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

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*Judgment Reserved on 13.12.2018*

*Judgment Pronounced on 31.05.2019*

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**ARB.A. (COMM.) No.18/2018**

SHABNAM DHILLON

..... APPELLANT

Through: Mr. Raj Shekhar Rao with Mr. Akshay Sharma and Mr. Vinayak Mehrotra, Advocates.

versus

ZEE ENTERTAINMENT ENTERPRISES  
LTD. & ORS.

..... RESPONDENT

Through: Mr. Darpan Wadhwa, Sr. Advocate with Mr. Yakshay Chheda and Mr. Aman Shukla, Advocates for R-1.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**RAJIV SHAKDHER, J:**

**Prefatory facts**

1. This is an appeal directed against the order dated 22.2.2018 passed by the learned arbitrator under Section 17 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act"). For the sake of convenience, the parties to the proceedings will be referred to as under:

- (i) Ms. Shabnam Dhillon, the appellant as 'SD';
- (ii) Zee Entertainment Enterprises Ltd., respondent No.1 as 'Zee'.

- (iii) SGGD Projects Development Private Limited, respondent No.2 as 'SGGD';
- (iv) IDBI Trusteeship Services Limited, respondent No.3 as 'IDBI Trustee'; and
- (v) Axis Trustee Services Limited, respondent No.4 as 'Axis Trustee.'

2. Furthermore, wherever necessary, unless the context requires otherwise, the aforementioned individuals and/or entities will be collectively referred to as 'parties'.

3. In order to adjudicate upon this appeal, the following broad facts are required to be noticed:-

4. SGGD issued 5500 senior, unlisted, unrated, secured and redeemable non-convertible debentures having a face value of Rs.1,00,000/- each in favour of an entity by the name Axis Finance Limited (in short "Axis Finance") via a Debenture Trust Deed dated 28.9.2013 (hereafter referred to as "1<sup>st</sup> DTD").

5. Resultantly, Axis Finance ended up holding debentures in SGGD worth Rs.55 crores. Importantly, the 1<sup>st</sup> DTD was executed amongst SD, SGGD and Axis Trustee in its capacity as the debenture trustee. SD had executed a Personal Guarantee dated 28.9.2013 (hereafter referred to as "first personal guarantee") Besides this, other ancillary documents were

also executed amongst SD, SGGD and Axis Trustee, which for the purposes of adjudication of the instant appeal need not be adverted to herein

6. Besides this, SGGD also issued 12,500 subordinate, unlisted, secured and redeemable non-convertible debentures having a face value of Rs.1,00,000/- each in favour of Zee. This transaction was carried out pursuant to Debenture Trust Deed dated 30.9.2013 (hereafter referred to as "2<sup>nd</sup> DTD"). Parties to the 2<sup>nd</sup> DTD were SD, SGGD and Axis Trustee, once again, in its capacity as the debenture trustee. Consequently, Zee acquired subordinate non-convertible debentures of an aggregate value of Rs.125 crores.

7. Notably, SD had executed Amended and Restated Personal Guarantee dated 30.9.2013 (hereafter referred to as "second personal guarantee"). This guarantee was executed by SD for the benefit of the Axis Trustee. Furthermore, an Inter-Creditor Agreement dated 8.10.2013 ('ICA') was also executed amongst Axis Finance, Zee and Axis Trustee.

8. Evidently, in and about May 2014 SGGD embarked upon another issue of non-convertible debentures (NCDs) though, this time around, for an aggregate sum of Rs.335 crores. These NCDs were issued in favour of the following entities:

- (i) Credit Suisse AG Singapore (in short "Credit Suisse"); and
- (ii) Investment Opportunities II Pte. Ltd. (in short "IOP")

9. Credit Suisse was, thus, issued NCDs worth Rs.150 crores. These NCDs were referred to as "Debentures of Series A and B". The aforesaid

transaction is encapsulated in Debenture Trust Deed dated 21.5.2014 (hereafter referred to as the “3<sup>rd</sup> DTD”). The 3<sup>rd</sup> DTD was thus entered into amongst SD, SGGD and IDBI Trustee in its capacity as the debenture trustee.

10. Evidently, by virtue of the money received upon issuance of the aforementioned NCDs in May 2014, the debt owed to Axis Finance was paid. In other words, the NCDs subscribed by Axis Finance were redeemed pursuant to the funds received against NCDs issued in May 2014.

11. It appears that SGGD vide letter dated 20.5.2014 addressed to Zee sought an extension of the redemption date of NCDs held by Zee till 10.6.2017. Via this very communication, SGGD also agreed to provide on or before 30.9.2015 an exit option to Zee. In response thereto, Zee vide letter dated 21.5.2014 authorized IDBI Trustee to execute the necessary amendments in the relevant documents and also conveyed its agreement to shift the date of redemption of NCDs to 30.6.2017. Furthermore, Zee via another letter of even date i.e. 21.5.2014 addressed to Axis Trustee consented to the replacement of IDBI Trustee as the debenture trustee in its place.

12. As a result of this development, the 2<sup>nd</sup> DTD was amended via Amended and Restated Debenture Trust Deed dated 21.5.2014 (hereafter referred to as “2<sup>nd</sup> amended DTD”). The 2<sup>nd</sup> amended DTD was executed amongst SGGD, SD, IDBI Trustee and Axis Trustee. Pertinently, Axis Trustee was only a confirming party to the 2<sup>nd</sup> amended DTD. With the execution of the 2<sup>nd</sup> amended DTD, IDBI Trustee substituted Axis Trustee

as the debenture trustee.

12.1 Besides this, as indicated hereinabove, 30.6.2017 was pegged as the maturity date. The 2<sup>nd</sup> amended DTD was executed for the purpose of incorporating certain amendments to the rights of the debenture holders.

13. It appears that Zee vide letter dated 3.9.2015 exercised the exit option. Via this communication, Zee called upon SGGD to redeem the NCDs held by it. In response thereto, SGGD vide letter dated 30.9.2015, refused to permit Zee to exercise the exit option. This resulted in Zee writing once again to the Board of Directors of SGGD on 25.11.2015. By this communication, Zee sought to convey to the Board of Directors of SGGD that SGGD had failed to remit the amount payable to it on the redemption of its NCDs, despite communicating its intent to exercise the exit option vide letter dated 3.9.2015.

13.1 This letter was followed up by Zee with another letter dated 5.1.2016.

14. Evidently, to these letters, no response was received from by SGGD. The result was that even on the extended redemption/maturity date i.e. 30.6.2017, the NCDs held by Zee remained unredeemed. Given this situation, Zee made another attempt at persuading SGGD to remit the amounts due to it under the NCDs held by it. This attempt was made by Zee vide letter dated 4.7.2017. Zee via this communication, *inter alia*, called upon SGGD to pay not only the principal sum of Rs.125 crores but also the interest for the period spanning between April and June 2017. In addition thereto, Zee also sought payment of penal interest at the rate of 2 percent for the period there had been a delay in the payment of interest owed to it by

SGGD. Apparently, a copy of this communication was marked by Zee to SD and IDBI Trustee. Since the copy of this letter was also marked to IDBI Trustee, Zee also called upon IDBI Trustee to initiate requisite action to seek consent of Senior Debenture Holders to enable invocation of security for the realization of its dues.

15. The record shows that within two days, IDBI Trustee vide letter dated 6.7.2017 called upon the Senior Debenture Holders (Series A and Series B) to give their consent to enforce securities as requested by Zee. It appears that to this communication no response was received by IDBI Trustee.

16. In view of this situation obtaining, Zee wrote to SGGD on 18.7.2017 and 22.8.2017. Via these letters, Zee called upon SGGD to remit monies under the 2<sup>nd</sup> amended DTD.

17. There was apparently no response to these communications by SGGD. As a result of complete non-cooperation by SGGD, Zee was propelled to serve a Demand Certificate dated 18.7.2017 on SD under Clause 6.6 of the second personal guarantee executed by her. Via this Demand Certificate, Zee called upon SD to pay the amounts under the NCDs issued to it within a period of five business days. SD failed to comply with the Demand Certificate served upon her by Zee. This impelled Zee to trigger the arbitration agreement captured in Clause 17.1 of the second personal guarantee vide notice dated 28.9.2017.

18. Apparently, IDBI Trustee conveyed to Zee that while it could proceed with the appointment of a sole arbitrator, the cost, fee, and expenses of the proceedings will have to be borne by it. Zee instead of appointing an

arbitrator moved a petition under Section 9 of the 1996 Act in the Bombay High Court. This petition was numbered as Arbitration Petition (L) No.432 of 2017. The Bombay High Court disposed of this petition vide order dated 19.12.2017. The Court via this order appointed a sole arbitrator with the consent of the counsel for Zee, SD, SGGD, and IDBI Trustee. It is important to note that on that date, IDBI Trustee was represented by its Manager, one, Mr. Rajesh Lakshman, who conveyed to the Court that IDBI Trustee had no objection to the Court appointing an arbitrator to adjudicate upon the disputes between the parties before the Court.

19. The Court while referring the matter to arbitration called upon the learned arbitrator her to decide the disputes arising out of the 2<sup>nd</sup> DTD and 2<sup>nd</sup> amended DTD as well as the second personal guarantee. Liberty was given to Zee to file an application under Section 17 of the 1996 Act. The Court though made it amply clear that it had not examined the matter on merits.

20. It is in this backdrop that based on an application moved by Zee under Section 17 of the 1996 Act, the impugned order came to be passed.

21. Arguments, in the instant appeal, on behalf of SD were advanced by Mr. Rajshekhar Rao while those on behalf of Zee/respondent No.1 i.e. the contesting party, were advanced by Mr. Darpan Wadhwa, Senior Advocate.

### **Submission of Counsel**

22. The submissions advanced by Mr. Rao can be, broadly, paraphrased as follows:

- (i) That the impugned order was a non-speaking order as it failed to advert to the principles analogous to Order 38 Rule 5 of the Code of Civil Procedures, 1908 (in short 'CPC'). In support of this submission, it was contended that it was for Zee to demonstrate that SD had an intention to dissipate or remove her assets from the jurisdiction of this Court. Reliance in this behalf has been placed on the observations of the Division Bench judgment of this Court rendered in *C.V Rao & Ors. vs. Strategic Port Investments KPC Ltd. and Ors.*, 2014 (145) DRJ 312 at pages 39 and 42 in paragraphs 51 and 54.
- (ii) That the learned arbitrator has failed to appreciate that there was no debt currently due and payable as per the contractual documents which form the basis of the application filed by Zee under Section 17 of the 1996 Act. In this behalf, it was submitted that Zee had consciously chosen to subordinate its claim to that of the Senior Debenture Holders. Thus, the argument which was advanced was that Zee could not recover/redeem its NCDs prior to the claims of Senior Debenture Holders being fully satisfied. In this behalf, my attention was drawn to Clauses 12.1 of the 2<sup>nd</sup> amended DTD and Clause 16.1 the 2<sup>nd</sup> DTD. Furthermore, reference was also made to the assertions made in Zee's letter dated 21.5.2014, which, according to the learned counsel, conveyed that Zee had accepted the decision taken of subordination and postponement and also to subject its right to repayment to that of the Senior Debenture Holders. It was contended that on account of this

commercial decision taken by Zee, it was to be paid interest at a higher rate. In this behalf, learned counsel also adverted to the fact that Zee had been paid approximately Rs.49 cores between 2014 and 2017.

- (iii) Zee's application under Section 17 of the 1996 Act was premature as there was already an interim order dated 4.12.2017 in place which was passed by the Debt Recovery Tribunal – II, Delhi (in short 'DRT') against SD. It was argued that since SD amongst others had been restrained from disposing of her assets and/or creating any third party interest in the assets, there was no imminent threat to Zee's interest. The argument was that unless Zee could demonstrate that SD was in the process of disposing of her assets, it could not have called upon the learned arbitrator to pass the kind of directions which were ultimately issued via the impugned order. Furthermore, in this behalf, the argument advanced was that the direction contained in the impugned order to provide a bank guarantee equivalent to 50% of the principal amount i.e. Rs.62.50 crores, was in the teeth of the order dated 4.12.2017 issued by the DRT.
- (iv) The impugned order failed to recognise the fact that the second personal guarantee was not alive at the relevant point in time due to amendments made to the 2<sup>nd</sup> DTD. In this behalf, reference was made to IDBI Trustee's letter dated 24.8.2017. Based on this letter, it was contended that with the retirement of Axis Trustee as the debenture trustee with the execution of the

3<sup>rd</sup> DTD and 2<sup>nd</sup> amended DTD, the second personal guarantee ceased to exist. It was sought to be emphasised that thereafter no fresh personal guarantee was executed by SD in favour of Zee which held NCDs with subordinate rights. In other words, the argument was that once Axis Finance had been paid, the 2<sup>nd</sup> DTD and second personal guarantee ceased to exist. In this behalf, reliance has been placed on provisions of Section 133 of the Indian Contract Act, 1872.

- (v) The fact that even according to Zee, the ICA dissolved upon Axis Finance being paid off would lead to a logical inference which was that the second personal guarantee ceased to operate once IDBI Trustee stepped into the shoes of Axis Trustee.
- (vi) My attention was drawn to the fact that this very aspect had been taken up by SD via an application filed under Section 16 of the 1996 Act to highlight that the arbitration proceeding was without jurisdiction.
- (vi)(a) This application, apparently, had not been disposed of by the arbitral tribunal at the point in time the arguments were heard in the instant appeal.

23. On the other hand, Mr. Darpan Wadhwa, learned Senior Counsel, in support of Zee's stand, largely, relied upon the impugned order. It was contended that there was no dispute that Zee had not been paid the amounts due under the NCDs held by it despite the fact that the date of the redemption had passed.

24. It was argued by Mr. Wadhwa that upon the redemption of the NCDs

held by Axis Finance though the ICA subsisting between Axis Finance and Zee came to an end the second personal guarantee offered by SD continued to operate thereafter solely for the benefit of Zee. For this purpose, learned counsel relied upon the 2<sup>nd</sup> amended DTD. Learned counsel also relied upon the letter dated 3.10.2017 issued by IDBI Trustee, whereby consent was given to Zee to appoint a sole arbitrator under the second personal guarantee. This apart, learned senior counsel also referred to the 2<sup>nd</sup> amended DTD. To buttress his submission, in particular, reference was made to the definition of the terms "guarantor" and "guarantee" contained in the 2<sup>nd</sup> amended DTD; the emphasis was on the fact that these definitions adverted to the second personal guarantee.

25. According to Mr. Wadhwa, the reliance on IDBI's letter dated 24.8.2017 was misconceived. It was contended that all that this letter conveyed was that no new personal guarantee was executed and that IDBI had to look for original documents. This aspect, according to the learned senior counsel, attained clarity when on 28.8.2017 IDBI Trustee gave its green-signal to Zee to enforce the second personal guarantee via arbitration. The fact that the second personal guarantee was operative and that the triggering of the arbitration agreement had IDBI's approval was sought to be demonstrated by relying upon the order dated 19.12.2017 passed by the Bombay High Court. It was contended, as noted hereinabove, that the Manager of IDBI Trustee had given its no objection to the appointment of a sole arbitrator.

26. Furthermore, learned counsel submitted that the argument advanced

on behalf of SD that the payment obligations towards Zee stood subordinated to the Senior Debenture Holders or postponed, was an untenable stand as the second personal guarantee did not fall within the ambit of the 2<sup>nd</sup> amended DTD. To highlight this aspect, learned counsel adverted to the fact that the IDBI Trustee, who is appointed as the trustee qua Series A and B NCDs as also *vis-a-vis* NCDs held by Zee, had not to date either raised an objection with regard to the existence and/or validity of the arbitration agreement or to the enforcement of the second personal guarantee by Zee. In other words, the argument was that, if at all, this objection could be raised it could only be raised by IDBI Trustee on behalf of Series A and B NCDs holders.

27. Besides this, learned senior counsel stressed upon the fact that this Court while exercising its appellate power under Section 37 of the 1996 Act would not supplant the discretion employed by the learned arbitrator unless the Court reaches a conclusion that in exercise of her discretion, the learned arbitrator had acted arbitrarily or in a capricious manner or the order passed was perverse or that the order ignored the well-established principles of law governing interlocutory injunctions. In support of this submission, reliance was placed by the learned senior counsel on the judgment of the Supreme Court in *Wander Ltd. & Anr vs. Antox India P. Ltd.*, 1990 (Supp.) SCC 727 and judgment of this Court in *Green Infra Wind Energy Limited vs. Regen Powertech Private Limited*, (2018) SCC OnLine Del. 8273.

28. Insofar as in answer to the submission advanced on behalf of SD that the learned arbitrator had failed to keep in mind the principles analogous to

the provisions of Order 38 and 39 of the CPC, Mr. Wadhwa submitted that in considering an application for interim directions, the learned arbitrator was not bound by the text of the aforementioned provisions as long the broad principles embedded therein were kept in mind. In this connection, it was sought to be highlighted that since the amount payable to Zee was not disputed, the risk of injury to it was much higher and therefore it carried a “lower risk of injustice”. Furthermore, learned senior counsel submitted that in passing the order, the learned arbitrator had noted the fact that SD after the event of default had occurred had proceeded to encumber its assets.

29. Besides this, the learned senior counsel stressed the point that since SD’s counsel during the course of hearing had indicated that the interim order passed by the DRT in favour of Series B NCDs holders had been lifted, it was all the more necessary for this Court to sustain the impugned order. Learned senior counsel went on to say that if, as contended on behalf of SD, the interim order passed by the DRT had been lifted then there was no impediment in SD furnishing a bank guarantee as directed by the learned arbitrator. In support of this submission, reliance was placed on the judgments of this Court in the case of *Ajay Singh vs. Kal Airways Private Limited & Ors* (2017) SCC OnLine Del 8934 and *Bestime Trading Co. Pvt. Ltd. vs. Alchmist Limited & Ors.*, 2017 SCC OnLine Del 12555.

### **Reasons**

30. I have heard the counsel for the parties and perused the record. What emerges therefrom is as follows:

- (i) Initially, the issuer i.e. SGGD had issued NCDs of the kind

described hereinabove to two entities i.e. Axis Finance and Zee.

- (ii) This transaction was encapsulated in the 1<sup>st</sup> DTD and the 2<sup>nd</sup> DTD.
- (iii) Furthermore, amongst others, security documents executed in favour of Axis Finance and Zee were the first personal guarantee and the second personal guarantee.
- (iv) SGGD redeemed the debentures held by Axis Finance once it issued a second set of NCDs (of the kind described hereinabove) to Credit Suisse and IOP aggregating to a sum of Rs.335 crores. These are referred to as Debentures of Series A and B.
- (v) This transaction was captured in 3<sup>rd</sup> DTD dated 21.5.2014.
- (vi) The entity/persons, who were parties to these documents were SGGD, SD, IDBI Trustee and a company by name Bestest Developers Pvt. Ltd.
- (vii) On the same date, that is, 21.5.2014, the 2<sup>nd</sup> amended DTD was executed amongst the following entities/persons:
  - (a) SGGD; (b) SD; (c) IDBI Trustees; and (d) Axis Trustee.
- (viii) Pertinently, Axis Trustee executed this document in its capacity as the confirming party.
- (ix) Pertinently, the 2<sup>nd</sup> DTD was, as indicated above, amended and restated via the Amended and Restated Debenture Trust Deed dated 21.5.2014 i.e., 2<sup>nd</sup> amended DTD. Admittedly, the maturity date of NCDs held by Zee was shifted to 30.6.2017. In this behalf, SGGD had addressed a letter dated 20.5.2014 to Zee. Via this letter, SGGD had also agreed to provide an exit

option to Zee by 30.9.2015. Zee exercised this option on 3.9.2015. Since SGGD opposed the exit option vide its communication dated 30.9.2015, disputes arose between SD and Zee.

- (x) On the issue of redemption of NCDs held by Zee, correspondence was exchanged between SGGD and Zee. The correspondence on this aspect commenced from November 2015 and ended with Zee approaching the Bombay High Court in December 2017.

31. Given this backdrop, the following broad aspects emerge for consideration:

- (i) Whether with the dissolution of the ICA upon redemption of the debt owed by SGGD to Axis Finance, did the personal guarantee dated 30.9.2013 furnished by SD get dissolved?
- (ii) Since Zee was a subordinate debenture holder, was the demand for payment premature?
- (iii) Could Zee while demanding redemption of the NCDs held by it claim monies from SD under the second personal guarantee?
- (iv) Whether the impugned order had been passed by the learned arbitrator without bearing in mind the principles analogous to Order 38 and 39 of CPC?

**Issue Nos. I, II, III**

32. Insofar as the first aspect is concerned, which is, as to whether upon redemption of the debt owed by SGGD to Axis Finance under the

1<sup>st</sup> DTD, the second personal guarantee survived, I may only indicate that the learned arbitrator has referred to various clauses of the guarantee including Clause 2.2, which shows that the personal guarantee in issue is a continuing guarantee. For the sake of convenience, the said Clause is set out hereafter:

***“2.2 Continuing Guarantee***

*This Guarantee is a continuing guarantee and will extend to the ultimate balance of all payable by the Issuer under the Debenture Documents, regardless of any intermediate payments or discharge in whole or in part. The obligations of the Guarantor under this Guarantee will cease (sic:cease) on the date on which the Secured Obligations are unconditionally and irrevocably satisfied.”*

*(emphasis is mine)*

33. Therefore to my mind, the argument that with the ICA executed between Axis Finance and SGGD having been dissolved, presumably upon payment of money to the former the second personal guarantee would also get effaced, cannot be accepted. What is clear though that Zee accepted the status of a Subordinate Debenture Holder. Nothing has been shown to me by way of any provision in the second personal guarantee which is suggestive of the fact that it got effaced with the payment of the debt of Axis Finance. On the other hand, the definition of the term “guarantee” in the 2<sup>nd</sup> amended DTD adverts to personal guarantee executed by SD on or about the date of the execution of the original deed i.e. the 2<sup>nd</sup> DTD. Therefore, clearly there is a recognition of the fact that the second personal guarantee continued to remain in operation. The argument based on Section 133 of the

Contract Act that with the execution of the 2<sup>nd</sup> amended DTD, whereby IDBI Trustee donned the robes of the trustee in place of Axis Trustee, relieved SD of her obligation as a guarantor is untenable as she is not only a party to the 2<sup>nd</sup> amended DTD but also, as indicated above, continued to hold out that she would be liable under the second personal guarantee. Furthermore, if this was the situation then surely IDBI Trustee via its letter dated 3.10.2017 would not have given its consent to Zee to appoint a sole arbitrator under the second personal guarantee. Therefore, the submission advanced on behalf of SD that the second personal guarantee was no longer in existence and that by the same logic it could not be arrayed as a party to the arbitration proceedings, in my opinion, is a submission which does not have much substance.

34. Therefore, while it is an accepted fact that Zee is a Subordinate Debenture Holder, its right to seek recovery of its debts by enforcing the second personal guarantee issued by SD cannot be impeded as that has nothing to do with the Senior Debenture Holders (Series A and B). The aforesaid discussion, to my mind, should answer the second and third aspect.

#### **Issue No. IV**

35. This brings to me with the argument raised on behalf of SD that the principles analogous to Order 38 and 39 had not been borne in mind by the learned arbitrator while passing the impugned order.

36. Clearly, in this argument is embedded the unstated position that the arbitrator is not bound by the provisions of Orders 38 and/or 39 of the CPC; what he or she is required to follow are the principles analogous to these

provisions. (See *Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd.*, (2007) 7 SCC 125 and *Ajay Singh vs. Kal Airways Private Limited & Ors.*, (2017) SCC OnLine Del 8934)

37. Keeping in mind this governing principle one requires to notice the following facts:

- (i) Firstly, SD created a fresh encumbrance on her residential property after the event of default had occurred and arbitration had been invoked by Zee; an act which is demonstrative of the fact that there is perhaps an intent to delay or obstruct the execution of award that may be passed against SD. An explanation was sought to be given, on behalf of SD, that the residential property was always encumbered since the date of purchase i.e. 2012 and that, in 2017 the mortgage loan was merely transferred from HDFC Bank to Punjab National Bank. Even if one were to take this explanation to be correct, this occurrence would perhaps fall within the scope and ambit of the circumstance described as “Events of Default” as it could jeopardise the security interest of Zee. SD’s transfer of mortgage loan without the approval of Zee, to my mind, would create an apprehension in the mind of an unpaid NCD holder i.e. Zee that there was an attempt to create a circumstance that the award if passed in its favour, would be a paper-award.
- (ii) Secondly, the fact that there is no dispute as regards occurrence of default in respect of redemption of NCDs held by Zee.
- (iii) Thirdly, the fact that SGGD is already facing litigation; and
- (iv) Fourthly, it chose not to give an exit option to Zee despite a representation being made in that behalf by it via its letter dated 20.5.2014.

37.1 Given the aforesaid circumstance, it was quite appropriate for Zee to move for seeking security from SD and for the learned arbitrator to issue a direction in that behalf. A direction of this kind becomes all the more necessary in view of the fact that during the course of arguments in the appeal, it was conveyed that DRT had vacated the interim order qua Series B Debenture Holders.

38. Besides this, to my mind, what is most crucial is that the Court while exercising appellate jurisdiction under Section 37 of the 1996 Act is not required to interfere with discretion employed by an arbitrator while passing orders under Section 17 of the 1996 Act as long the course adopted is, broadly, wholesome, maintains a robust balance between the interest of warring parties, and is not arbitrary or capricious. In other words, the order passed by the learned arbitrator is not one which transcends the bounds of reasonableness. An appeal impugning the exercise of discretion by an arbitrator can only be an "appeal on principle". (See *Wander Ltd v Antox India P. Ltd.*, 1990 (Supp) SCC 727)

39. In my opinion, the learned arbitrator has kept in mind largely the principles analogous to the provisions of Orders 38 and 39 of the CPC. Zee not only has, in my view, a *prima facie* case but also the balance of convenience appears to be, presently, in its favour. If an order of a kind which the learned arbitrator has passed is not sustained, it could seriously jeopardise the interest of Zee.

40. The argument advanced on behalf of SD that there is no pleading whatsoever to the effect that Zee carries an apprehension that SD would transfer, alienate or dispose of its movable and immovable assets by creating

third party rights or transferring the same to third parties is not correct, as there is a broad averment to that effect in paragraph 8 of the Section 17 application filed on behalf of Zee. The fact that the pleading is not in terms of the provisions of Order 38, in my view, cannot bind down the jurisdiction of the arbitrator to grant relief if the arbitrator otherwise based on the material placed before it gets a sense that the aggrieved party may end up with a paper-award if directions are not issued to the defendant in the action for furnishing a security. Undoubtedly, in arriving at this conclusion, the arbitral tribunal is neither bound by the provisions of CPC nor those of the Indian Evidence Act, 1872 —an aspect which emerges quite clearly upon reading the provisions of Subsection (1) of Section 19 of the 1996 Act.

41. Therefore, for the foregoing reasons, I am not inclined to interdict the order passed by the learned arbitrator.

42. The captioned appeal is dismissed. The parties are, however, left to bear their own costs.

**(RAJIV SHAKDHER)**  
**JUDGE**

**MAY 31, 2019**/pmc