors and Joinery (P) Ltd.* v. *State of Orissa* [1987 Supp SCC 751] ; *D. Cawasji & Co* v. *State of Mysore* [1984 Supp SCC 490 : 1985 SCC (Tax) 63] and *Bhubaneshwar Singh* v. *Union of India* [(1994) 6 SCC 77] . It is open to the legislature to remove the defect pointed out by the court or to amend the definition or any other provision of the Act in question retrospectively. In this process it cannot be said that there has been an encroachment by the legislature over the power of the judiciary. A court's directive must always bind unless the conditions on which it is based are so fundamentally altered that under altered circumstances such decisions could not have been given. This will include removal of the defect in a statute pointed out in the judgment in question, as well as alteration or substitution of provisions of the enactment on which such judgment is based, with retrospective effect.".

44. Likewise, in **Goa Foundation v. State of Goa** (2016) 6 SCC 602, this Court held:

> "**24**…The power to invalidate a legislative or executive act lies with the Court. A judicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act for that would amount to an encroachment on the judicial powers. However, the legislature would be competent to pass an amending or a validating act, if deemed fit, with retrospective effect removing the basis of the decision of the

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> Court. Even in such a situation the courts may not approve a retrospective deprivation of accrued rights arising from a judgment by means of a subsequent legislation (*Madan Mohan Pathak* v. *Union of India* [*Madan Mohan Pathak* v. *Union of India*, (1978) 2 SCC 50 : 1978 SCC (L&S) 103]). However, where the Court's judgment is purely declaratory, the courts will lean in support of the legislative power to remove the basis of a court judgment even retrospectively, paving the way for a restoration of the status quo ante. Though the consequence may appear to be an exercise to overcome the judicial pronouncement it is so only at first blush; a closer scrutiny would confer legitimacy on such an exercise as the same is a normal adjunct of the legislative power. The whole exercise is one of viewing the different spheres of jurisdiction exercised by the two bodies i.e. the judiciary and the legislature. The balancing act, delicate as it is, to the constitutional scheme is guided by the well-defined values which have found succinct manifestation in the views of this Court in *Bakhtawar Trust* [*Bakhtawar Trust* v. *M.D. Narayan*, (2003) 5 SCC 298].”

45. Given the aforesaid judgments, Section 15 of the 2019 Amendment Act removes the basis of **BCCI** (supra) by omitting from the very start Section 26 of the 2015 Amendment Act. Since this is the provision that has been construed in the **BCCI** judgment (supra), there can be no doubt whatsoever that one fundamental prop of the

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said judgment has been removed by retrospectively omitting Section 26 altogether from the very day when it came into force. This argument must therefore be rejected.

46. Equally, Shri Neeraj Kishan Kaul's argument that Section 87 is nothing but a re-hash of Section 26, and therefore in substance there is a direct encroachment on a judgment of this Court, must also be rejected. When contrasted with Section 26, Section 87 is in two parts: Section 87(a) negatively stating that the 2015 Amendment Act shall not apply to Court proceedings arising out of arbitral proceedings irrespective of whether such court proceedings are commenced before or after the commencement of the 2015 Amendment Act; and positively applying only to court proceedings in case they arise out of arbitral proceedings that are commenced on or after the commencement of the 2015 Amendment Act. It can thus be seen that the scheme of Section 87 is different from that of Section 26, and is explicit in stating that court proceedings are merely parasitical on arbitral proceedings. It is therefore clear that only arbitral proceedings have to be looked at to see whether the

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2015 Amendment Act kicks in. It is therefore not possible to accept Shri Kaul's argument that in the present case there is a direct assault on a judgment of this Court without first removing its basis.

Constitutional Challenge to the 2019 Amendment Act

47. This now sets the stage for the examination of the constitutional validity of the introduction of Section 87 into the Arbitration Act, 1996, and deletion of Section 26 of the 2015 Amendment Act by the 2019 Amendment Act against Articles 14, 19(1)(g), 21 and Article 300-A of the Constitution of India. The Srikrishna Committee Report recommended the introduction of Section 87 owing to the fact that there were conflicting High Court judgments on the reach of the 2015 Amendment Act at the time when the Committee deliberated on this subject. This was stated as follows in the Srikrishna Committee Report:

> "However, section 26 has remained silent on the applicability of the 2015 amendment Act to court proceedings, both pending and newly initiated in case of arbitrations commenced prior to 23 October 2015. Different High Courts in India have taken divergent views on the applicability of the 2015 Amendment Act to

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such court proceedings. Broadly, there are three sets of views as summarised below:

(a) The 2015 Amendment Act is not applicable to court proceedings (fresh and pending) where the arbitral proceedings to which they relate commenced before 23 October 2015.

(b) The first part of section 26 is narrower than the second and only excludes arbitral proceedings commenced prior to 23 October 2015 from the application of the 2015 Amendment Act. The 2015 Amendment Act would, however, apply to fresh or pending court proceedings in relation to arbitral proceedings commenced prior to 23 October 2015.

(c) The wording "arbitral proceedings" in section 26 cannot be construed to include related court proceedings. Accordingly, the 2015 Amendment Act applied to all arbitrations commenced on or after 23 October 2015. As far as court proceedings are concerned, the 2015 Amendment Act would apply to all court proceedings from 23October 2015, including fresh or pending court proceedings in relation to arbitration commenced before, on or after 23 October 2015.

Thus, it is evident that there is considerable confusion regarding the applicability of the 2015 Amendment Act to related court proceedings in arbitration commenced before 23 October 2015.The Committee is of the view

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> that a suitable legislative amendment is required to address this issue.
>
> The committee feels that permitting the 2015 Amendment Act to apply to pending court proceedings related to arbitrations commenced prior to 23 October 2015 would result in uncertainty and prejudice to parties, as they may have to be heard again. It may also not be advisable to make the 2015 Amendment Act applicable to fresh court proceedings in relation to such arbitrations, as it may result in an inconsistent position. Therefore, it is felt that it may be desirable to limit the applicability of the 2015 Amendment Act to arbitrations commenced on or after 23 October 2015 and related court proceedings."
>
> (emphasis supplied)

48. The Srikrishna Committee Report is dated 30.07.2017, which is long before this Court's judgment in the **BCCI** case (supra). Whatever uncertainty there may have been because of the interpretation by different High Courts has disappeared as a result of the **BCCI** judgment (supra), the law on Section 26 of the 2015 Amendment Act being laid down with great clarity. To thereafter delete this salutary provision and introduce Section 87 in its place, would be wholly without justification and contrary to the object sought to be achieved by the 2015 Amendment Act, which was

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enacted pursuant to a detailed Law Commission report which found various infirmities in the working of the original 1996 statute. Also, it is not understood as to how "uncertainty and prejudice would be caused, as they may have to be heard again", resulting in an 'inconsistent position'. The amended law would be applied to pending court proceedings, which would then have to be disposed of in accordance therewith, resulting in the benefits of the 2015 Amendment Act now being applied. To refer to the Srikrishna Committee Report (without at all referring to this Court's judgment) even after the judgment has pointed out the pitfalls of following such provision, would render Section 87 and the deletion of Section 26 of the 2015 Amendment Act manifestly arbitrary, having been enacted unreasonably, without adequate determining principle, and contrary to the public interest sought to be subserved by the Arbitration Act, 1996 and the 2015 Amendment Act. This is for the reason that a key finding of the **BCCI** judgment (supra) is that the introduction of Section 87 would result in a delay of disposal of arbitration proceedings, and an increase in the interference of courts in

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arbitration matters, which defeats the very object of the Arbitration Act, 1996, which was strengthened by the 2015 Amendment Act.

49. Further, this Court has repeatedly held that an application under Section 34 of the Arbitration Act, 1996 is a summary proceeding not in the nature of a regular suit – *see* **Canara Nidhi Ltd. v. M. Shashikala** 2019 SCC Online SC 1244 at paragraph 20. As a result, a court reviewing an arbitral award under Section 34 does not sit in appeal over the award, and if the view taken by the arbitrator is possible, no interference is called for – *see* **Associated Construction v. Pawanhans Helicopters Ltd.** (2008) 16 SCC 128 at paragraph 17.

50. Also, as has been held in the recent decision **Ssangyong Engineering & Construction Co. Ltd. v. NHAI** 2019 SCC Online 677, after the 2015 Amendment Act, this Court cannot interfere with an arbitral award on merits (*see* paragraph 28 and 76 therein). The anomaly, therefore, of Order XLI Rule 5 of the CPC applying in the case of full-blown appeals, and not being applicable by reason of Section 36 of the Arbitration Act, 1996 when it comes to review of

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arbitral awards, (where an appeal is in the nature of a rehearing of the original proceeding, where the chance of succeeding is far greater than in a restricted review of arbitral awards under Section 34), is itself a circumstance which militates against the enactment of Section 87, placing the amendments made in the 2015 Amendment Act, in particular Section 36, on a backburner. For this reason also, Section 87 must be struck down as manifestly arbitrary under Article 14. The petitioners are also correct in stating that when the mischief of the misconstruction of Section 36 was corrected after a period of more than 19 years by legislative intervention in 2015, to now work in the reverse direction and bring back the aforesaid mischief itself results in manifest arbitrariness. The retrospective resurrection of an automatic-stay not only turns the clock backwards contrary to the object of the Arbitration Act, 1996 and the 2015 Amendment Act, but also results in payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed. In fact, refund applications have been filed in some of the cases before us, praying that monies that have been released

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for payment as a result of conditional stay orders be returned to the judgment-debtor.

51. Also, it is important to notice that the Srikrishna Committee Report did not refer to the provisions of the Insolvency Code. After the advent of the Insolvency Code on 01.12.2016, the consequence of applying Section 87 is that due to the automatic-stay doctrine laid down by judgments of this Court - which have only been reversed today by the present judgment - the award-holder may become insolvent by defaulting on its payment to its suppliers, when such payments would be forthcoming from arbitral awards in cases where there is no stay, or even in cases where conditional stays are granted. Also, an arbitral award-holder is deprived of the fruits of its award - which is usually obtained after several years of litigating - as a result of the automatic-stay, whereas it would be faced with immediate payment to its operational creditors, which payments may not be forthcoming due to monies not being released on account of automatic-stays of arbitral awards, exposing such award-holders to the rigors of the Insolvency Code. For all these reasons, the deletion

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of Section 26 of the 2015 Amendment Act, together with the insertion of Section 87 into the Arbitration Act, 1996 by the 2019 Amendment Act, is struck down as being manifestly arbitrary under Article 14 of the Constitution of India.

52. However, the learned Attorney General cited a number of judgments which state that the court should not ordinarily interfere with the fixation of cut-off dates, unless such fixation appears to be arbitrary or discriminatory (*see* for e.g., **UOI v. Parameswaran Match Works** (1975) 1 SCC 305 at paragraph 10[2] and **Govt. of A.P. v. N. Subbarayudu** (2008) 14 SCC 702 at paragraphs 5 to 9[3]).

[2] "**10**….The choice of a date as a basis for classification cannot be always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. Where it is seen that a line or point there must be, and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless we can say that it is very wide of the reasonable mark."

[3] "**5**….This Court is also of the view that fixing cut-off dates is within the domain of the executive authority and the court should not normally interfere with the fixation of a cut-off date by the executive authority unless such Court order appears to be on the face of it blatantly discriminatory and arbitrary."

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53. In the present case, the challenge is not to the fixing of 23.10.2015 as a cut-off date, as the aforesaid date is the date on which the 2015 Amendment Act came into force. For this reason, the aforesaid judgments have no application. Instead, what has been found to be manifestly arbitrary is the non-bifurcation of court proceedings and arbitration proceedings with reference to the aforesaid date, resulting in improvements in the working of the Arbitration Act, 1996 being put on a backburner. This argument of the learned Attorney General for India also therefore must be rejected.

54. The result is that the **BCCI** judgment (supra) will therefore continue to apply so as to make applicable the salutary amendments made by the 2015 Amendment Act to all court proceedings initiated after 23.10.2015.

55. In this view of the matter, it is unnecessary to examine the constitutional challenge to the 2019 Amendment Act based on Articles 19(1)(g), 21 and 300-A of the Constitution of India.

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Constitutional Challenge to the Insolvency Code

56. It now falls on us to decide the second part of the challenges made in the present Writ Petitions, i.e. the challenge to the constitutionality of the Insolvency Code. As mentioned above, Dr. Singhvi has argued that the provisions of the Insolvency Code would operate arbitrarily on his client inasmuch as, on the one hand, an automatic-stay of arbitral awards in his favour would be granted under the Arbitration Act, 1996 as a result of which those monies cannot be used to pay-off the debts of his client's creditors. On the other hand, any debt of over INR one lakh owed to a financial or operational creditor which remains unpaid, would attract the provisions of the Insolvency Code against the Petitioner No.1 - making these provisions arbitrary, discriminatory and violative of Articles 14 and 19(1)(g) of the Constitution of India. As a result, he has suggested that in order for his client, in turn, to recover monies from Government Companies and NHAI, the definition of 'corporate person' contained in Section 3(7) of the Insolvency Code should either be read without the words "with limited liability" contained in

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the third part of the definition, or have Section 3(23)(g) of the Insolvency Code, which is the definition of 'person', read into the aforesaid provision. In order to appreciate this contention it is necessary to set out these definitions:

> "**Definitions**
> **3.** In this Code, unless the context otherwise requires,-
> xxx xxx xxx
>
> (7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;
>
> (8) "corporate debtor" means a corporate person who owes a debt to any person;
>
> (23) "person" includes-
> (a) an individual;
> (b) a Hindu Undivided Family;
> (c) a company;
> (d) a trust;
> (e) a partnership;
> (f) a limited liability partnership;
> (g) any other entity established under a statute;
> and includes a person resident outside India."

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57. As correctly argued by the learned Solicitor General, Shri Tushar Mehta, the first part of 'corporate person', as defined in Section 3(7) of the Insolvency Code, means a company as defined in Clause 20 of Section 2 of the Companies Act 2013. Sections 2(20) and 2(45) of the Companies Act, 2013, which define 'company' and 'Government company' respectively, are set out hereinbelow:

> "2(20). "company" means a company incorporated under this Act or under any previous company law;"
>
> "2(45). "Government company" means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company."

58. From a reading of the aforesaid definition, Shri Tushar Mehta is clearly right in stating that the three entities who owe monies under arbitral awards to the Petitioner No.1, being Government companies, would be subsumed within the first part of the definition. However, so far as NHAI is concerned, Dr. Singhvi's argument of

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either deleting certain words in Section 3(7) of the Insolvency Code, or adding certain words in Section 3(23)(g) of the Insolvency Code into Section 3(7) cannot be accepted.

59. It is clear from a reading of the Statement of Objects and Reasons of the NHAI Act, that the development and maintenance of national highways is a government function that falls within Entry 23 of List I of the Seventh Schedule to the Constitution of India. Further, under Section 5 of the National Highways Act, 1956, the Central Government may direct that any function in relation to the development or maintenance of national highways shall also be exercisable by any officer or authority subordinate to the Central Government. Under this provision, the function of execution of activities relatable to national highways was earlier delegated to the State Governments under an “agency system”. Though the system worked through the State Public Works Departments for a period of 40 years, as difficulties were experienced, the Centre itself decided to take over development and maintenance of the national highways system through the creation of a national highways authority.

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60. The following provisions of the NHAI Act are relevant and are set out hereinbelow:

> "3. **Constitution of the Authority**.—
>
> (1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf, there shall be constituted for the purposes of this Act an Authority to be called the National Highways Authority of India.
>
> (2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall by the said name sue and be sued.
>
> [(3) The Authority shall consist of—
>
> (a) a Chairman;
> (b) not more than six full-time members; and
> (c) not more than six part-time members, to be appointed by the Central Government by notification in the Official Gazette:
>
> Provided that the Central Government shall, while appointing the part-time members, ensure that at least two of them are non-Government professionals having knowledge or experience in financial management, transportation planning or any other relevant discipline.]

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12. **Transfer of assets and liabilities of the Central Government to the Authority—**

(1) On and from the date of publication of the notification under section 11.—

(a) all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with, or for, the Central Government, immediately before such date for or in connection with the purposes of any national highway or any stretch thereof vested in, or entrusted to, the Authority under that section, shall be deemed to have been incurred, entered into and engaged to be done by, with, or for, the Authority;

(b) all non-recurring expenditure incurred by or for the Central Government for or in connection with the purposes of any national highway or any stretch thereof, so vested in, or entrusted to, the Authority, up to such date and declared to be capital expenditure by the Central Government shall, subject to such terms and conditions as may be prescribed, be treated as capital provided by the Central Government to the Authority;

(c) all sums of money due to the Central Government in relation to any national highway or any stretch thereof, so vested in, or entrusted to, the Authority immediately before such date shall be deemed to be due to the Authority;

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(d) all suits and other legal proceedings instituted or which could have been instituted by or against the Central Government immediately before such date for any matter in relation to such national highway or any stretch thereof may be continued or instituted by or against the Authority.

(2) If any dispute arises as to which of the assets, rights or liabilities of the Central Government have been transferred to the Authority, such dispute shall be decided by the Central Government.

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14. **Contracts by the Authority.—**

Subject to the provisions of section 15, the Authority shall be competent to enter into and perform any contract necessary for the discharge of its functions under this Act.

15. **Mode of executing contracts on behalf of the Authority.—**

(1) Every contract shall, on behalf of the Authority, be made by the Chairman or such other member or such officer of the Authority as may be generally or specially empowered in this behalf by the Authority and such contracts or classes of contracts as may be specified in the regulations shall be sealed with the common seal of the Authority:

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Provided that no contract exceeding such value or amount as the Central Government may prescribe in this behalf shall be made unless it has been previously approved by that Government:

Provided further that no contract for the acquisition or sale of immovable property or for the lease of any such property for a term exceeding thirty years and no other contract exceeding such value or amount as the Central Government may prescribe in this behalf shall be made unless it has been previously approved by that Government.

(2) Subject to the provisions of sub-section (1), the form and manner in which any contract shall be made under this Act shall be such as may be provided by regulations.

(3) No contract which is not in accordance with the provisions of this Act and the regulations shall be binding on the Authority.

16. **Functions of the Authority**.---

(1) Subject to the rules made by the Central Government in this behalf, it shall be the function of the Authority to develop, maintain and manage the national highways and any other highways vested in, or entrusted to, it by the Government.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the Authority may, for the discharge of its functions—

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(a) survey, develop, maintain and manage highways vested in, or entrusted to, it;
(b) construct offices or workshops and establish and maintain hotels, motels, restaurants and rest-rooms at or near the highways vested in, or entrusted to, it;
(c) construct residential buildings and townships for its employees;
(d) regulate and control the plying of vehicles on the highways vested in, or entrusted to, it for the proper management thereof;
(e) develop and provide consultancy and construction services in India and abroad and carry on research activities in relation to the development, maintenance and management of highways or any facilities thereat;
(f) provide such facilities and amenities for the users of the highways vested in, or entrusted to, it as are, in the opinion of the Authority, necessary for the smooth flow of traffic on such highways;
(g) form one or more companies under the Companies Act, 1956 to further the efficient discharge of the functions imposed on it by this Act;
[(h) engage, or entrust any of its functions to, any person on such terms and conditions as may be prescribed;]
(i) advise the Central Government on matters relating to highways;
(j) assist, on such terms and conditions as may be mutually agreed upon, any State Government in the formulation and implementation of schemes for highway development;

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(k) collect fees on behalf of the Central Government for services or benefits rendered under section 7 of the National Highways Act, 1956, as amended from time to time, and such other fees on behalf of the State Governments on such terms and conditions as may be specified by such State Governments; and
(l) take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on it by this Act.

(3) Nothing contained in this section shall be construed as—

(a) authorising the disregard by the Authority of any law for the time being in force; or

(b) authorising any person to institute any proceeding in respect of a duty or liability to which the Authority or its officers or other employees would not otherwise be subject under this Act.

17. **Additional capital and grants to the Authority by the Central Government.--**

The Central Government may, after due appropriation made by Parliament, by law in this behalf,--

(a) provide any capital that may be required by the Authority for the discharge of its functions under this Act or for any purpose connected therewith on such terms and conditions as that Government may determine;

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(b) pay to the Authority, on such terms and conditions as the Central Government may determine, by way of loans or grants such sums of money as that Government may consider necessary for the efficient discharge by the Authority of its functions under this Act.

18. **Funds of the Authority.--** (1) There shall be constituted a Fund to be called the National Highways Authority of India Fund and there shall be credited thereto—

(a) any grant or aid received by the Authority;
(b) any loan taken by the Authority or any borrowings made by it;
(c) any other sums received by the Authority.

(2) The Fund shall be utilised for meeting—

(a) expenses of the Authority in the discharge of its functions having regard to the purposes for which such grants, loans or borrowings are received and for matters connected therewith or incidental thereto;
(b) salary, allowances, other remuneration and facilities provided to the members, officers and other employees of the Authority;
(c) expenses on objects and for purposes authorised by this Act.

19. **Budget.--**The Authority shall prepare, in such form and at such time in each financial year as may be prescribed, its budget for the next financial year, showing the estimated receipts and expenditure of the Authority and forward the same to the Central Government.

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20. **Investment of funds.---**The Authority may invest its funds (including any reserve fund) in the securities of the Central Government or in such other manner as may be prescribed.

21. **Borrowing powers of the Authority.---**

(1) The Authority may, with the consent of the Central Government or in accordance with the terms of any general or special authority given to it by the Central Government, borrow money from any source by the issue of bonds, debentures or such other instruments as it may deem fit for discharging all or any of its functions under this Act.

(2) Subject to such limits as the Central Government may, from time to time, lay down, the Authority may borrow temporarily by way of overdraft or otherwise, such amounts as it may require for discharging its functions under this Act.

(3) The Central Government may guarantee in such manner as it thinks fit the repayment of the principal and the payment of interest thereon with respect to the borrowings made by the Authority under sub-section (1).

22. **Annual report.---**The Authority shall prepare, in such form and at such time in each financial year as may be prescribed, its annual report, giving a full account of its activities during the previous financial year, and submit a copy thereof to the Central Government.

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> 23. **Accounts and audit**.---The accounts of the Authority shall be maintained and audited in such manner as may, in consultation with the Comptroller and Auditor-General of India, be prescribed and the Authority shall furnish, to the Central Government before such date as may be prescribed, its audited copy of accounts together with the auditors report thereon.
>
> 24. **Annual report and auditor's report to be laid before Parliament.---** The Central Government shall cause the annual report and auditor's report to be laid, as soon as may be after they are received, before each House of Parliament.
>
> xxx xxx xxx
>
> **33. Power of the Central Government to issue directions.-**
>
> (1) Without prejudice to the other provisions of this Act, the Authority shall, in the discharge of its functions and duties under this Act, be bound by such directions on questions of policy as the Central Government may give in writing from time to time.
>
> (2) The decision of the Central Government whether a question is one of policy or not shall be final."

61. Under Section 3 of the aforementioned Act, the Authority shall be a body corporate which shall consist of a Chairman and six

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full-time members, together with six part-time members, all appointed by the Central Government. The assets and liabilities of the Central Government in relation to national highways are then transferred to the Authority under Section 12. Under Sections 14 and 15, contracts that can be made on behalf of the Authority can only be made, if they exceed a certain value, after previous approval by the Government. Section 16 deals with the functions of the Authority, which makes it clear that these are governmental functions to be carried out only by the Government or by its agent appointed in this behalf.

62. Under Section 19, the budget prepared for the Authority has to be sent to the Central Government, capital and grants to the authority being made by the Central Government into the fund of the Authority (*see* Sections 17 and 18 of the NHAI Act supra). Likewise, an annual report is to be given to the Central Government under Section 22. Accounts and audit have to be made in consultation with the Comptroller and Auditor General of India, and furnished to the Central Government, which have then to be laid before the

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Parliament [*see* Sections 22 to 24 of the NHAI Act (supra)]. Under Section 33, the Central Government can issue directions on questions of policy, which would then be binding on the Authority.

63. From a conspectus of the above provisions, what is clear is that NHAI is a statutory body which functions as an extended limb of the Central Government, and performs governmental functions which obviously cannot be taken over by a resolution professional under the Insolvency Code, or by any other corporate body. Nor can such Authority ultimately be wound-up under the Insolvency Code. For all these reasons, it is not possible to accede to Dr. Singhvi's argument to either read in, or read down, the definition of 'corporate person' in Section 3(7) of the Insolvency Code.

64. Even otherwise, on the footing that the NHAI can be roped in under the Insolvency Code, this Court in **K. Kishan** (supra) has held:

> "**22.** Following this judgment, it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt

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contained in an arbitral award for a small amount of say, two lakhs of rupees, cannot possibly jeopardise an otherwise solvent company worth several crores of rupees. Such a company would be well within its rights to state that it is challenging the arbitral award passed against it, and the mere factum of challenge would be sufficient to state that it disputes the award. Such a case would clearly come within para 38 of *Mobilox Innovations* [*Mobilox Innovations (P) Ltd.* v. *Kirusa Software (P) Ltd.*, (2018) 1 SCC 353 : (2018) 1 SCC (Civ) 311] , being a case of a pre-existing *ongoing* dispute between the parties. The Code cannot be used *in terrorem* to extract this sum of money of rupees two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the Code, at least insofar as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist.

xxx xxx xxx

27. We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an arbitral award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an award, continues even after the award,

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> at least till the final adjudicatory process under Sections 34 and 37 has taken place."

65. In this view of the matter, the moment challenges are made to the arbitral awards, the amount said to be due by an operational debtor would become disputed, and therefore be outside the clutches of the Insolvency Code. Looked at from any point of view, therefore, proceeding against the NHAI under the Insolvency code by the Petitioner No.1 is not possible.

66. Dr. Singhvi then argued that under Section 5(9) of the Insolvency Code, 'financial position' is defined, which is only taken into account after a resolution professional is appointed, and is not taken into account when adjudicating 'default' under Section 3(12) of the Insolvency Code. This does not in any manner lead to the position that such provision is manifestly arbitrary. As has been held by our judgment in **Pioneer Urban Land and Infrastructure Limited and Anr. v. Union of India and Ors.** (2019) 8 SCC 416, the Insolvency Code is not meant to be a recovery mechanism (*see* paragraph 41 thereof) - the idea of the Insolvency Code being a mechanism which is triggered in order that resolution of stressed

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assets then takes place. For this purpose, the definitions of 'dispute' under Section 5(6), 'claim' under Section 3(6), 'debt' under Section 3(11), and 'default' under Section 3(12), have all to be read together. Also, the Insolvency Code, belonging to the realm of economic legislation, raises a higher threshold of challenge, leaving the Parliament a free play in the joints, as has been held in **Swiss Ribbons (P) Ltd. v. UOI** (2019) 4 SCC 17 (*see* paragraphs 17 to 24 thereof). For all these reasons, this contention of Dr. Singhvi must needs be rejected.

67. Dr. Singhvi's argument as to the need to fill in a *casus omissus* in the Code in order that his client get relief is again not tenable. The argument that an Order VIII-A CPC type mechanism is missing, and can be provided by us through interpretation - there being no third-party procedure by which debts owed to persons like the Petitioner can then be, by some theory of contribution or indemnity, fastened on to PSUs when operational creditors invoke the Insolvency Code against persons like the Petitioner - is again an

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argument which is answered by stating that the Insolvency Code is not meant to be a debt recovery legislation.

68. The argument of Shri Rai that the definition of 'dispute' under Section 5(6) of the Insolvency Code does not speak of the 'parties' to a dispute, and can therefore be interpreted to include a dispute between a sub-contractor and the principal employer with whom the sub-contractor may have no privity of contract, also does not commend itself to us. The definition of 'dispute' in Section 5(6) of the Insolvency Code deals with a suit or arbitration proceedings relating to one of three things - (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty.

69. Insofar as (a) is concerned, the definition of the word 'debt' contained in Section 3(11) of the Insolvency Code, refers to a liability or obligation in respect of a claim which is due from any person. This necessarily postulates the existence of a contractual or other relationship, which gives rise to a liability or obligation between parties in law. The same goes for (c), as a breach of a

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representation or warranty can only be by one contracting party to another. Also, when the quality of goods or service is referred to in (b), this again postulates some contractual or other relationship in law by which one party may sue the other.

70. In **Mobilox** (supra), after setting out the definition of 'dispute', this Court held:

> "**34.** Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:
>
> i. Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act)
>
> ii. Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And
>
> iii. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?
>
> If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate

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> of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

71. It is clear therefore that a dispute must be between the parties as understood under the Insolvency Code, which does not contain an Order VIII-A CPC type mechanism. This contention must also therefore be rejected.

72. For all these reasons, we find the challenge to the provisions of Insolvency Code, insofar as the present Writ Petitions are concerned, to be wholly devoid of merit.

Conclusion on facts

73. In the Writ Petition No.1074 of 2019 filed on 16.08.2019, the Petitioner company had alleged that a sum of INR 6070 crores was the sum awarded to the Petitioner company under various arbitral awards from 2008 to 2019 which had been challenged by the Respondent PSUs before various Courts, but the operation of which had not been stayed by such courts. On this factual premise, the Petitioner sought interim reliefs from this Court for the repayment of

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the said amounts from the Respondent PSUs, so as to enable it to repay its pending dues to its own operational creditors. This Court recorded as much in its order dated 13.09.2019 in Writ Petition No.1074 of 2019 as follows:

> "The two interlocutory applications are filed for two reliefs. One is to stay further proceedings before the National Company Law Tribunal, and the second is to direct respondent nos.5-8 – Union of India, National Highways Authority of India, NHPC Ltd., IRCON International Ltd. and NTPC Limited to pay off amounts due under the Awards of Arbitrators which have not been stayed by any Court, amounting to a sum of Rs.6,070 crores.
>
> Dr. Singhvi, learned Senior Counsel, states that his client will pay the Operational Creditors in these two interlocutory applications, amounts of Rs.8.81 crores and 26.21 crores within a period of 12 weeks from today. We record the aforesaid statement.
>
> We also issue notice to the Respondents in the two interlocutory applications.
>
> *Dasti* service, in addition, is permitted.
>
> List the matter on 04th October, 2019.
>
> Dr. Singhvi further states that this order which is passed by us at 11:45am today, will be communicated orally to the NCLT which,

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apparently, is taking up these matters today.
(emphasis supplied)

74. However, in its Counter Affidavit dated 21.10.2019, the Union of India contended that this prayer was 'factually incorrect' and 'deliberately misleading'. The Union of India reproduced charts filed by IRCON, NHPC and NHAI before this Court regarding the status of arbitral awards against them in favour of the Petitioner company (as on 30.09.2019), which detailed, *inter alia*, (i) the value of the contract between the Petitioner company and the Respondent PSU; (ii) the amount already paid by the Respondent PSU to the Petitioner under the said contract; (iii) the Petitioner's principal claim against the Respondent PSU in the arbitration; (iv) the amount awarded in favour of the Petitioner in the arbitration; (v) the amounts paid/deposited by the Respondent PSU by which the competent Court had granted stay; (vi) the balance amount due to the Petitioner; and (vii) whether stay orders were granted by competent Courts in respect of the arbitral awards. On the basis of these charts, the Union of India contended that the Petitioner company had deliberately suppressed the fact that these Respondent PSUs

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had stay orders in their favour in respect of some of these arbitral awards, and that these PSUs had *already* paid/deposited a substantial amount (approximately 83.30%) payable by them under the arbitral awards, after which stay orders in respect of these arbitral awards were granted. The figures mentioned in the charts were succinctly summarised in a table in the Counter Affidavit, which is reproduced below:

NAME OF THE PSU	**TOTAL AMOUNT OF AWARDS IN FAVOUR OF THE PETITIONER**	**TOTAL AMOUNT PAID/DEPOSITED BY THE PSU PENDING THE STATUTORY CHALLENGE OF THE AWARD**
NHPC	1063.82	932.03
NHAI	2343.23	2025.62
IRCON	268.10	119.06
NTPC	116.15	81.70

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TOTAL	**3791.30**	**3158.41 [83.30%]**

(Figures in INR Crores)

75. Pertinently, the Union of India alleged that none of the stay orders obtained by the Respondent PSUs in respect of these arbitral awards were under the automatic-stay mode, or under Section 87 of the 2019 Amendment Act. Instead, it was contended that the said stay orders were granted by the competent Court on an application filed by the Respondent PSUs, a hearing of the said application on merits, and upon the condition that portions of the arbitral awards be paid/deposited in the Court.

76. The Union of India also strongly denied the Petitioner company's contention that it was in financial distress due to the non-payment of contractual dues owed to it by the Respondent PSUs, which allegedly left it susceptible to being proceeded against under the Code by its various creditors. The Union of India alleged that the Petitioner has been paid the amount of the contract, even with escalation, in almost all cases. In fact, it was contended in the Counter Affidavit that the Petitioner company had been paid more

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than the initial contract value by the Respondent PSUs (approximately 117%). The Union of India further contended that most of the claims raised by the Petitioner company against the Respondent PSUs are outside the scope of the basic contract value - such as 'loss of profit' etc. - which would in any event not have any impact on the financial health of the company. This, the Union of India alleged, demonstrated that it was 'absolutely false' that the Petitioner company had been relegated to insolvency due to the non-payment of dues by the Respondent PSUs.

77. The Petitioner company then filed an Additional Affidavit dated 04.11.2019 before this Court, wherein it admitted that, as on 31.08.2019, the Petitioner company, while due a sum of INR 6373.82 crores from the Respondent PSUs, had already received INR 951.51 crores through court orders, and INR 1530.89 crores through the NITI Aayog Scheme (totalling INR 2482.4 crores). The Petitioner company then itself challenged as incorrect some of the figures and statements placed on record by the Union of India in its Counter Affidavit, particularly those on the status of Court

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proceedings in relation to arbitral-awards in favour of the Petitioner company.

78. A perusal of the rival contentions makes it clear that there is a factual dispute between the parties relating to: (I) the exact quantum of the arbitral-awards in favour of the Petitioner company due from the Respondent PSUs; (II) the amounts which may have already been paid and/or deposited by the Respondent PSUs in favour of the Petitioner company under the said arbitral awards; and (III) whether stay orders of competent Courts were passed in respect of these arbitral awards, and if so, whether they were under the automatic-stay mode or not.

79. It is settled law that when exercising its jurisdiction under Article 32 of the Constitution, this Court cannot embark on a detailed investigation of disputed facts. A five-Judge bench of this Court in **Gulabdas & Co. v. Asstt. Collector of Customs** AIR 1957 SC 733, was seized of a batch of Writ Petitions filed under Article 32, wherein the petitioners (who were Indian importers of stationary articles) alleged that the Central Board of Revenue had acted erroneously by

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imposing tax upon 'crayons' imported by them, which were not taxable, incorrectly assuming them to be 'colour pencils'. Dismissing these Writ Petitions, this Court held as follows:

> "**15.** The contention that the impugned orders are manifestly erroneous, because "Crayons" have been treated as 'coloured pencils' is not a contention which can be gone into on an application under Article 32 of the Constitution. It has no bearing on the question of the enforcement of a fundamental right, nor can the question be decided without first determining what constitutes the distinction between a 'coloured pencil' and a 'crayon', a distinction which must require an investigation into disputed facts and materials. This was a matter for the Customs authorities to decide, and it is obvious that this Court cannot, on an application under Article 32 of the Constitution, embark on such an investigation."
>
> (emphasis supplied)

80. To similar effect is the decision in **Surendra Prasad Khugsal v. Chairman, MMTC.** 1994 Supp. (1) SCC 87, where this Court held:

> "**6.** We have heard both the parties in all the petitions at some length. The petitioners in all the petitions place their reliance on the decision in the *M.M.R. Khan case* [1990 Supp SCC 191 : 1990 SCC (L&S) 632 : (1991) 16 ATC 541] . However, we find that the said case which admittedly concerned the canteen

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> workers both in the statutory canteens and recognised non-statutory canteens was decided on the facts in those cases including the provisions of the Railway Manual, the notifications and circulars issued by the Railway Board from time to time and other documents which pertained to the workers employed in the said canteens. None of the material which was taken into consideration there has relevance to the workers concerned in the present canteens. On the other hand, there are disputed facts in the present case which cannot be resolved in a writ petition under Article 32. We, therefore, find that this Court is not the proper forum to decide the present disputes."
>
> (emphasis supplied)

81. More recently, this Court in **Sumedha Nagpal v. State of Delhi** (2000) 9 SCC 745 held:

> "**2.** Both parties do recognise that the question of custody of the child will have to be ultimately decided in proceedings arising under Section 25 of the Guardians & Wards Act read with Section 6 of the Act and while deciding such a question, welfare of the minor child is of primary consideration. Allegations and counter-allegations have been made in this case by the petitioner and Respondent 2 against each other narrating circumstances as to how the estrangement took place and how each one of them is entitled to the custody of the child. Since these are disputed facts, unless the pleadings raised by the parties are examined with reference to evidence by an

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> appropriate forum, a proper decision in the matter cannot be taken and such a course is impossible in a summary proceeding such as writ petition under Article 32 of the Constitution."
>
> (emphasis supplied)

82. This Court cannot, therefore, in exercise of its jurisdiction under Article 32 of the Constitution undertake a detailed investigation to determine the status of monies paid/deposited pursuant to arbitral-awards in favour of the Petitioner company. Consequently, no directions in respect thereof can be made in the present proceedings.

83. Dr. Singhvi then argued that the NITI Aayog Office's Memorandum dated 05.09.2016, which contained a scheme by which contractors were able to retrieve 75% of awarded amounts together with interest thereon - referred to as "pay-out amount" - is arbitrary only to a limited extent. He had no quarrel with the fact that a bank guarantee should be given under the scheme to secure the pay-out amount, but argued that an additional bank guarantee of 10% per year on the pay-out amount, which is then compounded annually, is arbitrary and should be struck down under Article 14.

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This being severable, he contended that the scheme can remain, with the requirement of a 'top-up' bank guarantee of 10% per annum being struck down. A look at the circular dated 05.09.2016 shows that the scheme is in order that the hardship felt by the construction sector, thanks to the automatic-stay regime under Section 36 as originally enacted, be mitigated. It can thus be seen that the scheme is so that the construction sector can get the fruits of arbitral awards in their favour, which otherwise was not available at the time under the law. Dr. Singhvi's client was free to avail of the circular on its terms, or not to avail of the said circular. Having availed of the benefit contained in the circular, it is not possible for his client to now turn around and state, years after availing this benefit, that one part of the circular is onerous and should be struck down. Even otherwise, we find nothing arbitrary in requiring a 10% additional bank guarantee per annum so that the scheme be availed. Had the scheme not been open-ended, and had it ended within one year, there would have been no need for this 10% additional bank guarantee. It is only because the bank guarantee may be renewed for 75% of the pay-out amount that has been disbursed to

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contractors, that this condition is said to be onerous. We find that in point of fact the 10% extra bank guarantee is only to ensure that the further interest component per annum also gets covered, so that the Government/Government bodies are able to claim these amounts in case the bank guarantees have to be encashed. We, therefore, find no substance in this plea and reject it.

84. All the Writ Petitions are disposed of in the light of this judgment.

85. Accordingly, M.A. Nos. 2140-2144 of 2019 in C.A. Nos.2621-2625 of 2019 are allowed in terms of prayer (a) therein.

……J.
(R.F. Nariman)

……J.
(Surya Kant)

……J.
(V. Ramasubramanian)

New Delhi;
November 27, 2019