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

Reserved on: 4th October, 2021

Date of decision: 27th April, 2022

\+ **CS (OS) 2125/2012 & I.A.12878/2012**

TOMMORROWLAND LIMITED ..... Plaintiff
(earlier known as Tomorrowland Technologies Exports Limited)

Through: Mr. Pavan Sachdeva in person.

versus

PRASAD & CO. & ORS. .....Defendant

Through: Mr. Raman Kapur, Senior Advocate with Mr. Rishab Raj Jain, Advocate. (M:9811079695)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

<u>Prathiba M. Singh, J.</u>

1. The present suit is one of 27 connected suits, all of which relate to disputes between the Plaintiff – M/s MS Shoes East Ltd. (now known as Tommorrowland Limited) and various Defendants/Respondents who were Underwriters of a public issue brought out by the Plaintiff-Company in 1995. The background of the cases is the same but the underlying facts vary from case to case, hence separate judgements are being delivered.

<u>Background and Summary of the Proceedings</u>

The background of the disputes is that the Plaintiff had launched a public issue sometime in 1995 for issuance of Fully Convertible Debentures (*hereinafter 'FCDs'*) to public in India as well as Non-Resident Indians. The public issue was underwritten by various Underwriters, including the Defendant herein. The public issue was closed on the earliest closing date on the basis that it was over-subscribed. However, subsequently SEBI found some irregularities and directed the Plaintiff to give an option to all the subscribers to either continue their offers or withdraw the same. Pursuant thereto, several subscribers withdrew the offers and the issue was under-subscribed. The Plaintiff then sought to raise a demand against the Underwriters to subscribe to their respective portions of the underwritten FCDs. The Underwriters only partially subscribed, which led to disputes between the Plaintiff and the Underwriters. There was an arbitration clause in the Underwriting Agreements which was invoked by the Plaintiff. A ld. Single Judge of the Delhi High Court had appointed a Sole Arbitrator – Justice (Retd.) Ms. Manju Goel to adjudicate the disputes between the Plaintiff and all the Underwriters who were 267 in number. Several of the Underwriters settled their disputes during arbitral proceedings. However, the Defendants in the present 27 disputes herein, for various reasons, did not appear or remained *ex parte* in the arbitral proceedings, resulting in *ex parte* awards being passed against them. The said awards are the subject matter of the batch of cases being currently dealt with by the Court. The Plaintiff has filed suits seeking judgment in terms of the awards and the Defendants have resisted the same. Some of the Defendants have raised objections under Sections 30 and 33 of the Arbitration Act, 1940 *(hereinafter, "Act"*) and some Defendants have sought remand under Section 16 of the Act.

Brief Facts of the Present Case:

2. The Plaintiff launched a public issue for 1,75,84,800 zero interest unsecured Fully Convertible Debentures (*hereinafter, 'FCDs'*) of Rs.199 each for cash and at par aggregating to Rs.349,93,75,200/- to the public and issue of 31,28,500 FCDs of Rs.250/- each for cash at par aggregating to Rs.78,21,25,000/- to non-resident Indians / persons of Indian origin resident

abroad / OCBs on firm allotment basis together aggregating to Rs.428,15,00,200/- (*hereinafter 'public issue'*). The disputes in these cases relate only to FCDs issued to the public in India. The issue was publicized along with a prospectus, which was duly vetted by the Securities and Exchange Board of India (*hereinafter 'SEBI'*).

3. The issue was opened on 14th February, 1995 and the closing date for the issue was to be not later than 24th February 1995. The earliest closing date was 18th February, 1995. The Lead Managers to the issue were SBI Capital Markets Ltd., Tourism Finance Corporation of India Limited, Lloyds Finance Limited, Indian Merchant Banking Services Ltd. and Bank of Baroda. The Registrar to the issue was MAS Services Pvt. Ltd. The FCDs, which were to be allotted to the subscribers, were to be compulsorily and automatically converted into one equity share of Rs. 10/- each fully paid up, at a premium of Rs. 189/- in the case of Indian public, on the date of conversion i.e., on the expiry of seventeen and a half months from the date of allotment of these debentures. Each debenture was to have a face value of Rs.199/-. No interest was payable thereon.

4. Until the allotment of shares, no rights and privileges were to be enjoyed by the debenture holders. The sums received in respect of the public issue were to be retained in a separate bank account and the Company would not have access to the fund unless the approval of the Delhi Stock Exchange was obtained for allotment. The Letters of Allotment / Debentures Certificate(s) /Share Certificate(s) were to be delivered within three months from the date of allotment. In the event of over-subscription, the allotment was to be made by the Board in consultation with the Regional Stock Exchange at Delhi and a SEBI nominated representative was to be

associated in the process of finalisation of the basis of allotment, in case of over-subscription by more than two times. In case of non-allotment of the debenture(s) applied for, the excess amounts were to be refunded to the concerned applicants within 70 days from the closing of the Subscription List.

5. The entire issue was underwritten, insofar as the component offered to the Indian public for subscription was concerned. The clause relating to underwriting in the prospectus reads as under:

> *"UNDERWRITING*
> *The entire issue of 1,75,84,800 Zero Interest Unsecured Fully Convertible Debentures of Rs.199 each aggregating Rs.3,49,93,75,200 offered to Indian Public for subscription in terms of this Prospectus has been fully underwritten as under:……"*

6. There were 267 Underwriters in total, including the abovenamed Defendant-Prasad & Co. The prospectus specified the exact amount which was underwritten by each of the Underwriters. It was certified by the Board and the Lead Managers that the resources of the Underwriters are adequate to meet their respective underwriting obligations.

7. In the case of the present Defendant, the amount which was underwritten was to the tune of Rs.1,99,99,000/- (1,00,500 FCDs of Rs. 199/- each for cash at par aggregating to the total figure of Rs. 199.99 lakhs) by Underwriting Agreement dated 10th January, 1995. The ld. Arbitrator has considered it to be 1,00,497 FCDs.

8. The public issue opened on 14th February, 1995, as scheduled. On 17th February, 1995, a communication was issued by the Registrar and Lead Manager to the issue informing the Plaintiff that the issue was fully

subscribed. Accordingly, on 18th February, 1995, an advertisement was issued by the Plaintiff in various print outlets stating that the issue would be closed on the said date and the issue was closed on the earliest closing date i.e., 18th February, 1995.

9. However, SEBI noticed certain anomalies in the public issue offer price of Rs.199/- and accordingly directed the Plaintiff-Company to disclose to the public that the shares were quoted on cum-rights basis, which means that it was not adjusted for the higher equity that would result from a rights issue that was scheduled to follow the public issue. Corrigenda are stated to have been issued by the Plaintiff on 13th February, 1995, prior to the opening of the issue. However, some advertising continued to allegedly reflect the market price. SEBI is then stated to have issued a letter dated 6th March, 1995 addressed to the Lead Manager of the issue, directing that an option be given to investors to either withdraw their applications or continue to subscribe to the issue. The said letter reads as under:

> *"Securities and Exchange*
> *Board of India*
> *Ref: IMID/; XX/95*
> *March 6, 1995*
>
> *The General Manager*
> *SBI Capital Markets Limited*
> *New Delhi,*
> *Sir,*
>
> *RE: PUBLIC ISSUE OF M.S. SHOES EAST LIMITED*
> *Please refer to your fax message dated February 20, 1995 and your subsequent discussion at SEBI.*
> *We are herewith sending a draft of the approved letter to be issued by M.S. Shoes East Limited along with the letter of allotment. Please ensure that the letter ensure that the letter is issued in the form in which it has been*

approved by us without modification of any kind and also that they are actually despatched to the successful applicants along with the allotment letter. You had indicated that the issuer company has agreed to do so. The person/agency to whom the letter requesting refund should be addressed, must be specifically indicated in the letter. Lead Manager should also ensure that arrangements are made for immediate refund of monies to those who opt to do so. We would like to add that SEBI reserves to itself the right to take appropriate action against the issuer company and the lead manager for their lapses in this regard.
Please arrange to acknowledge receipt of this letter and also keep us informed of the action taken by the Company.

(USHA NARAYANAN)
DIVISION CHIEF"

10. The above letter is disputed by the Plaintiff. However, from the contemporaneous evidence available on record, there is no doubt that, in fact, letters were addressed by SEBI to the Plaintiff directing it to give an option to the investors to get refund of money paid by them with interest. Public announcements/notifications were also issued by SEBI asking the company to refund application monies to all those who wanted to withdraw from the public issue. Subsequent to the said direction, a large number of the subscribers withdrew their applications and the subscription fell below the minimum of 90% of the total issue stated in the prospectus.

11. Devolvement notices were issued by the Plaintiff to all the Underwriters on 15th March, 1995, informing them that the issue had been undersubscribed, and hence, the underwriters' obligations as per the

Agreements entered into therewith, are triggered. Again, on 24th March, 1995 and 17th April, 1995, letters/notices were sent by the Plaintiff-Company to the Underwriters informing them of their liability. Since the Underwriters did not subscribe and pay the said amount within the stipulated period of 60 days after the closure of the issue, the Plaintiff-Company had to refund the entire application money collected from the public.

12. The Plaintiff then sought the intervention of the Delhi Stock Exchange and requested for reference of the disputes between the Plaintiff and the Underwriters to arbitration, *vide* letter dated 2nd May, 1995. However, *vide* letter dated 26th April, 1997, the Delhi Stock Exchange refused to conduct the arbitration proceedings, which led the Plaintiff-Company to file petitions under Section 20 of the Arbitration Act, 1940 before the High Court of Delhi. *Vide* the initial order dated 14th March, 2007 in two suits filed by the Plaintiff under Section 20 of the Arbitration Act i.e., ***CS (OS) No. 1299A/1997*** and ***CS(OS) No. 845-1076/2006***, Hon'ble Ms. Justice (Retd.) Manju Goel was appointed as the ld. Sole Arbitrator. The relevant extract of the order dated 14th March, 2007 reads as under:

> *"13. I am in full agreement with the aforesaid view and deem it appropriate that the matter has to go to arbitration since the arbitration clause is not disputed.*
> *14. the respondents having been called upon to refer the dispute to arbitration and having failed to do so, have lost their right to appoint an arbitrator. In fact, respondent no. 1 is stated to have specifically declined to appoint an arbitrator.*
> *15. In view of the aforesaid, Hon'ble Ms. Justice (Retd.) Manju Goel, B-6, Dr. Zakir Hussain Marg, New Delhi (Phone No. 2378-2616) is appointed as the sole Arbitrator. It will be for the Arbitrator to fix the sitting fee, subject to a total fee of Rs.2.00 lacs, apart*

from the out-of-pocket expenses. The fee of the Arbitrator shall initially be borne by the petitioner to form part of the main cause.
16. The parties to appear before the learned Arbitrator on 21.4.2007 at 11.00 A.M.”

13. Thereafter, by order dated 22nd April, 2010 in ***CS(OS) No. 1199A/1998***, similar disputes were also referred to the same Ld. Arbitrator. Cumulatively, there were total of 267 claim petitions, which were referred to the ld. Arbitrator.

14. In respect of 103 Respondents against whom claims were settled and withdrawn, awards were passed on 25th September, 2010. Similar awards were passed *qua* 3 Respondents on 14th May, 2011 and *qua* 34 Respondents on 21st January, 2012. The awards under challenge in the present 27 connected suits before the Court were passed on various dates between May to July, 2012.

15. In the case of the present Defendant, the Ld. Arbitrator pronounced the Award on 28th May, 2012, by which the Ld. Arbitrator awarded a total sum of Rs.47,55,178/-, along with pendente lite and future interest, in favour of the Plaintiff-Company in the following terms:

“*27. The law is that the claimant is entitled to reasonable damages whether or not actual damages suffered is proved. The liability of the respondents would have been Rs.199/- per 18604 shares that devolved on it. The claimant's maximum claim could be only 18604* Rs. 199. During the hearing of final arguments, the claimant's CMD expressed that the claimant should be given 50% of Rs. 199/- i.e. Rs. 99.50 as that was the money that the respondents would have initially paid as per the prospectus had the respondents taken the unsold FCDs of his* *underwriting. I am not able to see any rationale behind this contention.*

*28. If the loss quantified in paragraph 26 above is proportionately distributed over the deficit procurement of shares viz 1,06,42,000 (exhibit PW1/54), the amount comes to Rs. 76.30 per defaulting share approximately. However, keeping in view the fact that the claimant's actual damages would have been much higher, it will not be altogether wrong to assess reasonable damages at Rs. 80/- per share that the defaulting underwriters failed to pay for when the FCDs devolved on them. In this case since the respondents were required to take 18604 shares that devolved on him, I assess reasonable compensation at 18604*Rs. 80 amounting to Rs. 14,88,320/-. I am conscious of the fact that the claimant has settled his claim against some of the underwriters against whom he had filed his claim before this tribunal. The claimant submits in a statement that he has recovered Rs. 2.45 crores from the settled claims in suit no. 1299A/97 and Rs. 0.35 crores in suit no. 1199A/98 i.e. a total amount of Rs. 2.80 crores against commitment of Rs. 349.93 crores. Clearly the claimant has settled with those who offered to do so at a rather low figure. However, the deficiency caused by such concessional settlements cannot be made good by receiving any extra amount from those who have not settled. The calculation of reasonable damages per share, rather than per underwriter takes care that each underwriter is burdened with reasonable damage recoverable from him and no one is burdened with the damage caused by others who may have contracted to underwrite different numbers of FCDs.*

29.The claimant is entitled to interest on this amount till the filing of claim petition. The claimant has asked for interest @ of 24% per annum. The claimant himself *raised loans at that time on interest @18.5%. The claim for interest is based on Interest Act and not on contract. The learned amicus curiae suggested that interest @ 18% would be reasonable. Awarding interest @ 18% the claim of the claimant towards interest for 146 months 10 days from 02.05.1995, the date when the respondents were liable to pay for the devolved FCDs till the date of filing of the claim on 11.7.2007 comes to Rs. 32,66,858/-. Thus the total reasonable damages along with interest till the filing of the claim petition comes to Rs. 47,55,178/-.*

30. The claimant is entitled to interest pendente lite and future till recovery. Since the nature of the claim is commercial, the interest pendente lite and future till recovery can also be awarded @ 18%. Hence I pass an award for Rs.47,55,178/- with pendente lite and future interest @ 18% from the date of filing of the claim petition till realization in addition to costs calculated hereunder Interest pendente lite on Rs.47,55,178/- for 4 years and 10 months comes to Rs. 41,48,893/-.

COST:

31. The claimant is entitled to cost of the proceedings. The respondent did not pay even his share of the fees of the Arbitration, which the claimant has paid. The claimant incurred further expenses on behalf of the Arbitration towards service of notice and publication in the newspaper. The venue for the Arbitration has always been the PHD House at Khelgaon, August Kranti Marg and total expenses towards venue charges comes to Rs. 5,05000/-. Further Amicus Curiae was also engaged to ensure that no injustice is done to any respondents who is proceeded exparte. Further there have been costs involved for keeping records and bringing them to the venue. The claimant has assessed such cost per respondent at Rs. 11,050/- which I assess as reasonable. Further an

> *administrative cost of Rs. 2500/- is also being assessed for the Arbitrator for the entire proceedings since throughout the course of this matter no such cost has been charged by the Arbitrator. Further the stamp paper of Rs.8,930/- is annexed to the award. Hence the total cost is assessed at Rs.22,480/- payable by the respondents to the claimant for the entire proceedings. Needless to say that the administrative cost of Rs. 2500/-is initially payable by the claimant to the Arbitrator."*

16. Similar awards have been passed against all the Underwriters who are Defendants in the 27 suits presently being decided. The said awards are sought to be enforced by the Plaintiff under Sections 14 and 17 of the Arbitration Act, 1940, seeking pronouncement of judgment and decree in terms of the respective Awards for the aforesaid amount along with interest @18% p.a. till the date of realisation of payment.

17. The Defendants/Respondents, upon being served, have resorted to filing two different types of objections to the Awards. One set of Respondents have filed objections under Section 16 of the Arbitration Act, 1940, challenging the legality of the award and other Respondents have filed applications under Sections 30 and 33 of the Act, seeking setting aside of the awards and opposing the prayer for pronouncement of judgment in terms of the awards.

18. The broad grounds raised by the Respondents are:

a) That the Respondents were not properly served in the arbitral proceedings;

b) That the time period for passing the award had expired and no ground exists for extension of time under Section 28 of the Act;

c) That on merits, the obligations of all the Underwriters stood discharged as the issue was fully subscribed, and it was not even kept open for the entire period. This issue has not even been considered by the ld. Arbitrator;

d) That the computation of damages and award of interest is not as per law.

19. In the present case, apart from the main suit seeking pronouncement of judgment under Sections 14 and 17 of the Act, an application being ***I.A.12878/2012*** under Section 28 of the Act, and objections under Sections 30 and 33 of the Act have also been filed.

I.A. No. 12878/2012 (under Section 28 of the Arbitration Act, 1940)

20. The present application was filed by the Plaintiff under Section 28 of the Arbitration Act, 1940, seeking *post-facto* extension of time of the arbitration proceedings from 20th August, 2007 to 28th May, 2012 i.e., the date on which the Award was pronounced by the Ld. Arbitrator, as the time taken by the Ld. Arbitrator to pronounce the Award took more than the 4 months prescribed in Rule 3 of the First Schedule of the Act.

21. The submission of Mr. Pavan Sachdeva, Promoter-in-person, is that the Ld. Arbitrator had a humongous task before her, owing to the large number of parties in the arbitral proceedings. Vide the initial order dated 14th March, 2007 in ***CS (OS) No. 1299A/1997*** and ***CS(OS) No. 845-1076/2006*** (under Section 20 of the Arbitration Act, 1940 for reference of disputes to arbitration), 232 Respondents were referred to arbitration and thereafter, by order dated 22nd April, 2010 in ***CS(OS) No. 1199A/1998***, disputes with 35 further Respondents were referred to arbitration. In all, the Ld. Arbitrator was called upon to deal with 267 cases/claims. It is submitted that the Ld. Arbitrator held proceedings almost every month. The first

notices were issued by the Arbitrator on 6th July, 2007 for proceedings to be held on 13th July, 2007. Various Respondents had entered appearance but about 59 envelopes were received back, as was recorded in the arbitral proceedings held on 13th July, 2007. Thereafter, fresh notices were issued on 12th May, 2010 for proceedings to be held on 31st July, 2010 out of which only 8 respondents were unserved. The proceedings for all 232 Respondents were held together. However, claims for each of the Respondents were different. The said claims were sent to the underwriters on 11th July, 2007 and for 35 Respondents, notices were sent on 14th June, 2010. To emphasize the fact that almost all the underwriters were aware of the matter, it is submitted that more than 100 Respondents filed replies and 45 Respondents filed their written statements on 8th November, 2008. Further, about 20 filed their written statement in 2009 and finally some of the Respondents filed their replies on 6th October, 2009. Since some of the Respondents were not served or were not appearing, the ld. Arbitrator decided to appoint an Amicus Curiae who could be an official of SEBI. However, SEBI merely suggested a panel of lawyers and out of the same, Shri O.P. Faizi was appointed as Amicus Curiae.

22. It is submitted by Mr. Sachdeva that considering the large number of underwriters who were Respondents to these petitions, it was an impossibility to render the Awards within four months. Accordingly, awards were rendered between May to July, 2012 and various petitions were filed by the Plaintiff/Claimant under Section 14 and 17 of the Arbitration Act, 1940 for making the awards Rule of Court and pass decrees in respect thereof. The said petitions were entertained in various proceedings. For example, in ***Tomorrowland Technologies Exports Limited v. Jethalal***

Ramji CS (OS) 2159/2012, the application under Section 28 of the Arbitration Act, 1940 for ex-post facto extension of time for passing of Award by the Ld. Arbitrator was allowed, *vide* order dated 2nd September, 2014. In the said order, the ld. Single Judge notices the fact that there were a large number of claims before the Ld. Arbitrator and that even an Amicus Curiae was appointed.

23. Similar orders have also been passed in ***Tomorrowland Technologies Exports Limited v. Pressman Advertising Limited [CS (OS) 2094/2012]*** and ***Tomorrowland Technologies Exports Limited v. Hemdev Securities (India) Pvt. Ltd. [CS (OS) 2070/2012]*** on 14th October, 2014 and 24th October, 2016 respectively. It is further submitted that *vide* order dated 24th March, 2014 in ***M/s MS Shoes East Ltd. v. Madhukar Khosla [CS (OS) 2061/2012]***, decree has also been passed after allowing the application under Section 28 of the Act. Similarly, more than 50 decrees have been passed, where the applications under Section 28 were allowed, though in most of them the Respondents have been proceeded against *ex parte*.

24. Mr. Sachdeva then relies upon the judgment in ***Mahadeolal v Administrator General of WB [1960] 3 SCR 578*** to argue that since various Single Judges have already allowed the applications under Section 28, in respect of the same awards, the same would be binding on this Court. Reliance is also placed on the judgments of the Supreme Court in ***Hari Shankar Lal v. Shambhunath Prasad and Ors. [AIR 1962 SC 78]*** and ***State of Punjab v. Hardyal [MANU/SC/0002/1985].*** On the basis of these decisions, it is submitted that the application under Section 28 of the Act is liable to be allowed in all the suits. It is also emphasized that most of the Respondents have not filed replies to these applications. In any event, most

of the Respondents, knowing fully well about the proceedings, have chosen to stay away from the arbitral proceedings and considering the voluminous nature of the proceedings, the ex-post-facto extension of time under Section 28 of the Act is liable to be allowed.

25. This application is vehemently opposed by the counsels for the Defendants. The Defendants have addressed common submissions on Section 28 and the same are as under:

a) That no cogent ground has been offered by the Plaintiff to explain its failure to seek extension of time on an earlier occasion.
b) Relying on ***Hari Shankar Lal v. Shambhunath Prasad & Ors. (Supra)***, the Defendants have asserted that if the time for passing of the Award is not extended, then the Award would be *non-est*. Relying upon ***Mahalingashetty & Co. Ltd. v. NPCC Ltd. & Ors. [126 (2006) DLT 142]*** (Para 19), it is argued that parties should always seek enlargement of time and failing to do so would go to the root of the matter.
c) Relying on ***Union of India v Peeco Hydraulic 2012 (5) R.A.J 221 (Del)*** and ***M/s Chanderkant & Co. v DDA 2014 (5) R.A.J. 42 (Del),*** it is argued that the Award is liable to be set aside as a whole.
d) It is further submitted that even if the Defendants were participating in the arbitral proceedings, the same would not create an estoppel against seeking extension of time. Without a specific court order, the arbitral proceedings could not have continued.

26. Heard. Clause 3 of the First Schedule to the Arbitration Act, 1940 (Implied Conditions of Arbitration Agreements) prescribes that the ld. Arbitrator shall make the award within four months of entering on the

reference, or within such further time as the Court may allow. The said clause reads as under:

> *"3. The arbitrators shall make their award **<u>within four months after entering on the reference</u>** or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."*

27. Further, Section 28 of the Arbitration Act, 1940 reads as under:

> *"28. Power to Court only to enlarge time for making award: -*
> *(1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.*
> *(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."*

28. It is relevant to note that there were three orders by which reference was made to the ld. Arbitrator i.e., orders dated 14th March, 2007, 8th August, 2007 and 22nd April, 2010 *qua* various Respondents. The same Sole Arbitrator was appointed in all the references. The ld. Arbitrator was called upon to adjudicate claims filed against more than 260 Respondents. The ld. Arbitrator commenced sending issuance of notices since 2007 onwards and finally the award came to be passed in May 2012 to July, 2012. In respect of several of the Respondents, the disputes were settled. In case of a large number of Respondents, it is evident from the arbitral record that service had proved to be a challenge. Since several Respondents were not served or were not appearing, the ld. Arbitrator appointed an *Amicus Curiae* in order to have a fair hearing and finally passed the awards. In the meantime, various

orders have been passed by the ld. Single Judges of this Court increasing the fees of the ld. Arbitrator. The ld. Arbitrator has held more than 50 sittings over the five-year period and dealt with the matters extensively.

29. The law on Section 28 of the Arbitration Act, 1940 is well settled. In ***Hari Shankar Lal v. Shambhunath Prasad & Ors., AIR 1962 SC 78***, the Hon'ble Supreme Court had observed as under –

> *".. I am, however, inclined to the view that in view of the provisions of s. 28, it is not possible to say that the arbitrators are not competent to act after the expiry of the period of four months from the date of their entering oh the reference. The provisions of this section contemplate the arbitrators having made the award beyond the period of limitation without having previously obtained the order of the Court extending the time of making the award. This implies that the arbitrators would have carried on their proceedings and would have made the award subsequent to the expiry of the period during which they should have made the award. The competency of the arbitrators to act in pursuance of the reference arises out of the reference made by the parties and is not dependent on the period during which they ought to make the award. So long as the power vested in them to decide the dispute between the parties is not withdrawn, they continue to be competent to act on the reference in expectation that the period for making the award would be extended by the Court."*

30. In ***State of Punjab v. Hardyal, AIR 1985 SC 920***, paragraph 18 reads as under –

> *"…As I observed earlier, the court has got the power to extend time even after the award has been-given or after the expiry of the period prescribed for the award. But the court has to exercise its discretion in a judicial manner….No useful purpose will be served in*

remanding the case to the trial court for deciding whether the time should be enlarged in the circumstances of this case. In view of the policy of law that the arbitration proceedings should not be unduly prolonged and in view of the fact that the parties have been taking willing part in the proceedings before the arbitrator without a demur, this will be a fit case, in our opinion, for the extension of time. We accordingly extend the time for giving the award and the award will be deemed to have been given in time."

31. This principle of law has been reaffirmed in ***Campagnie De Saint Gobain v. Fertilizer Corporation of India Ltd., (1970) ILR Delhi 927***, wherein it was observed as follows:

"33. The learned counsel have cited a number of judgments for and against the grant of the prayer for enlargement of time; but all of them are based on the fact of each individual case. There can be no doubt that the enlargement of time for making the award is entirely within the discretion of the court. In Kanhayalal Dugar v. Askaran Kishanlal AIR1957Cal658, it was observed that the court's power under section 28 to extend time are entirely discretionary and are not limited.. The court can enlarge time for making the award even after the award has been made and even after the time has expired. It was also held that one of the persuasive consideration before the court would be, "that after all the time, expense and trouble in going into arbitration and actually having the award, regarding which there is no meritorious objection, it is it is proper to enlarge the time and make the award, the fruit of so much time, labour and expense, effective and not to frustrate it by refusing time. Looking to all the facts and circumstance stated above, I am satisfied that it is a fit case. where time for making the award should be extended. I, Therefore, enlarge the time. until 29-9-

> *1969, the date on which the award was made in this case The award was, Therefore, made within the time allowed by law; and is not invalid on the ground of being made beyond time."*

32. Relying upon the foregoing judgments, a similar view was taken in ***Milan Kumar Mondal & Anr. v. Deshbandhu Chittaranjan Memorial Society (Regd) & Anr. [MANU/DE/8736/2007].***

33. The above judgments clearly lay down the position that if no objection is taken during the arbitral proceedings, then the time for passing the award can be extended, even after passing of the award i.e. *ex-post-facto*. It is within the discretion of the Court as to whether the time is to be extended or not and broadly the facts and circumstances need to be looked into.

34. The judgments cited on behalf of the Respondents show that in ***Union of India v. Peeco Hydraulic Private Limited [2012 (5) R.A.J. 221 (Del)],*** there was no consent of the parties and a specific objection had been taken by one of the parties. In ***M/s Chanderkant & Co. v. Delhi Development Authority [2014 (2) ArbLR 338],*** the reference took place in 1992 and the ld. Arbitrator revived the proceedings in 2012. The 20 years' delay was not enlarged by the Court. In ***Hari Krishna Wattal v. Vaikunth Nath Pandya (Dead) by LRs & Anr. [1973 (2) SCC 510],*** the Supreme Court found that under Section 28(2) of the Act, the parties could agree for enlargement of time and since there was mutual consent by the conduct of the parties, the time stood extended. In ***Jatinder Nath v. Chopra Land Developers (P) Ltd. & Anr. [(2007) 11 SCC 453],*** the Supreme Court clearly holds that the power of Court under Section 28 of the Act is so wide that the time can be

extended, even if the award is made beyond four months. In ***Rajora Builders v. Municipal Corporation of Delhi (Administration) & Ors. [61 (1996) Delhi Law Times 194***], one of the parties had taken an objection to the ld. Arbitrator continuing the proceedings. In ***Hindustan Steel Works Construction Limited v. C Rajashekhar Rao [(1987) 4 SCC 98],*** the above legal position is again reiterated that the ld. Arbitrator can extend the time with the consent of the parties but the Court has the discretion to extend the time, which has to be exercised in a judicial manner.

35. On an application of the decisions cited above to the facts of the present case, the Court cannot help but notice that the arbitral proceedings in these cases under consideration were not ordinary proceedings. They were proceedings which were conducted by the ld. Arbitrator in relation to more than 260 claims. This Court takes judicial notice of the fact that the awards passed by the ld. Sole Arbitrator have been the subject matter of multiple petitions and applications before this Court. A large number of awards passed in favour of the Plaintiff have been resolved due to settlements against several underwriters.

36. It is also noticed that ld. Single Judges in the case of ***CS(OS) 2159/2012***, ***CS(OS) 2070/2012*** and ***CS(OS) 2094/2012*** have already granted extension under Section 28 of the Act. Illustratively, the order dated 2nd September, 2014 in ***CS(OS) 2159 of 2012*** is set out below:

> *" IA No. 12983/2012 (u/s 28 of the Arbitration Act, 1940)*
> *1. This is an application filed under Section 28 of the Arbitration Act, 1940 (in short the Act). To be noted, the award was passed qua the defendants, and other similarly situated parties, on 28.05.2012 by a sole arbitrator, Justice Ms Manju Goel, a retired judge*

of this court.

2. The learned sole arbitrator was appointed by this court in a petition filed under Section 20 of the Act in suit no. 1299A/1997 vide order dated 14.03.2007. The disputes raised were referred to the learned sole arbitrator in that suit as well as in another suit which is suit no. 1199A/1998. The order in that suit, referring disputes to the very same arbitrator was passed on 22.04.2010. In all, the learned arbitrator was called upon to deal with 267 cases/ claims.

3. The learned arbitrator, it appears, appointed an amicus curiae. Mr O.P. Faizi, Advocate was appointed as an amicus by the learned arbitrator, evidently, vide order dated 21.01.2011. Because of the number of claims before the learned arbitrator, there appears to have been a delay in concluding the matter within four months as per the time frame prescribed under Rule 3 of the first Schedule of the Act.

4. Notably, the defendants herein were the respondents before the learned arbitrator and since the respondents did not appear before the arbitrator, as recorded in the award, they were proceeded ex parte. The present application is, however, contested only by defendant nos. 4 to 7, who were arrayed as, respondent nos. 4 to 7 before the arbitrator. Learned counsel for the contesting defendants says that the service was not effected and, therefore, this is the principal ground on which the objections to the award have been filed.

5. I am, however, dealing with an application under Section 28 of the Act. Under sub-Section (i) of Section 28 of the Act, the court is conferred with the discretion to extend the time for making of the award even after the award has been made, if the circumstances demand extension of time. In view of the fact that there were nearly 267 claims, to be dealt with by the arbitrator, I am of the view that this is a fit case in which the time ought to be extended, as prayed for. It is ordered accordingly. The prayer made in the

> *application is allowed. The time for rendering the award stands extended.*
> *6. The application stands disposed of."*

37. Since in respect of these very arbitral proceedings, extensions have already been granted in cases involving other underwriters and in the unusual facts and circumstances of these cases considering the large number of parties and large volume of claims, this Court is of the opinion that this is a fit case for *ex-post-facto* grant of extension under Section 28 of the Arbitration Act, following the settled legal position as set out above.

38. ***I.A. 12878/2012*** is accordingly allowed and disposed of.

CS(OS) 2125 of 2012 (under Sections 14 and 17 of the Arbitration Act) and Objections/Reply under Sections 30 and 33 of the Arbitration Act)

39. The present suit has been filed by the Plaintiff under Sections 14 and 17 of the Arbitration Act, seeking judgment and decree in terms of the Award passed by the ld. Sole Arbitrator, dated 28th May, 2012 passed in arbitration case being *M/s MS Shoes East Limited v. Prasad & Co.* Defendant has filed Objections/Reply under Sections 30 and 33 of the Arbitration Act, 1940, seeking setting aside of the impugned award. One of the objections raised by the Defendant is in respect of service in the arbitral proceedings and for having been proceeded *ex-parte*.

40. Mr. Vikram Nandrajog, ld. Counsel appearing for the Defendant has raised two main issues. First, that no service was effected in accordance with law. Ld. Counsel has pointed out that the first feature of the arbitral proceedings is that the ld. Arbitrator never issued any notice. The only notices, which are relied upon are notices issued by the ld. counsels for claimant. In this case, the notices were issued to a wrong address at Grover

Mansions at Asaf Ali Road, New Delhi, while, in the Underwriting Agreement, the address was clearly mentioned as UB-25, Inder Prakash, Barakhamba Road, New Delhi. This is the same address, which is now mentioned in the memo of parties, pursuant to which the Respondent has entered appearance and is defending the proceedings. He submits that Defendant No.1-Prasad and Co., is a partnership firm of Defendants No.2 and 3. Defendant No.4 is only an employee of the firm, and has no other role to play. He was incorrectly made a party in the arbitral proceedings. It is further submitted that the courier receipts, AD cards and registered AD slips sent from time to time show that none of these relate to an actual hearing notice given by ld. Arbitrator, but only pleadings and other affidavits, etc. which were allegedly sent by the counsels of the claimant. This, according to ld. counsel, is not service as required under the Arbitration Act, 1940. On a query from the Court, it is submitted by ld. Counsel that one of the AD cards which bears the seal of R.R. Capital would not be relevant, inasmuch as R.R. Capital is not connected to Defendant No. 1– Prasad & Co.

41. On the issue of service of notice, the following documents are relied upon by the Plaintiff:

a) Copy of the Process Server Report, addressed to Prasad & Co., UB-25, Indra Prakash, Barakhamba Road, New Delhi - 110001, in respect of Suit no. 1299/1997, dated 1st September, 1997/16th July, 1997.

b) Copy of Vakalatnama appointing Ld. Counsel Mr. Rajeev Datta along with the first page of the written statements filed by the Defendants in Suit No. 1299/1997.

c) Copy of notice dated 6th July, 2007 issued by the counsels for the Plaintiff to the Defendant at the address of Prasad & Co., UB-25, Indra Prakash, Barakhamba Road, New Delhi – 110001, and also at Grover Mansion, 3rd Floor, 3/17A Asaf Ali Road, New Delhi. Also annexed are registered AD acknowledgments.

d) Copy of the record of arbitral proceedings conducted by the Ld. Arbitrator on 13th July, 2007, which records the appearance of the Defendant via Ld. Counsel Mr. Piyush Pant.

e) Copy of the first page of the claim petition which was sent to the address of Prasad & Co., UB-25, Indra Prakash, Barakhamba Road, New Delhi – 110001, along with the address of Prasad and Co. Pvt. Ltd., 412-422, Indra Prakash Building, 21, Barakhamba Road, New Delhi – 110001. Also annexed are courier receipts and stamped acknowledgement by 'R.R. Investors Capital Services Ltd.', along with the Memorandum of Association of R.R. Investors Capital Services Ltd. The said company has Mr. Rajat Prasad as a subscriber, who is also a partner at the Defendant company.

f) Copy of attendance sheets which record the presence of the Defendant in the arbitral proceedings before the Ld. Arbitrator on the dates of 13th September, 2007, 6th October, 2007 and 19th January, 2008.

g) Copy of affidavit by way of evidence of claimant, along with postal receipts and acknowledgment stamped in the name of R.R. Investors Capital Services Ltd. The said affidavit was sent by speed post.

h) Copy of the order dated 3rd April, 2010 passed by the Ld. Arbitrator, where the Defendants were proceeded against *ex parte*.

i) Copy of notice dated 10th January, 2011 from the Hon'ble High Court of Delhi to appear before the court in the matter of MS Shoes East Ltd. v. Delhi Stock Exchange Association Ltd. & Ors. [C.S.(O.S.) No. 1299A/1997], wherein the Defendant is named at Serial No. 90.

j) Copy of notice dated 6th June, 2012, of passing of the award by the Ld. Arbitrator in the matter of MS Shoes East Ltd. v. Prasad & Co., sent to the Defendant at the address of Prasad & Co., 412-422, Indra Prakash Building, 21, Barakhamba Road, New Delhi – 110001. Also annexed are the postal receipts. Further annexed is a copy of the letter sent by the Defendant to the Ld. Arbitrator, dated 2nd July, 2012, wherein they acknowledge the receipt of the aforementioned notice.

k) Copy of the letter to the Plaintiff, dated 24th December, 2012, issued by the Ld. Arbitrator, containing the details of copies of award supplied, files inspected and copies of records supplied to various Defendants in the matter of arbitration between MS Shoes and Delhi Stock Exchange & Ors. (Suit No. CS(OS) No. 1299A/1997 and 1199/998), wherein it is noted that the Ld. Arbitrator had supplied a certified copy of the award to the Defendant.

42. The documents filed on record show that repeated notices were sent to the Defendant. The notices also have the receipt of the Defendant in many places. For eg., the initial summon/notice issued in the Section 20 petition is

duly received. The signature of the person receiving along with the round seal of the defendant is affixed. The *vakalatnama* of ld. Counsel, Mr. Rajiv Dutta, has been filed in the said petition. Thus, the Defendant was well aware of the invocation of the arbitration clause and the reference to the ld. Sole Arbitrator. Thereafter, repeated notices issued by ld. Counsel for the Plaintiff on behalf of the ld. Arbitrator have the signatures of an individual signing on behalf of the Defendant. Thus, the Defendant/Respondent having had adequate notice, this Court holds that the ld. Arbitrator was not expected to continue issuing notices to an entity, which voluntarily chose not to appear before her. The impugned Award does not deserve to be set aside due to any such alleged legal misconduct on part of the ld. Arbitrator. In fact, the records and the proceedings show to the contrary that the ld. Arbitrator had repeatedly passed directions, which were not complied with by the Respondent. The objection as to service is therefore completely untenable and is rejected.

43. The principal question that now arises is to the legality and validity of the impugned award.

<u>Submissions of the Defendant on Merits</u>

44. On merits, Mr. Nandrajog, ld. Counsel for the Defendants, submits that the ld. Arbitrator framed issues no.3, 6, 7, 8 and 10 specifically, there is no adjudication of these issues. The first and the foremost issue which the ld. Arbitrator ought to have adjudicated is whether the underwriters were discharged of their obligations, as the public issue was not kept open for the mandatory period of ten calendar days. Upon the publication being closed after four days, the claimant was completely in breach and the underwriters' obligations stood discharged. In relation to this issue, the ld. Arbitrator is

silent in the award, which vitiates the award itself. Further, it is argued that the entire contract has been vitiated by fraud and misrepresentation inasmuch as the irregularities and illegalities committed by the claimants in the process of public issue resulting in the issuance of a letter dated 6th March, 1995 by SEBI itself proves that whole the process was *mala fide*. The continuous manner in which the underwriters have been accused of vitiating their contractual obligations despite SEBI having directed the claimant to permit the subscribers to seek refund of subscription amount itself proves that the claimant has no legs to stand on in the matter. None of these issues, which were framed for adjudication having been accordingly adjudicated in accordance with law, the award is not sustainable. It is next argued by ld. counsel that no decision having been rendered in the issues framed in the matter, would constitute legal misconduct and by itself would render the award liable to be set aside.

45. Insofar as the computation of damages is concerned, the first and the foremost submission is that the HUDCO project was not in any manner connected with the public issue. The allotment of land by HUDCO and the payment of the deposit by the claimant to HUDCO was much prior to the public issue and could not have any direct correlation with the underwriters' obligations. The provisions of Sections 73 and 74 of the Contract Act have not been properly analyzed by the ld. Arbitrator, inasmuch as the underwriting agreement did not have any clause stipulating the liquidated damages as a pre-estimate of the damages which would be liable to be paid. Since Section 74 was not applicable to the present case, only direct damages could have been awarded and damages which are considered to be indirect could not have been taken into consideration. It is further argued that the

HUDCO project having been unconnected with the public issue, the damages which have been awarded are remote. It is submitted that the deposit, etc. related to HUDCO allotment cannot be considered for the computation of damages, without prejudice to the remaining arguments which have already been made. The further dimension that is pressed upon is that in order for any party to claim damages, the *bona fide* conduct towards mitigation of damages ought to be pleaded and established during trial. If a party does not make any attempt to mitigate the losses which are allegedly being caused to it, it cannot claim even the direct damages, which it has done in the present case. There were various sources of alternate funding, which the claimant could have explored and no evidence of mitigation has been placed on record.

46. Further, if the HUDCO amounts are deducted from the total amounts which have been considered by the ld. Arbitrator, the final calculation is only to the tune of Rs.8.27 crores and if the said amount is equally distributed among the various underwriters, the damages would be considerably lower.

47. Further, it is argued that on a principal amount of approximately Rs.14.88 lakhs, the interest has been awarded @ 18% for pre-suit, pendente lite and future interest. This interest is completely unsustainable as the rate is too high, and also the period is completely unjustified.

48. Finally, it is urged on behalf of the Defendant that the judgment of the ***Kailash Nath v. DDA [(2015) 4 SCC 136]*** clearly shows that in order for any party to be entitled to damages, actual loss had to be proved, and in any event, if the conduct has been fraudulent and the transaction is vitiated by

fraud, no relief is liable to be granted. On all these grounds, it is prayed that the award deserves to be set aside.

Submissions of Plaintiff on Merits

49. On the other hand, Mr. Pawan Sachdeva submitted that the earliest closing date as per the prospectus, which had been sent to all the Underwriters and also approved by SEBI, was 18th February, 1995. Once the issue was subscribed for more than 90%, it was mandatory for the issue to be closed and therefore, the stand of the Underwriters, that the issue should have been kept open for the full period of 10 days is incorrect. He further submitted that the Lead Manager to the public issue had submitted two reports – first at the end of 7 days, and again at the end of 45 days. It is his submission that the underwriters' obligation would continue till the final report of the Lead Manager is received. The first report dated 17th February, 1995 at the end of 7 days had stated that the issue is over-subscribed/subscribed more than 90%, whereas the report dated 4th April, 1995 received at the end of 45 days clearly stated that the issue was undersubscribed.

50. It is submitted that upon the Lead Manager reporting under-subscription, the auditors computed the obligation of the underwriters and made pro-rata distribution. The exact amount, which devolved on each of the underwriters as their responsibility, was communicated on 24th March, 1995 within 35 days of the closure of the issue. Thereafter, on 30th March, 1995 the Auditor Certificate was also sent. However, devolvement notices, which were issued, were not replied to by the underwriters, which itself

shows that the underwriters were well aware of their obligations due to under-subscribed issue.

51. It is submitted by the Plaintiff that as per the Rules and Regulations of SEBI and the Model Underwriting Agreement prescribed by SEBI, underwriting is mandatory for every public issue, since it is like an insurance from under-subscription. Reliance is placed on ***Naini Gopal Lahiri v. State of Uttar Pradesh [(1965) 35 Comp Cas 39 (SC)]*** to argue that unless and until the underwriting contract is executed, public issue cannot be proceeded with. Reliance is also placed on ***Pioneer Co. v. Kaithal Cotton & General Mills Ltd. [(1970) 40 Comp Cas 562 (P&H),*** to submit that an underwriting agreement is not just a guarantee, but is itself an application for allotment of shares, which are underwritten.

52. The second proposition canvassed by the Plaintiff is that as per SEBI's Rules and Regulations governing the aspect of minimum subscription, once 90% of the issue is subscribed, the issue is to be closed. It is only if the Company does not receive 90% of the amount within 60 days from the date of closure of subscription list, that the company has to refund the entire amount to the underwriters and the same would be without prejudice to the claims of the company against the underwriters. In the present case, on 22nd April, 1995 the refund was made to all the underwriters without prejudice to the company's rights to raise a dispute and to claim damages. Insofar as the provisions of the Companies Act, 1956 are concerned, reliance is placed on Section 69(4) of the Act to argue that the said provision requires subscribers to be fully safeguarded, by keeping all monies received from applications for shares in a separate bank account. The said amount cannot be used by the Company in any manner and can

only be utilized for the purpose of refunding the applicants' subscription amounts. In fact, if there is any delay in the said refund, interest is also liable to be paid.

53. A third proposition, which is assailed is that allotment of shares is not a direct step, immediately upon the subscription. There are three stages i.e. creation of the shares, issue of the shares and allotment of shares. It is only upon the final allotment being made that the underwriters' obligation is discharged. It is submitted that the letter dated 6th March, 1995, which is not admitted by the Plaintiff, wrongly uses the word 'allotment', whereas in fact at that stage, the allotment was yet to take place. As per the judgment in ***Morgan Stanley v Kartick Das (1994) 2 CTJ 385 (SC) (CP)***, the Supreme Court of India has clearly held that shares come into existence only when the allotment takes place.

54. The fourth proposition, which is canvassed, is that the closure of the issue being mandated upon 90% subscription, the underwriters' argument that the issue ought to have been kept open for 10 days is completely contrary to the rules. Reliance is placed on ***Bharat's Compendium of SEBI Capital Issues & Listing, 3rd Edition by Dr. K.R. Chandratre*** to argue that it is only if the issue is under-subscribed, that the subscription should be left open for the entire period. As per the schedule, the earliest closing date was 18th February, 1995. Thus, closing of the issue after 90% subscription on 18th February, 1995 was as per prescribed and agreed schedule.

55. Mr. Sachdeva relied heavily upon a judgment of the Division Bench of this Court in ***MS Shoes East Ltd. v. R. K. Singh and Co., RFA(OS) 83/2008: MANU/DE/2710/2015***, specifically on paragraphs 12 and 22-24. The submission of Mr. Sachdeva was that the underwriters could bring in

subscriptions until 60 days of the closure of the issue. He also relies upon the judgment of this Court in ***MS Shoes East Ltd. v. MRTP & Ors., MANU/DE/0947/2003*** wherein, the Division Bench while narrating the facts, records that there was a failure by the underwriters in making payment of the underwriting amounts within 30 days, as a result of which MS Shoes could not collect 90% of the issue amount within 60 days of the closure.

56. Mr. Sachdeva also relies upon the statement dated 22nd June, 1995 of Mr. Hiromony Kundu, the Deputy General Manager of SBI Capital Markets Ltd – which was the first Lead Manager. The said statement of Mr. Kundu shows that the issue was subscribed for over 90%, and hence, the same was closed on the earliest closing date.

57. On a query from the Court, Mr. Sachdeva relied upon various guidelines of SEBI to argue that the period during which the subscription has to be checked is 30 days i.e., if within a period of 30 days the issue is not subscribed, it would devolve upon the underwriters, who have to discharge their consequent obligations. Reliance is placed on the Model Underwriting Agreement, prescribed by SEBI, especially on Clauses 10 to 14. It is his submission that since at the end of the period of 30 days after the date of the closure of the subscription, the issue remained undersubscribed, the obligations of the underwriters were not discharged. Since the obligation of the underwriters was not discharged, the Plaintiff is entitled to claim compensation and damages in terms of the Clause 11(d) of the Model Underwriting Agreement. Under clause 17 of the Underwriting Agreement, the Underwriters had an option of termination, which they could have invoked if the company had breached any clause of the Agreement. However, none of the Underwriters invoked the said clause.

58. Mr. Sachdeva further submitted that the impugned award specifically records in paragraphs 2 and 3, the facts leading up to the closure of the issue and the responsibilities of the underwriters. According to him, the finding of the ld. Arbitrator is that since the public issue was under-subscribed, the underwriters had to make good the loss suffered by the claimant-Company. Reliance is also placed upon paragraphs 6 and 7 of the Award, wherein the Arbitrator concludes that within 35 days of intimation by the company, the underwriters have to procure subscriptions and if they fail to do so, the Company is free to take measures against the underwriters.

59. It is finally submitted that the reasonableness of the ld. Arbitrator's reasoning cannot be challenged in a petition under Sections 30 and 33 of the Arbitration Act, 1940. The ld. Arbitrator was within her competence to construe the contract and decide the damages. Unless there is perversity or legal misconduct, the impugned Award does not deserve to be set aside. The definition of 'perverse' as held by the Supreme Court in ***Arulvelu and Ors. v. State represented by the Public Prosecutor & Ors. MANU/SC/1709/2009*** and ***Sumitomo Heavy Industries Limited v Oil and Natural Gas Commission of India MANU/SC/0540/2010*** is relied upon.

Analysis and Discussion on Merits

60. The facts leading up to the public issue have already been captured in the introductory paragraphs hereinabove. In 1995, when the subject public issue was launched, Underwriters were governed by SEBI (Underwriters) Regulations, 1993, under which they were registered. As per the said Regulations, "underwriter" and "underwriting" are defined as -

> *"2. (f) 'underwriter' means a person who engages in the business of underwriting of an issue of securities of a body corporate;*
> *(fa) "underwriting" means an agreement with or without conditions to subscribe to the securities of a body corporate when the existing shareholders of such body corporate or the public do not subscribe to the securities offered to them;*

61. As per the above Regulations all Underwriters have to be duly registered under these Regulations, in order to conduct their businesses as Underwriters. The SEBI, after taking into notice the relevant criteria under Regulation 6 grants the Certificate of Registration under Regulation 8. Such criteria include necessary infrastructure, office space, equipment, manpower, past experience, no earlier disqualification, capital adequacy (Rs.20 lakhs), reserves, etc. Every underwriting contract has to be a valid agreement. All Underwriters have to abide by the Code of Conduct, as specified in Schedule III of the Regulations. Under Regulation 14, the Underwriting Agreement has to specify the period for which the agreement shall be in force, the allocation of duties and responsibilities between the Underwriter and the client, the amount of underwriting obligations, the amount of commission or brokerage payable and details of other arrangements. The said Regulation is relevant and is set out below:

> *"14. Every underwriter shall enter into an agreement referred to in [clause (b) of sub-regulation (1) of regulation 9A] with each body corporate on whose behalf he is acting as underwriter and the said agreement shall, amongst other things, provide for the following, namely :—*
> *(i) the period for which the agreement shall be in force;*
> *[(ia) the allocation of duties and responsibilities*

between the underwriter and the client;]
(ii) the amount of underwriting obligations;
(iii) the period, within which the underwriter has to subscribe to the issue after being intimated by or on behalf of such body corporate;
(iv) the amount of commission or brokerage payable to the underwriter;
(v) details of arrangements, if any, made by the underwriter for fulfilling the underwriting obligations."

62. As per Regulation 15, when called upon to subscribe for securities pursuant to an agreement under Regulation 9A, the Underwriter has to subscribe to such securities within a period of 45 days of the receipt of such intimation. The said Regulation reads as under:

> *"**15.** (1) The underwriter shall not derive any direct or indirect benefit from underwriting the issue other than the commission or brokerage payable under an agreement for underwriting.*
>
> *(2) The total underwriting obligations under all the agreements referred to in clause (b) of rule 4 shall not exceed twenty times the net worth referred to in regulation 7.*
>
> *(3) Every underwriter, in the event of being called upon to subscribe for securities of a body corporate pursuant to an agreement referred to in [clause (b) of sub-regulation (1) of regulation 9A] shall subscribe to such securities within 45 days of the receipt of such intimation from such body corporate."*

63. The Code of Conduct for Underwriters is prescribed in Schedule III, some of the relevant Clauses of which are set out below:

> "*1. An underwriter shall make all efforts to protect the interests of his clients.*

2. An underwriter shall maintain high standards of integrity, dignity and fairness in the conduct of its business.
....
4. An underwriter shall endeavour to ensure all professional dealings are effected in a prompt, efficient and effective manner.
5. An underwriter shall, at all times, render high standards of service, exercise due diligence, ensure proper care and exercise independent professional judgment."

64. In order to appreciate the objections raised against the award, it is necessary to note some of the important clauses in the Underwriting Agreement. In the present case, the Underwriting Agreement dated 30th December, 1994 was entered into by the Defendant with the Plaintiff on 10th January, 1995. Some of the clauses of the Underwriting Agreement are as under:

> *"**1.** We hereby record that we (hereinafter referred to as "the Underwriter")" have agreed to underwrite / procure subscription to **100500 (sic 1,00,497)** Fully Convertible Debentures of Rs.199/- each for cash at par aggregating to **Rs.1,99,99,000** (Rupees only) (hereinafter referred to as "the underwriting obligation") for the captioned public issue by **MS Shoes East Ltd.** (hereinafter referred to as "the Company") on the following terms and conditions.*
>
> ***2. Opening of the Subscription List** – The subscription list for the public issue shall open not later than three months from the date of this agreement or such extended period(s) as the Underwriter may agree to in writing. <u>The subscription list shall, unless the issue is fully subscribed, be kept open by the Company for a maximum period of 10 calendar days failing which the</u>*

Underwriter shall not be bound to discharge the underwriting obligations under this agreement.

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5. Material disclosures after filing of the prospectus *– The company agrees that, if after filing of the prospectus with the ROC any additional disclosures are required to be made in the interest of the investors in regard to any matter relevant to the issue, the company shall comply with such requirements as may be stipulated by SEBI or the lead manager and compliance of such requirements shall be binding on the underwriter:*

Provided that such disclosures shall not give a right to the underwriter to avoid underwriting obligations unless such subsequent disclosures are certified by SEBI as being material in nature and essential for the contract of underwriting. The question whether or not such subsequent disclosures are material in nature, the decision of SEBI shall be final and binding on both the parties.

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10. Computation of Underwriter's obligation

1. If the issue is undersubscribed, the underwriting obligation, shall be determined in the manner set out hereunder, provided that under no circumstances, the Underwriter's obligation to subscribe / procure subscription to shares shall exceed the amount mentioned in clause 1 above.

2. The following applications for shares shall be treated protanto in or towards satisfaction of the Underwriter's obligation under this agreement namely –

a) Applications which have been accepted excluding those withdrawn before allotment;

and

b) *applications received from the underwriter or any of his sub-underwriters including those applications which bear the stamp of the underwriter or any of his-underwriters.*

3. After making adjustments as provided in sub-clause (2) above, the underwriting obligation of the underwriter and other underwriters shall be subject to following further adjustments.

a) *The applications received from the public independently i.e. <u>those applications not covered under sub-clause (2) above, shall be apportioned amongst all the underwriters,</u> where underwriting obligations have not been fully satisfied after adjustments under sub-clause (2) above in proportion to their respective underwriting obligations and to that extent their respective underwriting obligation shall stand reduced.*

b) *If, after the adjustments made under sub-clause (2) and (3) (a), above, it is found that the shares available for adjustments are in excess of the shares required to be subscribed in fulfilment of the underwriting obligations of one or more individual underwriters, then such excess amount required to meet the underwriting obligations of any underwriter shall be further apportioned amongst such other underwriters, whose underwriting obligations have not been fully discharged, in proportion to their respective underwriting obligations.*

11. Procedure for effecting / discharge of underwriting obligations *– The underwriting obligations as determined under clause 10 shall be discharged in the manner mentioned below:*

a) *The company shall within 30 days after the date of closure of subscription list communicate in writing to the underwriters, the total number of* *shares remaining unsubscribed, the number of shares required to be taken up by the Underwriter or subscription to be procured thereof by the Underwriter.*

b) the company shall make available to the underwriter, the manner of computation of underwriting obligation and also furnish a certificate in support such computation from the Company's Auditors.

c) the underwriter on being satisfied about the extent of devolvement of the underwriting obligation, shall immediately and in any case not later than 30 days after receipt of the communication under sub-clause (a) above, make or procure the application to subscribe to the shares and submit the same together with the application moneys to the company.

d) In the event of failure of the underwriters to make the application to subscribe to the shares as required under clause (C) above, the company shall be free to make arrangement(s) with one or more persons to subscribe to such shares without prejudice to the rights of the company to take such measures and proceedings as may be available to it against the underwriter including the right to claim damages for any loss suffered by the company by reason of failure on the part of the underwriter to subscribe to the shares as aforesaid.

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13. Underwriting commission

1. In consideration of the underwriter agreeing to underwrite the shares/debentures as mentioned in clause (1) above, the company shall pay to the underwriter a commission @ 1% on the amount underwritten by them and subscribed by the Public. In case, of devolvement the Company shall pay to *the underwriter a commission at the rate of 2.5% on the issue price of the shares for the amount underwritten and devolving on them.*

2. The underwriting commission shall be payable by the company within 15 days from the date of finalisation of allotment and proof of such payment within the specified time should be available with the company. The obligation to pay underwriting commission shall arise only upon the Underwriter fulfilling his underwriting obligation and duly subscribing to the shares, if any, devolved on him.

14. Obligation of the Company

1. The company shall immediately after the closure of the subscription list, take expeditious steps for processing the application and complete the allotment within the time limit prescribed under the Companies Act, 1956 and also comply with other listing requirements.

2. If the company fails to receive 90% of the issue amount including the amount received from the Underwriter's towards devolvements, within 60 days from the date of closure of subscription list, the company shall refund the amount paid by the underwriter in fulfillment of his underwriting obligations. The obligation to refund the moneys shall be without prejudice to the disputes if any in regards to the underwriting obligation of the underwriter. In such event, it will however, be obligatory for the company to pay the underwriter, underwriting commission payable in terms of clause 13(1) and (2) thereof.

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16. Right of termination under special circumstances- *Notwithstanding anything contained* *herein, the underwriters shall have the option, to be exercised by him, at any time prior to the opening of the issue as notified in the prospectus of terminating this agreement under any or all of the following circumstances -*

i) If any of the representations / statements made by the Company to the underwriter and/or in the application forms, negotiations, correspondences, the prospectus or in this letter are or are found to be incorrect.

ii) a complete breakdown or dislocation of business in the major financial markets, affecting the cities of Calcutta, Bombay, Madras, or New Delhi.

iii) declaration of war or occurrence of insurrection, civil commotion or any other serious or sustained financial political or industrial emergency or disturbance affecting the major financial markets of Calcutta, Bombay, Madras or New Delhi.

xxx xxx xxx

***20. Reference to arbitration** – Any dispute arising out of this agreement between the underwriter and the company shall be referred to the Arbitration Committee constituted by the Regional Stock Exchange in which the shares are to be listed and the decision of the Arbitration Committee shall be final and binding on both the parties."*

65. As per the Underwriting Agreement, copies of the prospectus were supplied to all Underwriters, along with the application forms which were to be subscribed by the Underwriters, in the eventuality of the issue not being fully subscribed. The Underwriters thus had complete knowledge of the factual position relating to the Plaintiff as also the various obligations and rights as set out in the prospectus. As per the Underwriting Agreement, the

public issue was to open within three months from the date of the Agreement. The issue, unless fully subscribed, was to be kept open for a maximum period of ten calendar days. It is only if the issue remained undersubscribed that the underwriting obligation was to be triggered as per Clause 10 of the Underwriting Agreement. However, under Clause 11 of the Agreement, the manner in which the Underwriters would be discharged of their obligations was clearly prescribed. As per Clause 11, the total number of shares which were unsubscribed was to be communicated to the Underwriter within 30 days of the closure of public issue subscription. On the basis of the unsubscribed shares, the shares that were to be procured by the Underwriter were to be pro-rata distributed among all the Underwriters. The manner in which the computation of the Underwriters' obligation was to take place was to be furnished by the auditors of the company, who had to issue notices to the Underwriters. The said notice, which is to be issued within 30 days of closure, is referred to as the `devolvement notice' which sets out the responsibility that devolves upon each of the Underwriters. Upon receipt of such a notice, not later than 30 days, the Underwriter has the obligation to subscribe to the shares and submit the same along with the application money to the company. As per Clause 11(d) of the Agreement, if the Underwriter does not make such an application, the company would have the right to claim damages for any loss suffered due to such failure. Furthermore, if 90% of the issue is not subscribed, even after receiving the Underwriters' application money, then the company is to refund the amount to the respective Underwriters as per Clause 14(2) of the Agreement. If as per the Underwriter, any of the representations or statements made by the company either in the application forms, negotiation clause, prospectus agreement or any other documents are found to be incorrect, the Underwriter has the right to terminate the agreement itself.

66. On 17th February, 1995, the Registrar of the subject Public Issue communicated to the Lead Manager that on the basis of figures communicated, the issue has been subscribed for more than 90%. Accordingly, the company closed the public issue on 18th February, 1995, which was previously declared as the `earliest closing date'. This date was fully within the knowledge of the Underwriters, as the said date was contained in the prospectus.

67. However, subsequently, for whatever reasons, SEBI directed the company to give the option to each of the subscribers to withdraw their applications. The reasons why SEBI issued such directions are not within the scope of the present proceedings. Suffice to say that a large number of subscribers withdrew their applications upon receiving notices from the company, in compliance with SEBI's directions. Criminal investigations are stated to have been launched against the promoters of the Plaintiff. However, it is not disputed that the case which was registered against the promoter of the Plaintiff-Company by CBI, was eventually closed.

68. It is relevant to note that even though SEBI directed the Company to give its investors the option to withdraw, it did not direct discharge of the Underwriters' obligations in relation to the public issue.

69. Thus, upon the withdrawal of the applications by the subscribers, devolvement notices were issued on 15th March, 1995 by the Plaintiff to the Underwriters. In these notices, the Underwriters were informed that the issue has been undersubscribed and the Underwriters were called upon to procure the applications to subscribe to their shares of the FCDs and submit

the application along with the amounts in terms of the Underwriting Agreement. The said devolvement notices were also issued to the Underwriters within the 30 days as prescribed i.e., on 15th March, 1995.

70. The factum of the devolvement notice having been issued is not disputed by the Defendant. It is also not the case of the Defendant that it terminated the agreement due to any incorrect information which was referred to it as per the prospectus or other related documents. No document has been placed on record to show that upon receiving the devolvement notice, the Defendant refuted the claim of the Plaintiff. The only submission canvassed on behalf of the Defendant is that since the issue was closed within four days after being launched and it was more than 90% subscribed, the obligation of the Underwriter was automatically discharged under Clause 2 of the Underwriting Agreement.

71. In order to answer whether the obligation of the Defendant-Underwriter stood discharged, the scheme of the Underwriting Agreement is relevant. It is well-settled that an Underwriting Agreement is in the nature of an insurance contract wherein the Underwriter performs the role of an entity providing insurance to the public issue i.e., if the issue fails for any reason, the Underwriter is bound to subscribe to the FCDs/shares. The nature of the Underwriting Agreement is clearly set out in the aforementioned Regulations which defines underwriting as extracted above. As per the said definition, if the public does not subscribe to the securities offered to them, the Underwriter has to subscribe to the same. In ***Naini Gopal Lahiri and Ors. v. State of Uttar Pradesh [1965] 35 CompCas 30 (SC)***, the Supreme Court, while considering the nature of an underwriting agreement observes:

> *"……….An underwriter is a person who agrees with*

> *the company in consideration of a commission payable to him, that if all or a particular number of the company's shares are not taken up by the public, he will make up the deficiency and make up the total number of shares underwritten by him. Underwriting is in the nature of an insurance against the possibility of inadequate subscription."*

72. As per Clause 2 of the Underwriting Agreement, the issue had to be kept open for a maximum period of ten calendar days. However, the Underwriters were well aware that the ten-day period is only the maximum period and that the minimum period is as stated in the prospectus till the earliest closing date which in this case was 18th February, 1995. It cannot, therefore, be said that the Plaintiff was to blame for not keeping the public issue open for the entire period of ten days. It was clearly the understanding of all the parties concerned that the issue was already subscribed by the earliest closing date as per the communication of the Lead Manager.

73. Even considering that the issue became under-subscribed later due to various allegations and the issuance of the notices to the subscribers, pursuant to the directions of SEBI, even then the under subscription of the issue took place within the 30-day period as prescribed under Clause 11A of the Underwriting Agreement. A reading of Clause 2 along with Clause 11 of the Agreement, makes it clear that the underwriters' obligations would not stand discharged until the 30-day period from the date of closure of subscription list is communicated.

74. For ease of reference, the process of subscription to public issue and until the issuance of the FCDs is illustrated as under:

Opening of public issue

Earliest date of closing

Final date of closing

Receipt of all the applications and the amounts from the subscribers

Closure of subscription list

Communication to the Underwriters as to whether the issue is subscribed or unsubscribed

Subscription by the Underwriters

90% of the issue amount received	90% of the issue amount not received
Allotment	Refunds

75. The above flow chart makes it clear that it is only after the closure of the subscription list that the company has to communicate to the Underwriters within a period of 30 days, as to whether any liability has devolved upon the Underwriters and if the obligations of the Underwriters are to be discharged or not. The said letters have to be accompanied with the auditor's certificate showing the computation. After receiving the said letters, the Underwriters have to take the necessary steps to subscribe within 30 days.

76. Thus, as per the Underwriting Agreement, it is clear that the obligations of the Underwriters are not discharged simply upon the issue being fully subscribed in the first instance. Various steps have to be followed through to determine as to whether the issue is fully subscribed or not. In this case, though the impression at the initial stage when the public issue was closed was that the issue was fully subscribed; when the subscribers were given the option to withdraw, as per the directions of SEBI, a large number of them withdrew their applications. Thus, the issue remained unsubscribed.

77. It is in order to cater to such kind of situations and for reducing the various risks involved in a public issue, that Underwriting Agreements are entered into. Underwriters who are in the business of underwriting are fully aware of the various steps that are to be completed before the Underwriters are finally discharged of their obligations.

78. In any Underwriting Agreement, either of the following has to happen in order for the Underwriter's obligations to be discharged:

a) Closure of subscription list and the issue being fully subscribed with the entire amounts being received from the subscribers;
b) Partial subscription by the public and partial subscription devolving upon the Underwriters, which is effected;
c) 90% of the issue remaining unsubscribed even after the devolvement upon the Underwriters, then all subscription amounts received have to be refunded under Clause 14(2) of the Agreement.

79. Unless and until any of the above events occurs, the Underwriters' obligations cannot be held as having been discharged. The stand of the

Defendant that the Underwriter's obligation would be discharged upon the issue being initially closed on the earliest closing date i.e., 18th February, 1995 is contrary to the scheme of the Underwriting Agreement. The question whether the issue remains undersubscribed or not is to be determined after the closure of the subscription list and not before that. This is because a 30 days' window has been provided for the subscribers to send their applications duly filled in along with the application money, which is to be kept with the Lead Manager. It is only once the application monies and the applications are received that the subscription list is generated and finally closed. After the subscription list is closed, if no communication is received by the Underwriter within 30 days, then the obligation of the Underwriter would stand discharged and not before that. Thus, the stand of the Defendant is contrary to the Underwriting Agreement itself.

80. The next question is whether this has been finally considered by the ld. Arbitrator or not. The ld. Arbitrator in the present case has passed awards in respect of a large number of Respondents. The ld. Arbitrator in paragraphs 17 and 20-22 of the impugned award observed as under:

> *"17. The claimant had proved the contract of underwriting and the default or breach on the part of the respondent. The respondent as well as the other underwriters failed to perform their part of the contract by not paying for the said FCDs that devolved on them. This led to sale of FCDs falling below 90% of the issue. <u>According to instructions of the SEBI (exhibit PW1/60) the claimant had to refund all the application monies received from the subscribers</u>. The registrar of the issue MAS accordingly refunded the money received to all those who had actually subscribed. In other words the issue failed.*
> *xxx xxx xxx*

20. The claimant claims that the amount of damages for breach stipulated in the contract is the total amount underwritten as if it was the liquidated damages. In fact the contract says that the company would be entitled to claim damages suffered by the company by reasons of failure on the part of the underwriter to subscribe to the debentures as aforesaid without mentioning any liquidated amount.

21. The claimant submits that the claimant is entitled to the full amount underwritten, i.e. value of 100497 FCDs totaling to Rs. 1,99,99,000/- Learned Amicus Curiae concludes that this cannot be granted as this will lead to an absurd result of benefitting the claimant by awarding the entire amount of the issue without having to issue the corresponding shares. I am not able to agree either with the claimant or with the learned amicus curiae. This is not a suit for specific performance of a contract where the parties have to fulfill their mutual obligations. Had the claimant sued for a specific performance, it would have been required to handover the requisite number of FCDs. The claimant has asked for damages. The damages may or may not be equal to the value of FCDs undertaken to be sold in the market by the underwriters. In fact the standard form for the underwriting agreement has a clause saying that the damages payable by an underwriter in case of breach could be liquidated at a multiple of the value of the FCDs undertaken to be sold or applications for them obtained.

22. Nor can I accept the claimant's proposition since the respondents are not in absolute breach of the agreement. They have not entirely failed to act on the contract. They have actually sold some FCDs but not the entire number stipulated. As per the notice issued by the claimant on the instructions of the Registrar, the respondents had failed to secure subscriptions for 18604 FCDs. The liability of the respondents is thus *limited to 18604 FCDs. True, the issue having failed, all the subscriptions for all the FCDs had to be refunded. All the FCDs for which the respondents procured subscriptions minus those which were withdrawn could be counted towards fulfillment of its obligations. However, the respondents are not obliged to take those FCDs the subscriptions for which had to be refunded on account of failure of the issue. The contract makes no provision for liquidated damages against the respondents/underwriters in the event of failure of the issue.*

81. From a perusal of the paragraphs of the Award extracted above, it is clear that though there is no detailed discussion of each of the clauses of the Underwriting Agreement, broadly the rationale and the reasoning of the ld. Arbitrator is that the Underwriters did not pay for all the FCDs that devolved upon them. The ld. Arbitrator noticed that as per SEBI's instructions, the Plaintiff had to refund the application monies received from the subscribers. The ld. Arbitrator also noticed that in terms of the contract, the Plaintiff would be entitled to claim damages for the loss suffered which is clearly provided for in Clause 11(d) of the Agreement. The ld. Arbitrator further notes that no provision for liquidated damages has been made in the Agreement. Thus, it cannot be said that the ld. Arbitrator failed to decide the issue as to whether the Underwriters' obligations were discharged or not.

82. Enormous emphasis has been laid on the fact that the ld. Arbitrator did not discuss the letter dated 6th March, 1995 and the effect thereof. This letter dated 6th March, 1995 is subject of vehement contest between the parties. Firstly, it is the Plaintiff's case that this letter was never produced before the ld. Arbitrator, though the Underwriters place enormous reliance on the same. The said letter allegedly issued by SEBI to the Lead Manager

has been filed in these proceedings. The language of the said letter reads as under:

"Securities and Exchange
Board of India
Ref: IMID/; XX/95
March 6, 1995

The General Manager
SBI Capital Markets Limited
New Delhi,
Sir,

RE: PUBLIC ISSUE OF M.S. SHOES EAST LIMITED
Please refer to your fax message dated February 20, 1995 and your subsequent discussion at SEBI.
We are herewith sending a draft of the approved letter to be issued by M.S. Shoes East Limited along with the letter of allotment. Please ensure that the letter ensure that the letter is issued in the form in which it has been approved by us without modification of any kind and also that they are actually despatched to the successful applicants along with the allotment letter. You had indicated that the issuer company has agreed to do so. The person/agency to whom the letter requesting refund should be addressed, must be specifically indicated in the letter. Lead Manager should also ensure that arrangements are made for immediate refund of monies to those who opt to do so. We would like to add that SEBI reserves to itself the right to take appropriate action against the issuer company and the lead manager for their lapses in this regard.
Please arrange to acknowledge receipt of this letter and also keep us informed of the action taken by the Company.

(USHA NARAYANAN)
DIVISION CHIEF"

83. It is relevant to notice that one of the issues framed by the ld. Arbitrator *vide* order dated 6th December, 2008 was as under:

> *"Did SEBI, vide its letter dated 6th March, 1995, addressed to M/s SBI Capital Markets Limited, one of the Lead Managers to the issue, direct that the investors/subscribers to the issue be allowed to withdraw their applications voluntarily on individual basis? If so, to what effect?"*

84. Thus, clearly the letter dated 6th March, 1995 was within the knowledge of the ld. Arbitrator, even though it does not find a mention in the Award. The purport of the 6th March, 1995 letter is that the Plaintiff was to write to subscribers giving them the option to withdraw their subscription. The subscribers were in fact given the option to withdraw, which led to the issue becoming under-subscribed. The fact that the Plaintiff actually wrote to the subscribers and gave them an option to withdraw is not disputed. The directions given by SEBI in the letter dated 6th March 1995, are also clearly reaffirmed by the Lead Manager in its letter 21st April, 1995 which is exhibit number PW-1/60.

85. The said letter (Fax Message) dated 21st April 1995 reads as under:

> *"No. Date*
> *CFO/95 April 21, 1995*
> *FAX MESSAGE*
> *FOR MR. PAVAN SACHDEVA, CMD, MS SHOES EAST LTD., NEW DELHI*
> *FROM MR. H. KUNDU, DOM, SBICAPS, NEW DELHI*
>
> *FOR MR. PAVAN SACHDEVA, CMD, MS SHOES EAST LTD., NEW DELHI*
> *FROM MR. H. KUNDU, DOM, SBICAPS, NEW DELHI*

<u>Reg: MS Shoes East Ltd. – Public Issue of FCDs</u>

With reference to the captioned issue, we forward herewith for your information and necessary action, copy of letter No. PMD/PVK/95 dated April 21, 1995 received from SEBI stating inter alia that as the Company has failed to receive 90% of the minimum subscription amount within 60 days of the closure of the issue, as mentioned in the prospectus, it has become incumbent upon the Company to refund the entire amount forthwith to all the applicants.

Kindly ensure compliance of the instructions of SEBI contained in the aforesaid letter.

Regards,

Deputy General Manager

86. This letter of the Lead Manager was on record of the ld. Arbitrator which confirms two facts –

a) That SEBI had informed the Lead Manager that the Plaintiff - Company had failed to receive 90% of the minimum subscription amount;

b) That the entire amount was to be refunded forthwith to all the Applicants.

87. Post the closure of the public issue on the ground that it was more than 90% subscribed, the above situation arose because SEBI had directed the Plaintiff to give an option to subscribers to withdraw if they so choose. Upon the option being given by the Plaintiff, a large number of subscribers in fact withdrew their subscriptions, which then led to the Lead Manager to issue the above letter. The entire claim of the Plaintiff is based on the fact

that since the issue was not subscribed, the Underwriters are liable to pay damages. Thus, denying the letter of SEBI dated 6th March 1995 would be a self-contradictory stance of the Plaintiff.

88. The ld. Arbitrator, instead of referring to the letter dated 6th March, 1995, which was a disputed letter, has referred to the letter of the Lead Manager dated 21st April, 1995 in arriving at her conclusion. The letter dated 21st April 1995 was a consequence of directions issued by SEBI vide letter dated 6th March 1995. The purport and intent of both the letters i.e., the letter of SEBI and letter of Lead Manager being identical, the question whether SEBI's letter was considered by the ld. Arbitrator or not would become an academic issue, as it was well within the knowledge of the ld. Arbitrator that SEBI had issued directions which were complied with by the Plaintiff.

89. The Underwriters cannot be seen to argue that the correct letter was not considered by the ld. Arbitrator as they did not make any submissions before the ld. Arbitrator and it is also not clear whether the said letter was even filed before the ld. Arbitrator or not. The ld. Arbitrator having considered the letter dated 21st April, 1995 of the Lead Manager, this Court cannot conclude that the ld. Arbitrator did not consider the correct letter in the overall context.

90. An argument has also been made by the Defendant that the Underwriting Agreement was vitiated by fraud. In order to support this submission, press clippings are relied upon to show that one of the promoters of the Plaintiff was, in fact, arrested. However, an allegation of fraud cannot be raised in a sketchy manner. Proper pleadings of fraud ought to exist which, in effect, make out a case of a criminal offence. Recently, the

Supreme Court in ***Union of India & Anr. v. M/S K.C. Sharma & Co. & Ors [Civil Appeal No. 9049-9053 of 2011, judgment dated August 14, 2020].*** has held as under:

> *"It is fairly well settled that fraud has to be pleaded and proved. More so, when a judgment and decree passed earlier by the competent court is questioned, it is necessary to plead alleged fraud by necessary particulars and same has to be proved by cogent evidence. There cannot be any inference contrary to record. As the evidence on record discloses that fraud, as pleaded, was not established, in absence of any necessary pleading giving particulars of fraud, we are of the view that no case is made out to interfere with the well reasoned judgment of the High Court."*

91. Thus, allegations of fraud would require the parties to specifically plead and then lead evidence before the ld. Arbitrator, which has admittedly not happened in the present case. Allegations of fraud also go to the root of the matter on whether the dispute is arbitrable. However, it has been well-settled by the Supreme Court in its judgment of ***Ayyasamy v. A. Paramasivam (2016) 10 SCC 386*** that-

> *"the mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act (1996 Act), finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits."*

92. The allegations in the present case were not of such a nature which involve or require a complex investigation. Moreover, the Plaintiff has not been held guilty of any criminal offence. The Defendants have failed to make out a case for non-arbitrability of the disputes.

93. Similar awards, as are under challenge in the present proceedings, have been passed by the ld. Arbitrator in a large number of cases. Such awards have also been satisfied or settled before this Court in various proceedings and no allegation of fraud has been made in the arbitral proceedings or before the Court. Therefore, the allegations of fraud raised by the Defendants are untenable and do not constitute a valid objection under Sections 30 and 33 of the Act.

94. It is also pertinent to note that as per the Underwriting Agreement, the Defendant had the option of terminating the Agreement under Clause 14, if any of the facts disclosed by the Company in the Prospectus or related documents were found to be incorrect. However, despite receiving the devolvement notice, termination was not resorted to. Moreover, the Defendant did not even reply to the devolvement notice. The Defendant also chose not to appear before the ld. Arbitrator after a certain stage and contest the matter, despite being aware of the proceedings.

95. On the question of the scope of interference by courts in arbitral awards passed under the Arbitration Act, 1940, the Supreme Court has recently held in ***Atlanta Limited Thr. Its Managing director v. Union of India represented by Chief Engineer, Military Engineering Service [Civil Appeal No.1533/2017 decided on 18th January, 2022*** that the Court does not sit in appeal over an Award passed by an Arbitrator, and the only

grounds on which it can be challenged are those that have been specified in Sections 30 and 33 of the Arbitration Act, 1940 namely, when there is an error on the face of the Award, or when the learned Arbitrator has misconducted himself or the proceedings. The said judgement has also reiterated the settled principle of law that challenge cannot be raised against the Award only on the ground that the Arbitrator has drawn his own conclusion or has failed to appreciate the relevant facts.

96. This Court cannot lose sight of the fact that disputes arose in 1995 i.e., almost 26 years back. The stand of the Defendant is, in effect, that the impugned award should be set aside or that the matter ought to be remitted back to the ld. Arbitrator. Considering the nature of the disputes, the reasoning of the ld. Arbitrator cannot be faulted with and that there is no perversity in the impugned award, this Court is of the opinion that the impugned award deserves to be upheld to the extent that it holds that the Underwriters failed to discharge their obligations and that liability under the Underwriting Agreement devolved upon the Defendant.

Computation of Damages and Interest in the Award

97. On the question of computation of the damages and interest awarded by the Ld. Arbitrator, Mr. Sachdeva submitted that the said issue falls within the domain of the Arbitrator and the Court cannot interfere in the same. The judgment of the Hon'ble Supreme Court in ***Arosan Enterprises Ltd. v. Union of India (UOI) & Ors. [AIR 1999 SC 3804]*** was relied upon.

98. It is submitted that the calculation of the total damages, which were awarded, can be easily explained by the manner in which the ld. Arbitrator has divided the total FCDs into 'subscribed' and 'under-subscribed' FCDs. The ld. Arbitrator has, after considering the various amounts, merely

awarded Rs.15.85 crores, and in respect of the remaining amount of FCDs, the disputes already stand settled with other Underwriters.

99. It was further submitted that losses were fully established by the Plaintiff before the Ld. Arbitrator by filing detailed affidavits of evidence and also by giving all the relevant documents in respect of the Hotel project and Yarn project that the Plaintiff was to undertake had the issue succeeded. It is submitted that though the claim of the Plaintiff was much higher, the Award is only limited to the Hotel project and expenses related to publication of the issue. Paragraphs 8 and 9 of the Award clearly set out the details of the various exhibits and the expenses incurred by the Company for the purpose of the public issue. It is submitted that it is evident from the impugned award that the ld. Arbitrator has clearly applied her mind as to how damages ought to be computed.

100. Insofar as the award of interest is concerned, Mr. Sachdeva relied upon various judgments to argue that the ld. Arbitrator is entitled to award both interest future as well as *pendente lite* in view of Section 29 of the Arbitration Act, 1940. He finally urges that in view of the decision in ***Hindustan Prefab Ltd. v. Union of India [(1987) 2 ArbiLR 123 (127)]*** the Court would have no jurisdiction to interfere, even if interest was wrongly awarded. Mr. Sachdeva also relied upon the Ex.PW-1/72 to argue that in view of the loans which were taken by the Company where 18% interest was being charged, the Award of the ld. Arbitrator is sustainable, inasmuch as the 18% interest was being paid by the Company itself.

101. On the other hand, the ld. counsels for the Defendant submit that the manner in which damages have been calculated by the Ld. Arbitrator, is contrary to the settled legal position. It is submitted that the Ld. Arbitrator

has failed to consider the fact that the underwriters were not responsible for any damages or compensation after they stood discharged under the agreement. It is submitted that under Sections 73 and 74 of the Indian Contract Act, 1872, actual loss had to be established by the claimant. It is further pointed out that the Ld. Arbitrator makes a categorical finding in the impugned award that the claimant-Company had not quantified the losses suffered. Accordingly, it is submitted that since losses were not quantified and/or proved by the Plaintiff, the Ld. Arbitrator could not have arrived at the figure with a conjectural calculation for awarding damages in favour of the Company. It is further submitted that under Section 29 of the 1940 Act, interest can be awarded only from the date of decree and pre-suit interest cannot be awarded. It is thus put forth that the Ld. Arbitrator has, clearly, erred in awarding not just interest *pendente lite* but also prior to the filing of the claim petition i.e., 2nd May, 1995, which according to ld. counsel is completely contrary to the Act.

102. On the issue of damages, a perusal of the impugned award shows that the ld. Arbitrator has considered the claims of the Plaintiff under Sections 73 and 74 of the Indian Contract Act, 1872. The Ld. Arbitrator rightly observed that since the contract made no provision for liquidated damages against the respondents/underwriters in the event of failure of the issue, the tribunal had to assess the 'reasonable damages/compensation'. For the purpose of computing damages, the following factors have been considered by the Ld. Arbitrator:

a) Forfeiture of the Plaintiff's Hotel project by HUDCO owing to the failure of the public issue – Rs.68.68 crores;
b) Similar forfeiture by DDA – Rs.3.9 crores;

c) Total expenses in floating the public issue minus the sum forfeited – Rs. 81.20 crores (including bills for issuing prospectus @Rs. 1.6 crores; bills for conferences @Rs. 0.23 crores and bills for advertisements @Rs.6.58 crores)

103. The fact that the Plaintiff was to launch its Hotel project and had already got land allotted for the said purpose, was mentioned in the Prospectus for the public issue itself, which was an admitted document among the parties. The fact that amounts were forfeited by HUDCO and DDA was also not in dispute. The Ld. Arbitrator also observed that the cost of the public issue was available on record, as were the bills for issuing prospectus, bills for conferences, and bills for advertisements approved by the Lead Managers. Thus, contrary to what has been submitted by the Defendants, it cannot be said that actual loss was not proved by the Plaintiff/Claimant, even if such loss was not quantified. The Ld. Arbitrator notes in paragraph 26 of the impugned award that the Claimant may not have brought on record various other bills and expenses as its case was based on the assumption of liquidated damages. Therefore, the Ld. Arbitrator herself proceeds to assess 'reasonable damages', based on the factors enumerated above.

104. The total loss quantified by the Ld. Arbitrator in paragraph 26 of the Award was proportionately distributed over the deficit procurement of shares *viz* 1,06,42,000 which amount came to Rs. 76.30/- per defaulting share approximately. However, the Ld. Arbitrator assessed reasonable damages at Rs. 80/- per share on the ground that the Claimant's actual damages would have been higher. Thus, the total loss was pro-rata apportioned between the various Underwriters on the basis of the

Underwriting Agreements and the subscriptions declared thereunder. In the present case, as per the Underwriting Agreement, the number of shares subscribed was 1,00,497 FCD/ shares. Out of these, presumably the Defendant subscribed to 81,893 FCDs/shares. Thus, the final devolvement on the Defendant was 18,604 FCDs/shares. By fixing the amount of compensation as Rs.80 per FCD/share, the Ld. Arbitrator calculated damages as Rs.14,88,320/-.

105. Upon conclusion of submissions, both parties have submitted that disputes with a large number of the underwriters had been settled by the Plaintiff, at much less the amount than what was claimed. The Plaintiff was accordingly directed to place on record charts showing the amounts which were recovered during settlements with various Underwriters. A perusal of the same shows that during the course of arbitral proceedings, the Plaintiff settled with 66 parties against whom claims were awarded. The Plaintiff further settled with 26 Underwriters during the course of pendency of petitions for pronouncement of judgment / objections.

106. Moreover, during the pendency of the present suit, a without prejudice offer dated 8th February, 2017 was made by the Plaintiff to the Defendant in the following terms:

> *"**Sub: Offer of out of court settlement without prejudice to our rights in the suit/ application and without prejudice to our contentions in the reply to the objections filed by you.***
> ***SETTLEMENT OFFERED WITHOUT PREJUDICE***

Amount (Rs.) in the Suit filed on 25.6.2012	*18% from the date of Suit till 28.2.2017*	*No. of Years & No. of Days*	*Per Day Interest*	*Total Amount Due as on 28.2.2017 (A + B)*	*Settlement amount offered 20%*

A	B				
9,054,213.00	*7,626,376.01*	*(4Yrs 248 Days)*	*4465.09*	*16,680,589.01*	*3,336,117.80*

Please consider the above before next date i.e. 1.5.2017 before Hon'ble High Court of Delhi.
Thanking you."

107. A perusal of the various settlements already entered into and the settlement offer made in the present case shows that the Plaintiff has settled with various underwriters from arbitral proceedings for varying percentages. In some cases, it is at 10% of the awarded amount and in other cases, it is 20% to 25% of the awarded amount. Though such settlements have been entered into with the mutual consent of parties, since the entire dispute has been adjudicated on the basis of obligations of Underwriters and damages have been awarded on a pro-rata basis which has been divided amongst the Underwriters, these out of court settlements would also be relevant in order to determine as to what should be the reasonable damages that ought to have been awarded *qua* the present Defendants. The ld. Arbitrator has simply proceeded on the basis that *qua* each share, the assessment of reasonable compensation would be Rs.80/-.

108. The law on compensation for breach of contract under Sections 73 and 74 of the Indian Contract Act, 1872 has been laid down in a number of judgments. In ***Oil & Natural Gas Corporation Limited v. Saw Pipes Ltd. (2003) 5 SCC 705***, Hon'ble Supreme Court held in the context of liquidated damages that:

> *"68. From the aforesaid discussions, it can be held that:*
> *(1) Terms of the contract are required to be taken into consideration before arriving at the*

conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove <u>actual loss or damage suffered by him before he can claim a decree</u>. <u>The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract</u>.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

109. For the purpose of assessing unliquidated damages under Section 73 of the Act, it would be pertinent to refer to the *locus classicus* English judgment in ***Hadley v. Baxendale [1854] EWHC J70***, wherein the principle embodied in Section 73 was enunciated as under: -

> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract <u>should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of</u>*

> *contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."*

110. The Supreme Court reiterating the principle of remoteness of damages in ***Kanchan Udyog Ltd. v. United Spirits Ltd. (2017) 8 SCC 237*** has relied on paragraph 1785 of Chitty on Contracts 26th edn (1989) Vol. 2, p. 1128-1129 as extracted below:

> *"The important issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties, but causation must also be proved: there must be a causal connection between the defendant's breach of contract and the plaintiff's loss. The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of plaintiff's loss."*

111. Therefore, the settled legal position is that a party cannot be made responsible for indirect or remote loss that may have been caused to the claimant as a result of breach on the part of the Respondent/Defendant. In the opinion of this Court, the Underwriters could not have been made responsible for the entire loss suffered by the Plaintiff. The allegations and the history of these litigations shows that there was an interference by SEBI after the public issue for whatever reason, which led to withdrawal of the subscriptions by the initial subscribers. The losses and confusion that prevailed due to the letter issued by SEBI directing the Plaintiff to give investors the option to withdraw from the public issue and the withdrawal of subscriptions thereafter cannot be the sole responsibility of the

Underwriters. The Plaintiff also appears to have contributed by its own conduct in the loss suffered by it, as is evident from the facts on record, though no criminal culpability may have been found by the investigating authorities. Moreover, the Ld. Arbitrator ought to have considered if the Plaintiff made any *bona fide* attempt to mitigate its losses.

112. Thus, based on the facts and circumstances that have emerged, the question that would arise is what is the reasonable compensation or damages to be awarded against the Underwriters. This Court is of the opinion that a large number of Underwriters have already settled their disputes with the Plaintiff, even during pendency of arbitral proceedings. After passing of the Awards, several parties have settled. The Plaintiff has to clearly shoulder a substantial part of the blame for the losses which it may have suffered. The liability to pay compensation/damages *qua* the Underwriters ought to thus be reduced to a reasonable amount i.e., 1/4th of the losses per share as computed by the ld. Arbitrator i.e., Rs.20/- per FCD/share. Further, the award of 18% interest p.a. by the Ld. Arbitrator is highly onerous and unsustainable, especially considering the prevalent market conditions. The said rate is also liable to be reduced to a reasonable percentage.

113. In a petition for pronouncement of judgment in terms of the Award under Sections 14 and 16 of the Arbitration Act, 1940, and while considering objections under Sections 30 and 33, it is the settled legal position that the Court has to apply its mind to arrive at the conclusion whether there is any cause to modify the award under Section 15 of the Arbitration Act, 1940 (***Union of India v. Manager, M/s Jain and Associates (2001) 3 SCC 277***). It has further been held by the Supreme Court in ***Naraindas Lilaram Adnani v. Narsingdas Naraindas Adnani &***

Ors. 1995 Supp (1) SCC 312 that under Section 15(b) of the Arbitration Act, 1940, the Court, may, by order, modify or correct an Award.

114. Accordingly, in the facts and circumstances of the present case, while upholding the responsibility of the Underwriters to discharge their underwriting obligations, this Court holds that only reasonable damages which arose in the natural course of things or were in the direct contemplation of the parties could have been awarded by the Ld. Arbitrator for the failure of the Underwriters to discharge their obligations under the Agreement. Thus, applying the principles of computation of damages as per settled law as also taking the account the settlements that have been entered into by the Plaintiff with similarly placed underwriters in the interest of justice, the damages awarded *qua* the Defendant are modified as under:

Total number of FCDs devolved upon the Defendant

(18,604) x Rs. 20 = Rs. 3,72,080/-

115. Insofar as award of interest is concerned, the Underwriters cannot be held fully responsible for the delay in appointment of arbitrator or for the period when the arbitral proceedings of the present proceedings have remained pending. Accordingly, the amount awarded above as damages, shall be paid along with interest @7% p.a. from the date of pronouncement of the award i.e., 28th May, 2012 till today. If the entire awarded amount is paid within a period of 8 weeks, no further interest would be liable to be paid. However, in case of non-payment, simple interest on the entire awarded sum [i.e., principal amount + the interest @ 7% per annum from the date of award till today] would be liable to be paid @ 4.5% per annum. The costs of proceedings as awarded by the ld. Arbitrator are upheld.

116. The suit and the objections under Sections 30 and 33 of the Arbitration Act, 1940 are disposed of in the above terms. All pending applications are also disposed of.

117. Judgment and decree as per the Award with the modification as set out above is pronounced.

118. Decree sheet be drawn accordingly.

PRATHIBA M. SINGH
JUDGE

APRIL 27, 2022
Rahul/AD