

Comp.A.Nos.77 to 79 and 489 to 491 of 2017

Comp. A.Nos.77 and 78 of 2017

and

Comp.A.Nos.489 to 491 of 2017

in

C.P.No.275 of 2010

SENTHILKUMAR RAMAMOORTHY J.

Comp. A.Nos.77 to 79 of 2017 were filed by the company in liquidation represented by its ex-Directors and by a contributory. In the said applications, the following relief is prayed for:

PRAYER IN COMP.A.NO.77 OF 2017: To transfer Arbitration Proceedings SCH-5480: Teledata vs. Euram, pending before the Vienna International Arbitration Centre between the first Applicant and first Respondent to the file of this Court.

PRAYER IN COMP.A.NO.78 OF 2017: Pending transfer to stay all further proceedings SCH-5480: Teledata vs. Euram.

PRAYER IN COMP.A.NO.79 OF 2017: To direct the Respondents 2 to 6 to jointly and severally pay the company in liquidation, the sum of US \$ 32,470,974.97 together with interest at 6% per annum

from 30.11.2011 along with future interest at the rate of 6% per annum till the date of payment.

2.Upon receipt of notice in Comp.A.Nos.77 to 79 of 2017, the European American Investment Bank AG(EURAM) filed Comp.A.Nos.489 to 491 of 2017 praying for the following relief:

PRAYER IN COMP. A.NO.489 OF 2017: To dismiss Comp. A.No.77 of 2017 in C.P.No.275 of 2010 as not maintainable.

PRAYER IN COMP. A.NO.490 OF 2017: To dismiss Comp. A.No.78 of 2017 in C.P.No.275 of 2010 as not maintainable.

PRAYER IN COMP. A.NO.491 OF 2017: To dismiss Comp. A.No.79 of 2017 in C.P.No.275 of 2010 as not maintainable.

3.While the above applications were pending adjudication, it is the admitted position that the first Applicant in Comp. A.Nos.77 to 79 of 2017 withdrew the Arbitration Proceeding pending before the Vienna International Arbitration Centre. As a consequence, Comp. A.Nos.77 and 78 of 2017, which are to transfer the said Arbitration Proceedings to the file of this Court and pending such transfer for stay of the said Arbitration Proceedings, are rendered infructuous.

Accordingly, the said Applications are liable to be dismissed as infructuous.

4. As a corollary, Comp. A.Nos.489 and 490 of 2017, which are filed to dismiss the Comp. A.Nos.77 and 78 as not maintainable, are also rendered infructuous. Therefore, the said Applications are liable to be dismissed as infructuous. As a result, it is proposed to dispose of Comp. A. Nos.77 and 78 of 2017 and Comp. A.Nos.489 and 490 of 2017 as infructuous. Comp. A.No.79 of 2017 is for the payment of the sum specified therein to the company in liquidation and this Application is required to be decided notwithstanding the withdrawal of the Arbitration Proceedings. Consequently, Comp. A. No.491 of 2017, which is an Application to dismiss Comp. A.No.79 of 2017 as not maintainable, also survives notwithstanding the withdrawal of the Arbitration Proceedings. By this Order, it is proposed to dispose of the infructuous applications, as indicated above, and Comp.A.No.491 of 2017 which relates to the maintainability of Comp.A.No.79 of 2017. For the sake of convenience, the Applicant in Comp.A. Nos. 489 to 491 of 2017 is referred to as Euram or the Applicant and the Respondents in the said applications are referred

to as Respondents, as per their respective rank in the said Applications, in this Order.

5.The learned counsel for Euram, Mr. Anirudh Krishnan, opened his submissions by referring to a diagrammatic representation of the transactions and also narrated the sequence of events that resulted in the filing of the present applications. He pointed out that the Applicant/Euram is a bank in Austria and that Euram provided a subscription loan to an entity called Vintage FZE, Respondent 7 herein(FZE). By utilising the said subscription loan, the said Vintage subscribed to Global Depository Receipts(GDRs) issued by various issuer companies, including the company in liquidation. On receipt of the subscription money, these issuer companies issued GDRs to Vintage. The subscription money was, in turn, remitted by the issuer companies into the account maintained by such companies in Euram. The subscription loan, which was extended by the Applicant to Vintage, was, inter alia, secured by a pledge of the amounts remitted into the accounts of the issuer companies in Euram. For this purpose, one such issuer company, i.e. the company in liquidation, executed both an Escrow Agreement and a Pledge

Agreement with Euram. Both these agreements contain an arbitration clause. On the basis of an alleged breach of the terms of the said agreements, Euram invoked the pledge and thereby debited the account of the company in liquidation. This action was challenged by the company in liquidation, through its ex-director, by filing a suit before the Commercial Court in Austria. The said suit was dismissed on the ground that an arbitration clause is contained in the Escrow Agreement between the parties. In response to the contention that the Pledge Agreement is disputed by the company in liquidation, the Courts in Austria held that the execution of the Escrow Agreement is not in dispute and that, therefore, the Arbitration Proceeding should be conducted under the Escrow Agreement and that the arbitration clause contained therein is sufficient to assume and exercise jurisdiction over the dispute relating to the Pledge Agreement. This position was confirmed in appeals up to the Supreme Court of Austria. Accordingly, the company in liquidation, through its ex-director, commenced an Arbitration Proceeding before the Vienna International Arbitration Centre. After commencing Arbitration Proceedings, the company in liquidation, through its ex-director, and a contributory filed Comp.

A.Nos.77 to 79 of 2017 praying for the remedies specified supra. Moreover, the company in liquidation failed to prosecute the Arbitration Proceedings by remitting the requisite deposit/fees and, therefore, the Arbitration Proceedings were terminated.

6. In these circumstances, the thrust of the submissions of the learned counsel for Euram was that this Court does not have or should decline to exercise jurisdiction and, therefore, hold that Comp. A.Nos.77 to 79 of 2017 are not maintainable. In this regard, the first contention of the learned counsel was that when the seat of arbitration is specified as Vienna and when the governing law is Austrian law, the jurisdiction of this Court is ousted. In support of this submission, the learned counsel referred to the judgments, which are set out below along with context and principle:

(i) **Enercon (India) Ltd vs. Enercon GMBH [2014] 5 SCC 1**, wherein, at paragraphs 137 and 138, the Hon'ble Supreme Court held that "once the seat of arbitration has been fixed in India, it would be in the nature of exclusive jurisdiction to exercise the supervisory powers over the arbitration and the Courts in England cannot exercise concurrent jurisdiction."

(ii)**Reliance Industries Limited and another vs. Union of India [2014] 7 SCC 603**, wherein, at paragraph 45, the Hon'ble Supreme Court held that "the parties had consciously agreed that the judicial seat of the arbitration would be London and that the Arbitration Agreement will be governed by the laws of England, it was no longer open to them to contend that the provisions of Part I of the Arbitration Act would also be applicable to the arbitration agreement."

(iii)**Union of India vs. Reliance Industries Limited and others [2015] 10 SCC 213**, wherein, at paragraph 18, the Hon'ble Supreme Court held that " Part I of the Arbitration Act, 1996 would not apply where the juridical seat of arbitration is outside India or the law governing the arbitration agreement is a law other than Indian law."

(iv)**Indus Mobile Distribution (P) Ltd vs. Datawind innovations (P) Ltd and others [2017] 7 SCC 678**, wherein, at paragraph 19, the Hon'ble Supreme Court held that "the moment the seat is designated, it is akin to an exclusive jurisdiction clause."

7.The second contention of the learned counsel for Euram was that the principles of comity of courts requires that this Court refrain from exercising jurisdiction. In support of this submission, the learned counsel referred to and relied upon the judgments, which are set out below along with the context and principle:

(i)**World Sport Group (Mauritius) Ltd. vs. MSM Satellite(Singapore) Pte. Ltd [2014] 2 ABR 349**, wherein, at paragraph 21, the Hon'ble Supreme Court held that "the Bombay High Court was obliged to refer the parties to arbitration unless it found that the agreement referred to in Section 45 of the Act was null and void, inoperative or incapable of being performed."

(ii)**Surya Vadanam vs. State of Tamil Nadu and others [2015] 5 SCC 450**, wherein, at paragraph 50, the Hon'ble Supreme Court held that "the principle of "comity of courts" should not be jettisoned, except for special and compelling reasons. The Hon'ble Supreme Court further held that if the principle of comity of courts is accepted, we must give due respect even to such orders (interim orders) passed by a foreign court."

(iii)**GOLDEN ENTRANCE SHIPPING SA vs. RMA WATANYA SA AND TWO OTHERS [2016]EWHC 2110(Comm)**, wherein, at

paragraph 28, the High Court of England held that "it is the principle of the common law that a litigant who has voluntarily submitted himself to the jurisdiction of the Court by appearing before it cannot afterwards dispute its jurisdiction."

(iv) **O.P.Verma vs. Lala Gehrilal and another, AIR 1962 Raj 231**, wherein, at paragraph 27, the Division Bench of the Rajasthan High Court held that a party having taken a chance of a judgment in his favour by submitting to the jurisdiction of the Court should not be allowed to turn round when the judgment goes against him to say that the Court had no jurisdiction.

(v) **Potluri Rajeswara Rao vs. Syndicate Bank [2000] ALD 508**, wherein, at paragraph 11, the Andhra Pradesh High Court held that mere submission is not sufficient but the relevant foreign court should have jurisdiction from the point of view of private international law.

8.The third contention of the learned counsel for Euram was that Section 446(2) of the Companies Act,1956 (CA 1956) does not have overriding effect over a subsequent statute. In specific, the learned counsel pointed out that the non obstante clause in Section

446(2) would override statutes existing as of the date of enactment of Section 446(2) but not subsequent statutes such as the Arbitration and Conciliation Act, 1996 (the Arbitration Act). In this connection, he referred to the judgment of the Hon'ble Supreme Court in **National Insurance Company Limited vs. Sinitha and others**[2012] 2 SCC 356, wherein, at paragraphs 13 to 16, the Hon'ble Supreme Court held that the non-obstante clause in Section 144 of the Motor Vehicles Act, 1988 would not override Section 163-A thereof because Section 163-A was introduced subsequently with effect from 14.11.1994.

9. The fourth contention of the learned counsel for Euram was that the jurisdiction of the Court under CA 1956 is limited to the territory of India and is not extra-territorial. In this regard, he also referred to the judgment in **MST JAGIR KAUR AND ANOTHER vs. JASWANT SINGH**, AIR 1963 SC 1521, wherein, the Hon'ble Supreme Court held that Section 488(8) of the Cr.P.C, which uses the words "resides and last resided", would only apply to residents within the territory of India because the Cr.P.C is territorial in operation. By relying on the said judgment, the learned counsel

submitted that CA 1956 is also restricted in its operation to the territory of India and cannot be applied extra-territorially. By contrast, he submitted that the Information Technology Act, 2000, the Foreign Exchange Management Act, 2000 and the Indian Penal Code 1860 have been expressly extended beyond the territory of India.

10.The fifth contention of the learned counsel for Euram was that only the Provisional Liquidator or Official Liquidator can initiate proceedings on behalf of the company in liquidation. In support of this submission, he referred to and relied upon the judgments, which are set out below along with the context and principle:

(i)M/s.Bakshi Chemicals (P) Ltd vs. Punjab National Bank and others, 2016 SCC Online P & H 2846, wherein, at paragraph 6, the High Court of Punjab and Haryana referred to the fact that only the Official Liquidator has the power to prosecute the proceedings on behalf of the company in liquidation once a winding up order is passed.

(ii)Great Indian Motor Works Ltd. Vs. Employees and another, [1960] 1 SCC 13, wherein, at paragraph 9, the Hon'ble

Supreme Court held that it is only the Liquidator who is authorised with the sanction of the Court to institute any suit or other legal proceedings in the name and on behalf of the company in liquidation.

(iii)**Assistant Commissioner, Ernakulam. vs. Hindustan Urban Infrastructure Limited and others, [2015] 3 SCC 745,** wherein, at paragraph 47, the Hon'ble Supreme Court held that the powers conferred upon the liquidator under Section 457 of the Companies Act, 1956 can be exercised by him alone and he cannot authorise any other person to exercise those powers.

11.The learned counsel also pointed out that the Securities and Exchange Board of India (SEBI) had conducted an investigation and concluded that Euram is not liable to be prosecuted and concluded the proceedings as against Euram by merely warning Euram. He further submitted that for all the above reasons, the Applications filed by the company in liquidation, through its ex-directors, and the contributory are not maintainable.

12.In response, Mr. Krishna Ravindran, the learned counsel for Respondents 4 and 5, namely, Mr. Arun Panchariya and Pan Asia Advisors Ltd.(now Global Finance and Capital Limited), in Comp. A.

Nos.489 to 491 of 2017 submitted that the Applicants in Comp. A.Nos.77 to 79 of 2017 do not have the locus standi to maintain the Applications and that the Applications constitute an abuse of process. The learned counsel further submitted that in the suit and arbitration in Austria, these Respondents were not parties. Therefore, he submitted that the said persons are neither necessary nor proper parties and should not have been joined as parties in these Applications. He further submitted that the Applications are premature because SEBI only recently initiated proceedings in respect of the company in liquidation by issuing notices to all concerned, including the ex-directors of the company in liquidation. In this regard, he pointed out that the earlier proceedings of SEBI did not relate to the company in liquidation whereas the present proceedings do. For all these reasons, he concluded his submissions by contending that there is no basis to entertain Comp. A.Nos.77 to 79 of 2017 under Section 446(2) of CA 1956.

13. Thereafter, submissions were advanced by Mr. Karthik Seshadri, the learned counsel for Respondents 1 and 2 (i.e. the Applicants in Comp. A.Nos.77 to 79 of 2017). He opened his

submissions by pointing out that the Pledge Agreement was not disclosed to the ex-Directors of the company in liquidation and that the company in liquidation became aware about the pledge only when the pledge was invoked and the amounts that were earlier credited in the account of the company in liquidation in Euram were debited. In order to substantiate the submission, he referred to the statement of account at Page No.204 of the typed set of papers filed by the said Respondents (as applicants in Comp. A. Nos.77 to 79 of 2017). The said statement of accounts reflects that a sum of USD 36,966,927.05 is available in the account of the company in liquidation as of 08.11.2011. He, thereafter, referred to the statement of account at Page No.222 of the same typed set of papers, which shows that a sum of USD 32,360,849.93 was debited by invoking the pledge. The learned counsel further submitted that this amount of USD 32,360,849.93 is the money of the company in liquidation and that Comp. A.Nos.77 to 79 of 2017 were filed in order to ensure that the money is brought back into the account of the company in liquidation.

14.He, thereafter, referred to various provisions of CA 1956, namely, Section 441 and 446(2) and pointed out that the debit was made on 18.11.2011, i.e. after the commencement of winding-up as per Section 441 of CA 1956. Consequently, he submitted that the said debit is liable to be declared as void as per the provisions of the CA 1956, including Section 531 thereof.

15.On the question of locus standi, he referred to the judgment of the Hon'ble Supreme Court in **Rishabh Agro Industries Ltd vs. P.N.B. Capital Services Ltd, [2015] 5 SCC 515 (the Rishab Agro Industries case)**, wherein, at paragraph 10, the Hon'ble Supreme Court held that "despite appointment of the Official Liquidator, the Board of Directors continue to hold all residuary powers for the benefit of the company which includes the power to take steps for its rehabilitation. The Board of Directors, in the instant case, were not in any way by any judicial order debarred from taking recourse to the provisions of the Act for the purpose of rehabilitation of the Company."

16.In response to a question as to why Mr.Arun Panchariya and others were not made parties to the suit and Arbitration Proceedings in Vienna, he submitted that the ex-Directors were not aware about the complicity of the said persons in the transaction in question until proceedings were initiated before this Court. On that basis, he justified the fact that the said persons had not been impleaded previously. In this regard, he also adverted to the averments in the affidavit filed in support of Comp.A. 77 to 79 of 2017, wherein the role played by each of the Respondents therein is set out.

17.His next contention was that this Court has extremely wide jurisdiction under Section 446(2) of CA 1956 and that Comp. A.No.79 of 2017 is clearly maintainable. In support of this submission, he referred to and relied upon the judgments, which are set out below along with context and principle:

(i)V.Radhakrishnan and 3 others vs. P.R.Ramakrishnan and 10 others, 1994 – 1 – L.W. 163(the V.Radhakrishnan case), wherein, at paragraph 34, the Division Bench of this Court held that a creditor or contributory has the right to approach the

Court and complain about the non-exercise of powers by the Official Liquidator under Section 457 of CA 1956.

(ii)**Sudarsan Chits (I) Ltd. vs. O.Sukumaran Pillai and others, [1984] 4 SCC 657**, wherein, at paragraphs 8 and 9, the Hon'ble Supreme Court recognized the wide jurisdiction of the Court under Section 446(2) and that the said power could be exercised at any time after the appointment of the Official Liquidator as the Provisional Liquidator.

(iii)**Rajratna Naranbhai Mills Co. Ltd. vs. New Quality Bobbin Works, [1973] 43 Comp Cas 131**, wherein, at paragraph 16, the Gujarat High Court held that Section 446(2) conferred a special jurisdiction on the Court and that it is necessary to place a liberal construction on Section 446(2) so as to widen the jurisdiction of the High Court in dealing with all questions arising in the course of winding up.

(iv)**Jetivia SA and another vs. Bilta (UK) Limited and others, [2015] UKSC 23**, wherein, at paragraphs 108 to 110, the UK High Court held that Section 213 of the Insolvency Act has extra-territorial application. Similar conclusions are contained in Paragraph 213 to 215 of the said judgment.

(v)**Chatan Arvind Bhagat and others vs. M/s.Maxworth Orchards (I) Ltd and others, in O.S.A.Nos.384 to 386 of 2007, order dated 21.07.2009**, wherein, at Paragraph Nos.13 and 14, the Division Bench of this Court concurred with the view expressed by the Gujarat High Court in **Rajratna Naranbhai Mills Co. Ltd., vs. New Quality Bobbin Works(cited supra)** and held that an order of winding up under Section 447 operates in favour of all the creditors and contributories of the company as if it had been made on the joint petition of all the creditors and contributories. It was further held therein that the object of winding up proceedings of a company is to collect all the assets, properties and choses-in-action belonging to a company under liquidation and to distribute them to various persons as per the provisions of CA 1956.

18.By relying upon the above judgments, the learned counsel for Respondents 1 and 2 concluded his submissions by pointing out that Comp. A.No.79 of 2017 is maintainable under Section 446(2) of CA 1956 and that, therefore, Comp. A.Nos.489 to 491 of 2017 are liable to be dismissed. The other counsel for the Respondent adopted the arguments of Mr. Karthik Seshadri.

19.By way of rejoinder submissions, the learned counsel for Euram explained as to why the company in liquidation offered a pledge of amounts remitted in the account of the company in liquidation in Euram as a security for the loan taken by Vintage. He reiterated that Section 446 of CA 1956 does not override Section 45 of the Arbitration Act, which mandates that the dispute should be referred to arbitration, if an arbitration clause is contained in the agreement between the parties. He also pointed out that the view taken by the Austrian Courts to the effect that the Escrow Agreement is valid and that the Arbitration Proceedings should be conducted under the Escrow Agreement should be respected as per the comity of nations. He further submitted that the only relevant consideration under Section 45 of the Arbitration Act is whether the arbitration agreement is valid and whether the dispute is capable of settlement by arbitration. In this regard, he submitted that there are no averments in the affidavit in support of Comp. A.Nos.77 to 79 of 2017 to the effect that the arbitration agreement is void.

20.By relying upon the judgment of the Hon'ble Supreme Court in **National Thermal Power Corporation vs. The Singer**

Company and others, AIR 1993 SC 998, the learned counsel submitted that where the governing law is Austrian law and the seat of arbitration is in Vienna, only Austrian law applies.

21.His next submission was that while the winding up proceedings are proceedings in rem, the relief requested in the Applications filed by the ex-Directors is a relief in personam. In this connection, he referred to and relied upon paragraph 23 of the judgment of the Hon'ble Supreme Court in **Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd and others, AIR 2011 SC 2507**. He also relied upon the judgment of the Hon'ble Supreme Court in **The Rajah of Vizianagaram vs. Official Receiver, Vizianagaram, AIR 1962 SC 500**, wherein, at paragraph 13, the Hon'ble Supreme Court held that the courts of a country dealing with the winding up of a company can ordinarily deal with the assets within their jurisdiction and not with the assets of the company outside their jurisdiction. He also relied upon the judgment of the Delhi High Court in **Morepen Finance Ltd. vs. Reserve Bank of India, 2004 SCC Online Del 685**, wherein, at paragraph 24, the Delhi High Court held that the essence of

fraudulent preference is the giving of an improper benefit to a few creditors leading to inequality between them and the generality of creditors. By relying upon the said judgment, he contended that the creditors were not treated unequally in this case and, therefore, there is no fraudulent preference.

22. In response to a question as to whether the transaction in Austria is void under Section 536(2) of CA 1956, he submitted that the enforcement of a pledge is not a disposition of property as per Section 536(2) of CA 1956. In order to substantiate this submission, he referred to and relied upon the judgment in **Bank of Maharashtra vs. Official Liquidator, Navjivan Trading Finance Pvt. Ltd, (1999) 96 Comp. Cas 234(Guj)(the Bank of Maharashtra case)**, wherein, at paragraph 20, the Division Bench of the Gujarat High Court held that Section 536(2) of CA 1956 only applies to a disposition of property made after the commencement of winding-up and that the creation of the charge over the FDRs is the disposition and not the subsequent action to enforce the said charge.

23.The records were examined and the oral and written submissions of all the parties were considered carefully. In this case, the Provisional Liquidator was appointed on 18.06.2014 and, thereupon, as per Section 441 of the CA 1956, the winding up is deemed to have commenced from the date of presentation of the winding up petition, which is in July 2010. Keeping the above material dates in mind, the relevant transactions should be examined. The relevant transactions took place in the year 2010, when the loan agreement, Escrow Agreement and Pledge Agreement were executed on or about 26.02.2010. The enforcement of security by debit happened, later, on or about 06.03.2012. Therefore, it is clear that the creation of the security took place before the commencement of winding-up but the security was called in or enforced and the account of the company in liquidation was debited, as a consequence, after the commencement of winding-up. In this connection, it may be noted that the Pledge Agreement was executed in Mumbai, India, and pertains to two assets, namely, the Pledged Securities and the Pledged Time Deposit Account, with the latter being relevant for the purposes of this case. In addition, there is no doubt that powers under Section 446(2) of CA 1956 may be

invoked at any time after the appointment of the Provisional Liquidator as held by the Hon'ble Supreme Court in **Sudarsan Chits (I) Ltd. vs. O.Sukumaran Pillai and others, [1984] 4 SCC 657(cited supra).**

24.The contentions of the learned counsel for Euram should be examined in the above background. Even before considering the jurisdictional challenge on the basis of the arbitration clause, the challenge on the basis that CA 1956 does not have extra-territorial operation may be considered. This contention was canvassed mainly on the basis that Section 1(3) states that CA 1956 extends to the whole of India. According to the learned counsel for Euram, this implies that it does not apply extra-territorially. However, many provisions of CA 1956, including but not limited to Sections 4, 50, 125(5), 125(6), 156, 157, on a plain reading, apply extra-territorially. Consequently, it is clear that CA 1956 applies, where appropriate, both to assets and persons situated outside India albeit subject to the caveat that there would be an interplay between the laws of that country and CA 1956 and each law may apply for a different purpose. By way of illustration, this would be clear if the

relevant clauses of Section 125 of CA 1956 are examined. Therefore, this contention of the learned counsel for Euram is rejected. The principal ground on which the learned counsel for Euram contends that the jurisdiction of this Court is ousted or, in any event, should not be exercised is on account of the existence of an arbitration clause in the Escrow Agreement and Pledge Agreement between the Bank and the company in liquidation. The ancillary ground is that the governing law under both the Escrow Agreement and Pledge Agreement is Austrian law and the seat of arbitration is in Vienna, Austria and, therefore, this Court should direct the company in liquidation and Euram to resolve their disputes through arbitration as per the contractual mechanism in this regard. However, it is to be noted that there are multiple parties in Comp. A.Nos.77 to 79 of 2017, namely, Respondents 3-8 therein, who are admittedly not parties to the arbitration clause in the Escrow Agreement or the Pledge Agreement and the direction for payment of money is requested jointly and severally against Respondents 2-6 in Comp.A.79 of 2017. Further, it is evident from the proceedings initiated by SEBI that all these parties appear to be involved in the transactions relating to the GDR issue, which is closely linked to this

transaction. In recognition of such involvement, SEBI has issued notices to all these persons, including the ex-Directors of the company in liquidation, Euram and Respondents 4 and 5 in C.A. Nos. 489 to 491 of 2017 and the SEBI proceedings relating to the company in liquidation are at a nascent stage. In these facts and circumstances, it cannot be concluded, at this juncture, that the said parties are neither necessary nor proper parties to these Applications. If it cannot be concluded that these parties are not necessary or proper parties and keeping in mind the fact that relief is requested jointly and severally against Respondents 2-6, the principles laid down in **Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya (2003) 5 SCC 531** and, in particular, in paragraphs 13-17 thereof, albeit in the context of an application under Section 8 of the Arbitration Act, would apply and the dispute cannot be bifurcated and referred to arbitration only as regards the company in liquidation and Euram. Indeed, even in **Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. (2013) 1 SCC 641**, which arose out of an application under Section 45 of the Arbitration Act, the Hon'ble Supreme Court held, in paragraph 99, that the question as to whether the dispute can be referred to

arbitration would turn on the facts although, in that case, in light of the fact that all the parties were claiming through or under agreements that contained arbitration clauses, and only two parties were not signatories thereto, the dispute was referred to arbitration. By contrast, as stated above, in this case, except two parties, the others are not parties to an arbitration agreement and it cannot be said that the non-signatories claim through the signatories. Therefore, in the facts and circumstances of this case, notwithstanding the arbitration clause in the Escrow Agreement and the Pledge Agreement, the dispute cannot be bifurcated and referred to arbitration and all the judgments cited by the learned counsel for Euram with regard to the arbitration clause and its implications are distinguishable because of the existence of non-signatories, in this case, who do not claim through the signatories.

25.This leads to the next contention as to whether this Court should decline to exercise jurisdiction on account of the need to maintain comity of nations. In this regard, it is relevant to note that the arbitration proceedings in Vienna, Austria, were terminated and legal proceedings are not pending in any court currently. In effect,

there are no legal proceedings in relation to the relevant transactions except for the Applications before this Court. This is an additional reason as to why this Court is not required to decline to exercise jurisdiction on the ground of comity of nations and the judgments cited in support of the principle of comity of nations are distinguishable on the above basis and because no decision on the merits of the dispute was pronounced by any other court or tribunal either in arbitration or otherwise. Moreover, the learned counsel for Euram also contended that the Official Liquidator is the only person who is entitled to represent the company in liquidation in legal proceedings, including arbitration proceedings. This contention is tenable to the extent that the Official Liquidator is the person vested with the responsibility of managing the assets and affairs of the company in liquidation and, therefore, has the primary responsibility but that does not mean that the ex-directors or other interested persons cannot apply to the Companies Court to protect the interest of the company in liquidation as held both in the **Rishab Agro Industries case**, in the specific context of a company under provisional liquidation, and the **V.Radhakrishnan case** (both cited supra). Moreover, in this context, the question that arises for

consideration is whether the Official Liquidator should be compelled to initiate or prosecute arbitration proceedings in Vienna, Austria notwithstanding Section 446(2) of CA 1956. While on this issue, the contention of the learned counsel for Euram that the non-obstante clause in Section 446(2) of CA 1956 does not override Section 45 of the Arbitration Act may be also dealt with. There is no doubt that, in the event of incompatibility or conflict, the said non-obstante clause would only override provisions in other statutes that had been enacted previously and were on the statute book on the date of entry into force of Section 446. Nevertheless, in this case, there is no application under Section 45 of the Arbitration Act at present. Besides, as discussed above, in view of the fact that there are several non-signatories to the arbitration agreement, reference to arbitration cannot be made in this case. Therefore, in effect, it is immaterial that Section 446 of CA 1956 does not override Section 45 of the Arbitration Act. The Hon'ble Supreme Court in **Sudarsan Chits (I) Ltd case(cited supra)** explained the object and purpose of Section 446(2) of CA 1956 and, in particular, stated that it is intended to enable the company in liquidation to consolidate claims and proceedings in respect of the company in liquidation and

thereby ensure that the Official Liquidator is in a position to carry out liquidation effectively and efficiently. Keeping this object and purpose in mind, the distinction that the learned counsel for Euram made between the winding-up proceeding being a proceeding in rem, and this action- to recover the amounts that were in the bank account of the company in liquidation in Euram-being a proceeding in personam, may be technically valid but becomes immaterial given its impact on the proceeding in rem. It is also true that the powers of this Court under Section 446(2) of CA 1956 are extremely wide and there is every reason to construe such powers liberally and widely as held by the Gujarat High Court in **Rajratna Naranbhai Mills Co. Ltd. vs. New Quality Bobbin Works(cited supra)**. In such circumstances, it would be totally inequitable and unnecessary to direct the Official Liquidator to initiate arbitration proceedings in Austria for this purpose and, in any event, as discussed above, many of the respondents in Comp. A.Nos.77 to 79 of 2017 are not parties to the arbitration agreement. Therefore, such arbitration proceedings, if initiated, would not be effective and separate proceedings would be required to be prosecuted before this Court against non-parties to the arbitration agreement.

26. It is also to be noted that the learned counsel for Euram has not produced a single judgment to the effect that the Court should decline to exercise jurisdiction under Section 446(2) of CA 1956 on account of the existence of an arbitration clause. In other words, all the judgments relate to civil proceedings and not to the exercise of special jurisdiction by the Companies Court.

27. Notwithstanding the above conclusions, needless to say, no opinion is being expressed, at this juncture, with regard to the validity of the claim made by the ex-Directors and contributory of the company in liquidation in Comp. A.No.79 of 2017. The validity and sustainability of the said claim would have to be independently decided, when the said application is taken up for disposal. In such proceedings, issues such as the validity of the security in favour of Euram, whether the enforcement thereof is valid against the Official Liquidator of the company in liquidation and other related issues would need to be examined. Indeed, this exercise can only be carried out effectively by this Court in a manner that balances the interest of all stakeholders, including that of the company in liquidation. The above constitutes another reason as to why it is just and necessary that this Court exercises jurisdiction in this case.

Consequently, keeping in mind the wide powers and jurisdiction under Section 446(2) of CA 1956 and in light of the foregoing analysis, I have no hesitation in holding that Comp. A. No.79 of 2019 is maintainable. Consequently, Comp. A.No.491 of 2017 is liable to be dismissed.

28.As stated at the outset, Comp. A.Nos.77 and 78 of 2017 have been rendered infructuous in view of the termination of the arbitration proceedings in Austria. Therefore, the said Applications are liable to be dismissed. Similarly, Comp. A.Nos.489 and 490 of 2017, which relate to the maintainable of Comp. A.Nos.77 and 78 of 2017 are also, consequently, infructuous and are, therefore, liable to be dismissed.

29.In the result, Comp. A.Nos.77 and 78 of 2017 and, consequently, Comp. A. Nos. 489 and 490 of 2017 are dismissed as infructuous. In addition, Comp. A.No.491 of 2017 is also dismissed for reasons discussed above. Therefore, Comp.A.No.79 of 2017 is directed to be listed for disposal on 01.11.2019.

23.10.2019

Speaking/Non Speaking order

Index: Yes/No

Internet: Yes/No

Comp.A.Nos.77 to 79 and 489 to 491 of 2017

SENTHILKUMAR RAMAMOORTHY, J.
rrg



Pre Delivery order
in
Comp. A.Nos.77 and 78 and
489 to 491 of 2017

WEB COPY

23.10.2019