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

***Reserved on: 10th February, 2022***
***Pronounced on: 14th February, 2022***

\+ OMP (I) (COMM.) 290/2021

ZOSTEL HOSPITALITY PVT. LTD. ..... Petitioner

Through: Mr. Amit Sibal, Sr. Adv along with Mr.Abhishek Malhotra, Ms. Shilpa Gamnani, Ms. Atmaja Tripathy, Mr. Vinamra Kopariha, Mr. Kaustubh Prakash, Mr. Vinay Tripathy , Ms. Anjali Tiwari, Advs.

versus

ORAVEL STAYS PRIVATE LIMITED & ANR... Respondents

Through: Mr. Mukul Rahatagi, Sr. Adv. with Ms. Anuradha Dutt, Mr. Lynn Pereira, Mr. Avimukt Dar, Mr. Mayank Mishra, Ms. Suman Yadav, Mr. Haaris Fazili, Ms. Vaishnavi Rao, Mr. Ayush Dhawan, Mr. Kunal Dutt, Ms. Shivangi Sud, Ms. Prerna Sharma, Advocates

**CORAM:**
**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**J U D G M E N T**

**% 14.02.2022**

(By Video Conference on account of COVID-19)

**1.** What, exactly, is the "fruit" of an arbitral proceeding?

**2.** In a somewhat intricate fashion, this question arises for consideration in the present case, which presents an interesting conundrum regarding the scope of Section 9(1)(ii)[1] of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), when invoked at a post-arbitral stage.

**3.** Section 9 provides for grant of interim measures of protection by a Court. It is well known that the provision is, more often than not, invoked at the pre-arbitral stage, before arbitral proceedings commence. This, however, is a case where an arbitral award stands rendered, and the petitioner, claiming to be the successful litigant before the learned arbitrator, seeks interim protection after the award has been rendered.

**4.** The vast majority of judgements on Section 9 relate to its scope and ambit at the pre-arbitral stage. The peripheries of Section 9

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[1] **9. Interim measures, etc., by Court.—**
(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court –
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(ii) for an interim measure of protection in respect of any of the following matters, namely: –
(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
(b) securing the amount in dispute in the arbitration;
(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
(d) interim injunction or the appointment of a receiver;
(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

jurisdiction, when invoked at a post-award stage, stand delineated in the following extract from the judgement of the High Court of Bombay (through Dr Chandrachud, J., as he then was), in ***Dirk India Pvt Ltd v. Maharashtra State Power Generation Co. Ltd***[2]:

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

This passage has received the imprimatur of the Supreme Court, having been cited, approvingly, in ***Hindustan Construction Co Ltd v. U.O.I.***[3], as correctly delineating the scope of Section 9 jurisdiction, when invoked at a post-award stage.

**5.** Interestingly, both sides, before me, rely on this extract from ***Dirk India***[2]. Mr. Sibal, learned Senior Counsel for the petitioner, contends that if interim protection, as sought in this petition, is not granted, the award, rendered in favour of his client by the learned arbitrator, would be rendered unenforceable. This, according to him, justifies grant of interim protection, premised on the above enunciation of the law. Mr. Rohatgi, learned Senior Counsel for the respondent contends, *per contra*, again relying on the afore-extracted

[2] **2013 (7) Bom CR 493**
[3] **AIR 2020 SC 122**

passage, that post-award protection, under Section 9, is "intended to safeguard the fruit of the proceedings". The award, on the basis of which the present petition has been filed by the petitioner, according to Mr. Rohatgi, grants no "fruits" to the petitioner, which could be safeguarded. In fact, Mr. Rohatgi went to the extent of stating that the award grants the petitioner, effectively, nothing at all, despite containing various observations favouring the petitioner. The final direction in the litigation alone is enforceable, submits Mr. Rohatgi, and not mere observations, howsoever favourable they may appear to be. Absent any enforceable corpus, submits Mr. Rohatgi, the present petition cannot be maintained at all.

**Facts**

**6.** Having thus identified the issue under consideration, albeit abstractly, one may proceed to the facts.

**7.** Zostel Hospitality Pvt Ltd ("Zostel") and one of its investor-shareholders Orios Venture Partners ("Orios") decided to enter into a contract with Oravel Stays Pvt Ltd ("Oravel"), whereunder, essentially, Zostel would transfer its hotel business to Oravel and Orios, against which Oravel would, *inter alia*, transfer, to Zostel, "identified assets" which included 7% of its shareholding. The terms of this proposed arrangement were reduced to writing, in the form of a Term Sheet dated 26th November 2015. The opening recital in the Term Sheet read thus:

"This preliminary term sheet ("Term Sheet") sets forth the current intent with regard to the acquisition of identified assets of Zostel Hospitality Private Limited ("Target") by Oravel Stays Private Limited ("Acquirer") ("Acquisition"). This Term Sheet is non-binding and is intended solely as a summary of the current terms that are proposed by the parties; provided that the paragraphs opposite the headings "Confidentiality", "Approvals", "Expenses", "Exclusivity" and "Governing Law and Arbitration" shall be legally binding provisions. The parties do not intend to be bound until they enter into Definitive Agreements regarding the subject matter of this Term Sheet, and either party may, at any time prior to execution of such Definitive Agreements, unilaterally terminate all negotiations pursuant to this Term Sheet without any liability to the other party."

**8.** The Term Sheet contained, among others, the following clauses:

| S. NO. | ITEM | DESCRIPTION |
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| 3 | Acquisition | The Acquirer will acquire the identified assets of the Target, which would include intellectual property rights (trademarks and domain names), software, certain key employees and other assets (" Assets") of the Target.<br><br>For purposes of the acquisition of Assets, the Acquirer shall pay the 'minimum permissible price by law to the Target. |
| 4 | Closing | The closing shall be conditional upon fulfilment of the following conditions: (i) completion of limited legal and financial diligence *of* the Target; (ii) the Target obtaining all corporate, governmental, management, third party, exchange control and other regulatory approvals that are necessary or advisable; (iii) conditions identified |

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| | | under Annexure I; and (iv) any other conditions in the Definitive Agreements ("Closing").<br><br>It is hereby clarified that the term losing, in case of a Merger Framework, shall mean the filing of the scheme of merger with the court.<br><br>Upon Closing:<br><br>(a) Preference shareholders of the Target shall be entitled to acquire preferred securities (which may include equity with contractual rights) ("Preferred Stock") in the Acquirer.<br><br>(b) Equity shareholders of the Target shall be entitled to acquire equity shares in the Acquirer.<br><br>The total shares issued including, Preferred Stock and equity shares shall not exceed 7% of the fully diluted shareholding of the Acquirer. Upon completion of the post-closing obligations as set-out in **Annexure** II ("Post Closing Obligations"), Founders shall be entitled to a payout of US$ 1 million. |
| 5 | Shareholder Rights | **Preemptive Rights:**<br><br>If the Acquirer proposes to offer equity securities to any person, then Tiger and Orios, *(pari passu* with other right holders of the Acquirer) shall have a pro-rata right to subscribe to such new securities to maintain their respective shareholding in the Acquirer. Exceptions and the treatment of securities not subscribed for by |

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| | | shareholders who have a right to do so, as mutually agreed between the parties, shall be set forth in the Definitive Agreements.<br><br>**Liquidation Preference:**<br><br>In the event of any liquidity event (as defined in the shareholders agreement dated July 25, 2015 entered by and between the Acquirer and its shareholders ("OYO SHA")), the preference shareholders of the Target will have liquidation preference on the amount actually invested by them in the Target. The proceeds will be distributed *pari passu* to the Series A Shares, Series A1 Shares, Series B Shares, Series C Shares and Preferred Stock, in an amount equal to the higher of (i) their pro-rata share of the proceeds and (ii) their original price plus all accrued and unpaid dividends.<br><br>The balance of the liquidation proceeds to be paid to the holders of equity shares.<br><br>**Anti-Dilution Protection**<br><br>Subject to exceptions as provided under the OYO SHA, the conversion ratio for the Preferred Stock shall be 1:1 ("Conversion Ratio"). The Conversion Ratio shall be adjusted on a broad based weighted average basis, in the event the Acquirer raises a further round of financing at a valuation which is less than US$ 400 million.<br><br>**Limited Information Rights** |

| | | |
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| | | The Acquirer shall provide limited and reasonable information (subject to confidentiality restrictions) to the Target Shareholders (in a mutually agreed format) for the purposes of facilitating a sale of their respective securities.<br><br>**Co Sale Right**<br><br>Tiger and Orios shall have a pro rata co-sale right *(pari passu* with other right holders of the Acquirer).<br><br>In the event that Tiger and/or Orios acquire any of the shares held by the Founders within 12 months of Closing, they shall be entitled to exercise Preemptive and Co-Sale Rights in respect of such shares. |
| 7 | Definitive Document | Subject to the conditions set forth in this Term Sheet, the parties shall mutually agree, execute the following documents and such other documentation as the parties may deem necessary (hereinafter referred to as the "Definitive Agreements"):<br>(a) Share Subscription Agreement/ Merger Framework Agreement (Acquirer);<br>(b) Shareholders Agreement (Acquirer);<br>(c) Asset/ Business Transfer Agreement;<br>(d) Non-Compete, Non Solicitation Agreement with the Founders;<br>and<br>(e) Settlement and Release Agreement executed between the Acquirer and Target.<br>The parties may pursuant to mutual discussions agree upon execution of |

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| | | one or more. agreements to capture the entire understanding arrived at amongst them. |
| 9 | Due Diligence | Following execution of this Term Sheet, the Acquirer shall have the opportunity to conduct a diligence on the Target. The Target shall provide all such information, documents and material about the business and affairs of the Target *as* listed in the Exhibit to this Term Sheet. |
| 10 | Non-compete, & Non-solicitation, Non-Disparagement Agreement | Founders shall enter into a non-disparagement agreement, non-compete and non-solicitation agreement with the Acquirer and the Founders agreeing not to engage directly/indirectly in any business anywhere in the world which competes with the business of the Acqui.rer and/ or the Target (including hostel/ apartments/ alternate accommodation business) for a period of 5 years from the date of Closing. No separate consideration shall be payable to the Founders for this non-compete and non-solicitation agreement. It is clarified that the family of Dharam Veer Singh (one of the Founders) owns hotel properties as part of a traditional hotel business. The Founders undertake to ensure that such business does not compete with the business carried on by the Acquirer.<br><br>The Target Shareholders agree not to directly (or through an affiliate) invest in any business that is determined by the Board of the Acquirer as a competing business (in accordance with the list of such |

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| | | competitors) till such time as they are shareholders of the Acquirer. The parties agree that the restriction contained in this Clause shall only come into force on the date of execution of the Definitive Agreements and shall fall away on the long-stop date as agreed in the Definitive Agreements in the event the Closing has not occurred by such date. It is clarified that Tiger and Orios shall be free to invest in any business they have already invested in prior to signing of this Term Sheet. |
| 16 | Governing Law & Arbitration | This Term Sheet will be governed by Indian 1aw.<br><br>Any dispute between the parties arising from or relating to this Term Sheet which cannot be amicably resolved between the parties shall be referred to arbitration in New Delhi in accordance with the Arbitration and Conciliation Act, 1996. The Tribunal shall consist of 1 arbitrator to be agreed upon between the parties. The language of the arbitration shall be English and the decision of the arbitrator shall be final and binding on the parties. The law of the arbitration shall be the laws of India. |

Annexures I and II to the Term Sheet read thus:

"**ANNEXURE I**

**Closing Obligations**

1. Withdrawal of all cases by the Target against the Acquirer, including but not limited to CS (OS) No.

2093/2015, contemporaneously and simultaneously with the Acquirer withdrawing its cases against the Target, including but not limited to CS (OS) 1058 of 2015, pursuant to a certain Settlement and Release Agreement executed in a mutually acceptable form and manner.

2. Transfer the consumer traffic by redirecting all calls, website, phone based application and any other consumer traffic generating system to the respective channels of the Acquirer, reasonable costs of which shall be borne by the Acquirer.

3. Transfer Assets reasonable costs of which shall be borne by the Acquirer.

4. Send an appropriate written, mutually agreed communication to all the stakeholders of the Target, including but not limited to the property owners, customers and the employees intimating about the closure of operations of the Target and the Acquisition by the Acquirer.

5. Hand over to the Acquirer all the data base and records related to customers, hotel owners, including contracts pertaining to live property and property yet to go live along with the relationship contacts, subject to confidentiality norms and privacy related concerns.

6. Execute all documents (to the satisfaction of Acquirer) to ensure that employee/ option holder liabilities are satisfied after Closing.

## ANNEXURE II

## Post-Closing Obligations

Post-Closing the Target shall:

1. Facilitate, on a best efforts basis, to bring all properties of the Target comprising of live and new signed properties in the Acquirer's network, subject to a mutually agreed minimum threshold.

2. Reduce the total amount of minimum guarantee to be paid to the property owners in relation to the aforesaid properties to a mutually agreed amount per month.

3. Within 30 days, fulfil all obligations towards its employees, including obligations towards those employees who have been employed by the Acquirer.

4. Take steps to wind up the company and subsidiaries in a form and manner deemed suitable to the parties."

**9.** Claiming that, owing to defaults on the part of Oravel, Zostel was unable to acquire the assets of Oravel, Zostel initiated arbitration proceedings against Oravel. An eminent former Chief Justice of India arbitrated culminating in an arbitral award dated 6th March, 2021. Zostel claims to have sought the relief, in the present petition, to ensure that the arbitral award is not frustrated and Zostel is not rendered unable to enforce the award. The concluding, operative para of the arbitral award reads as under:

"In view of the above findings, this Tribunal holds that Claimant is entitled to Specific Performance of the Respondent's obligations under Term Sheet dated 26.11.2015. However, as Definitive Agreements have yet to be executed, the Tribunal holds that the Claimant is entitled to take appropriate proceedings for Specific Performance and execution of the Definitive Agreements as envisaged, for itself and its shareholders under the Term Sheet.

Further, the Claimant is entitled to costs in the cause."

**10.** Oravel has challenged the arbitral award before this Court, by way of OMP (Comm) 151/2021, which is presently pending, and was listed along with the present petition on 9th February, 2022. With

consent of both sides, however, the present petition was taken up for hearing, as Zostel seeks urgent interim relief.

**11.** The Court, seized with a post-award Section 9 petition, cannot revisit the award. The prayer for interim protection has to be examined, treating the award as correct and binding. Acknowledging this position, Mr. Rohatgi, learned Senior Counsel for Oravel submits, on instructions, that, despite the fact that Oravel's challenge to the award is pending, the present post-award Section 9 petition may be decided assuming the award to be correct and binding.

**12.** In passing the present judgement, therefore, I have proceeded on the premise that the award, dated 6th March, 2021, is a valid award, binding on the parties.

**13.** Given this position, it is necessary to understand what exactly the award dated 6th March, 2021 says, so that the Court could identify the "fruits" thereof, that the petitioner may seek to take away, and of which the petitioner may legitimately seek protection.

The Award, condensed

**14.** The grievance ventilated by Zostel before the learned Arbitrator was that it had complied with all its obligations under the Term Sheet and transferred its hotel business to Oravel. Owing, however, to the recalcitrant attitude adopted by Oravel, Zostel complained that the Definitive Agreements – the drafts of which had been forwarded by

Zostel to Oravel and which were on the cusp of execution – could not be executed, and, as a result thereof, Oravel reneged on its obligations towards Zostel under the Term Sheet.

**15.** Zostel therefore prayed, before the learned arbitrator, *inter alia*, that

(i) Oravel be directed to specifically perform its obligations under the Term Sheet by transferring/issuing, in the name of Zostel's shareholders, 7% of Oravel's shareholding, on a *pro rata* basis depending on the respective shareholding of Zostel,

(ii) Oravel be directed to pay, to Zostel's founders, US $ 1 million.

(iii) Oravel be directed to pay damages for loss of goodwill and reputation as well as inconvenience caused to Zostel and its shareholders, to the tune of US $ 17 million, and

(iv) in the alternative, Oravel be directed to pay an amount equivalent to 7% of the value of Oravel's shareholding as per the last round of funding, along with US $ 1 million.

**16.** The learned arbitrator framed the following issues, as arising for consideration:

> "1. Whether the Arbitral Tribunal has jurisdiction to consider or entertain the claims of Claimants Nos 3 to 17?
>
> 2. Whether Claimant Nos. 2 and 3 have waived their rights to raise any claims in the present arbitration and hence their claims are not maintainable?
>
> 3. In the event of Claimant Nos. 2 to 17 not being entitled to maintain their claim, whether Claimant No. 1 is entitled to

claim/pray for the relief of allotment of shares from the Respondents to Claimant Nos. 2 to 17 and the payment of USD 1 million to Claimants No. 4010?

4. Whether the term sheet dated 26.11.2015 is non-binding as stated in it or whether it is abiding, valid and enforceable agreement in terms of the acts of the parties as alleged by the Claimants?

5. Whether there was consensus ad idem between the parties on the Draft Definitive Agreements stipulated under clause 7 of the Term Sheet dated 26.11.2015?

6. Whether is asserted by the Claimants they were ready and willing to perform their obligations under the Term Sheet dated 26.11.2015 and to execute the draft definitive agreements contemplated under the Term Sheet?

7. Whether the transaction(s) as contemplated in the Term Sheet dated 26.11.2015 has been consummated and the Claimants have performed conditions detailed in the Term Sheet dated 26.11.2015?

8. Whether the Claimant is proved that there was a breach of contract in terms of the Term Sheet dated 26.11.2015 by the Respondent?

9. Whether the Claimants are entitled to specific performance of the Term Sheet dated 26.11.2015 by directing the Respondents to issue 7% of the present shareholding of the Respondent in favour of Claimant No. 2 to 17 pro-rated to their respective shareholding of Claimant No. 1?

10. Whether the Claimant is No 4 to 10 are entitled to the payment of USD $ 1 million?

11. Whether as an alternative to specific performance, Claimants are entitled to an amount equivalent to 7% of the value of the Respondent as per the last round of funding received by the Respondent along with USD $ 1 million to Claimant Nos. 4 to 10?

12. Whether Claimants No. 4 to 10 are entitled to interest on the amount of USD 1 million from the date of execution of the Term Sheet, if so what period and at what rate?

13. Whether the Claimant is proved loss of goodwill and are entitled to damages to the extent of 17 million USD?

14. Whether the Claimant No. 1 he is entitled in the alternative for payment of USD 8,89,22,768/-, as claimed in the Replication?

15. Who should bear the cost and if so to what amount?

16. To what reliefs are parties entitled?"

Of these, for the purposes of the present petition, and the dispute herein, Issues 1, 2 and 3 are not of particular relevance.

**17.** On the remaining issues, the learned arbitrator held thus:

**18.1** Qua Issue 4

**18.1.1** Issue 4 addressed the question of whether the Term Sheet constituted a valid and binding contract. Zostel contended that the Term Sheet was a binding and valid contract, whereas Oravel, relying, *inter alia*, on the preambular recital in the Term Sheet, submitted that it was not binding and was merely exploratory.

**18.1.2** The learned Arbitrator held, at the outset, that the construction of the Term Sheet had to be attempted by reading it as a whole, and not by merely reading the preamble and ignoring its main

clauses. The learned Arbitrator went on, thereafter, to reproduce Clause 4 of the Term Sheet and observed thus:

> "*A reading of Clause 4 and Annexure-I shows that completion of the due diligence process, obtaining approvals and fulfilment of conditions under Annexure-I our requirements that ought to be fulfilled in order to close the transaction.* In other words, closing of the transaction (i.e., Acquisition of Claimant No. 1 by the Respondent) is the natural and only consequence of compliance of these conditions.
>
> Clauses 4(iii) and (iv) of the Term Sheet show that fulfilment of the conditions stated in Annexure-I are essential and conditions stated under Definitive Agreements have to be fulfilled in addition to the conditions laid down in clauses 4(i) to 4(iii)."
>
> (Emphasis supplied)

Observing, thereafter, that the Term Sheet required Zostel to perform several "closing obligations", apart from the conditions mentioned in the Definitive Documents, towards closing of the transaction, the learned Arbitrator held that the Term Sheet could not be treated as a mere exploratory document. It was further observed that Clause 7 of the Term Sheet, which stipulated that the execution of the Definitive Documents was "subject to the conditions set forth in the Term Sheet", and, thereby, encompassed the conditions set out in Clause 4, indicated that execution of the Definitive Documents was not independent of the Term Sheet. The learned Arbitrator also noted that Zostel had, in order to fulfil the obligations enlisted in Annexure-I to the Term Sheet, (i) facilitated transfer of its employees, (ii) facilitated transfer of the properties in its network to Oravel's network, (iii) facilitated the process of consumer migration, (iv) facilitated the

process of transfer of future bookings w.e.f. 31st December, 2015 and (v) provided the consumer data of Oravel to Zostel.

**18.1.3** "Without expressing any opinion or the consequences of the (said) act (which was subject matter of other issues)", the learned Arbitrator observed that, had the Term Sheet not been binding, there was no reason for Oravel to have entertained communications from Zostel, informing it of performance of the above acts. Following this discussion, the learned Arbitrator held that "the parties were acting upon the Term Sheet and the Term Sheet (was) a binding document".

**18.2** Qua Issue 5

**18.2.1** This issue addressed the question of whether there was consensus *ad idem* between the parties on the Draft Definitive Agreements, which had been forwarded by Zostel to Oravel.

**18.2.2** The learned Arbitrator relied, in the first instance, on the following definition of consensus *ad idem*, in ***Mayawanti v. Kaushalya Devi***[4] (in para 18 of the report):

> "The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. *The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem.* The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. *If the stipulations and terms are uncertain, and the parties are not ad idem,*

[4] **(1990) 3 SCC 1**

*there can be no specific performance, for there was no contract at all. Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement. Negotiations thereafter would also be material if the agreement is rescinded."*

(Emphasis supplied)

**18.2.3** Relying on Clause 7 of the Term Sheet, in conjunction with communications between the parties and the Board Resolution of Oravel, the learned Arbitrator held that "it (was) clear that at the very least, parties were *ad idem* in respect of acquisition of identified assets of Claimant No. 1 by the Respondent". The learned Arbitrator observed that finalisation of the Definitive Agreements was hindered by an objection by Venture Nursery, one of the shareholders of Oravel, and the observations and findings of the learned Arbitrator in that regard are of considerable significance:

"Admittedly, Due Diligence was conducted in December 2015. Parties began exchanging drafts of various Definitive Agreements in the month of December 2015, and by January 2016 several revised drafts were shared based on comments of the parties. In view of the arguments advanced by both parties, it is clear that after nearly 8 of January 2016, the drafts were being commented upon and traditions were being made accordingly. However, it was only on January 26, 2016 that 1 of the partners of Sequoia Capital (Respondent's Shareholder and Investor) addressed an email to Claimant No. 1's Shareholder stating that:

"Oyo team has been working relentlessly to finalise the docs. we are nearly there but a minority investor has held up the process by asking for a new and unreasonable rights in the SHA and generally being unsupportive.

Just wanted to let you know that we are trying to resolve asap while minimising any long-term risks/issues."

Several drafts were shared thereafter. Meetings took place between the parties regarding the issues raised by Venture Nursery and its objections in respect of the deal. Ex. C-57 captures the position existing as on 22.03.2016 and highlights that:

a. Venture Nursery was not supporting the deal and has written to the Board of Directors stating this.

b. OYO was reluctant to do anything which could put the indicated financing at risk.

c. OYO's team stated that going forward they would attempt to do a quid pro quo with Venture Nursery. The terms being that if existing or new OYO investors are ready to give VN exit, the VN would have to agree to stop being signatories to future SHAs and amendments thereto. Their idea is to bring out the irrationality at Venture Nursery's any by offering them a deal which would be fair.

d. It was decided by all parties that revised Framework Agreement would be signed at the earliest.

Though Ex. C-57 has been denied by the Respondent being an internal document of the Claimant, RW-1 (Mr. Abhishek Gupta) relying on the said email in his cross-examination and stated that some items discussed in the meeting were documented in Ex. C-57. In view of RW-1's testimony, Respondent's objection, Ex. C-57 is not sustainable.

Ex. C-53 (Colly) is a WhatsApp communication between Mr. Dharamveer Chauhan and Mr. Ritesh Agarwal and shows that Claimants were regularly seeking updates on the Venture Nursery Issue. *The said communication clearly shows that the parties were waiting for the exit of Venture Nursery to complete the transaction.*

*Ex. C-48 (Colly) shows that it was on the instructions of the Respondent that the Claimants bought the Stamp papers. This leads to a natural conclusion that the respondent was inclined to close the transaction.*

*Documents placed on the record show that the parties were inclined to close the deal. It is evident that the revision of Definitive Documents and that finalisation was significantly affected by the events pertaining to the issues raised by Venture Nursery. Objections raised by Venture Nursery disturb the normal course of finalisation of the Definitive Documents.* No documents had been placed on record, which suggest a contrary view.

*It was essential that Definitive Agreements be amended to include the changes necessitated in view of the objections raised by Venture Nursery. However, such documents never came to be finalised by the parties. Therefore, in view of the documents placed on record and the pending issue with Venture Nursery that remained to be resolved by the Respondent, this Tribunal holds that there could not have been complete consensus ad idem on the Draft Definitive Agreements."*

(Emphasis supplied)

**18.3** Qua Issue 6

**18.3.1** Addressing the issue of whether Zostel was ready and willing to perform its obligations under the Term Sheet and to execute the draft Definitive Agreements, the learned Arbitrator held that there was merit in Zostel's submissions that

(i) Zostel had performed all closing obligations under the Term Sheet,

(ii) the obligations that remained unfulfilled (i.e. execution of the finalised Definitive Documents and withdrawal of pending litigations) were solely on account of the failure, on the part of Oravel, to perform its obligations pursuant to the Term Sheet, despite Zostel's willingness and readiness to perform the same,

(iii) it was after the transfer of Zostel's hotel business and employees to Oravel that Zostel was informed about the issues raised by Venture Nursery,

(iv) Zostel had purchased Stamp papers at the instruction of Oravel,

(v) Zostel had, on multiple occasions, sought response from Oravel regarding the status of the transaction after the exit of Venture Nursery,

(vi) Zostel's witness had testified that, while Zostel was willing to transfer whatever Oravel desired, for many items, they had received "no instructions",

(vii) though efforts were made towards amicably resolving pending litigations between the parties, which was a Closing Obligation under the Term Sheet, Zostel failed to do so owing to Oravel's failure to adhere to its obligations, in terms of payment of consideration in view of transfer of the business of Zostel and

(viii) Zostel attempted to close the transaction even in October 2017, after the transfer of its hotel business to Oravel in January 2016.

**18.3.2** Finding merit in the submissions of Zostel, the learned Arbitrator held that Zostel was ready and willing to perform its obligations under the Term Sheet and execute the draft Definitive Documents.

**18.4** Qua Issue 7

**18.4.1** Issue 7 addressed the question of whether the transactions under the Term Sheet had been consummated and whether Zostel had performed its obligations thereunder. On both the issues, Zostel, needless to say, asserted in the affirmative, whereas Oravel disputed the contention.

**18.4.2** The learned Arbitrator held thus:

> "Parties have been heard. The Term Sheet shows that the transaction i.e. acquisition of Claimant No. 1 by the Respondent consisted of several steps that were listed in Annexure I and Annexure II of the Term Sheet is Closing and Post-Closing Obligations. The pleadings and documents placed on record show that Claimant No. 1 did perform some of the conditions stated therein on the instructions of the Respondent. These inter alia included termination of contracts with hotel properties, transfer of Consumer Traffic to the Respondent, said the appropriate 'mutually agreed communication to stakeholders of the target intimating them about closure of operations of the target and acquisition by the acquirer and handing over database and records relating to customers and hotel owners. It is also observed that obligations such as withdrawal of pending suits was to be done simultaneously by both parties and was not carried out in view of the turn of events and the issues raised by the Respondent's shareholder, Venture Nursery. Some conditions remained unfulfilled on the part of Claimant No. 1 due to the absence of instructions from the Respondent.
>
> A perusal of the pleadings and evidence placed on record, shows that the Claimant perform part of its obligations under the Term Sheet as instructed by the Respondent. The said obligations were performed in compliance of the Term Sheet which was binding on the parties (as failed in Issue No. 4) and were not gratuitous acts. There is no document on record which shows that the Respondent instructed Claimant No. 1 at any stage, to stop taking steps towards fulfilment of the obligations stipulated under the Term Sheet. In fact,

Communications placed on record show that the Respondent was instructing and coordinated with Claimant No. 1 regarding various aspects of the transaction. This Tribunal holds that Claimant No. 1 carry out all facts within its control to consummate or the transactions contemplated in the Term Sheet and fulfil the obligations stipulated under the Term Sheet as instructed by the Respondent. The Claimant cannot be held responsible for the obligations that could not be fulfilled due to lack of instructions on the part of the Respondent or due to complications that arose due to the dispute raised by the Respondents minority shareholder, Venture Nursery."

**18.5** Qua Issue 8: On the issue of whether Oravel had breached the Term Sheet, the learned Tribunal held in favour of Zostel, thus:

"Parties have been heard. In view of the arguments advanced, evidence led by the parties and the findings in Issue Nos 4, 5, 6 and 7, this Tribunal holds that while the Claimant was ready and willing to fulfil the obligations mentioned in the Term Sheet and also formed part of the obligations, the Respondent failed to do so. On being requested by the Claimant's for performance of simultaneous obligations such as finalisation and signing of the Definitive Documents, the Respondent kept assuring that the same would be done once Venture Nursery's concerns were addressed. Claimant No. 1 continued to perform its obligations in compliance of the Term Sheet. There is no document on record which shows that the Respondent instructed Claimant No. 1 to stop taking steps towards fulfilment of the obligations stipulated under the Term Sheet at any stage. Therefore, there was a legitimate expectation on the part of the Claimant that the Respondent would also perform its part of the obligations under the Term Sheet. However, as the Respondent fails to perform its obligations, this Tribunal holds that Respondent committed breach of its obligations under the Term Sheet."

**18.6** Qua Issue 9:

**18.6.1** Issue 9 addressed the pivotal question of "whether the Claimants are entitled to specific performance of the Term Sheet dated 26.11.2015 by directing the Respondent to issue 7% of the present shareholding of the Respondent in favour of Claimant No. 2 to 17 pro-rated to their respective shareholding of Claimant No. 1".

**18.6.2** In addressing this issue, the learned Arbitrator took stock of Clause 4 of the Term Sheet, which made the entitlement of Zostel, to 7% of the shareholding of Oravel, consequential "upon closing" and, thereafter, proposed to answer the issue thus:

> "Clause 4 shows that it is only upon 'closing', that the preference and equity shareholders of Claimant No.1 would have been entitled to a total of 7% of the fully diluted shareholding of the Acquirer/Respondent. 'Closing' was conditional upon fulfilment of certain conditions, 1 of which was fulfilment of obligations under the Definitive Documents.
>
> This Tribunal has held (Issue No. 5) that parties could not arrive at consensus ad idem in respect of the Definitive Documents and the same were not finalised on account of the objections raised by Respondent's shareholder Picture Nursery, which was to be resolved by the Respondents.
>
> The Term Sheet was a binding document and the Claimant did everything within their control to complete their obligations under the same. The Claimant cannot be held responsible for the accident omissions of the Respondent and/or its shareholders by virtue of which sum of the obligations could not be fulfilled by the Claimant. This Tribunal has held that Claimant No. 1 is entitled to claim/prey for the relief of allotment of shares from the Respondents to Claimant Nos. 2 to 17.
>
> It is clear that Definitive documents could not be executed because of a problem created by the shareholder of the Respondent (Venture Nursery); the Term Sheet is a binding document and parties were acting on it; some of the pending

> obligations could not be carried out due to lack of instructions from the Respondent; the Respondent has committed a breach of its obligations under the Term Fee and the Claimant did everything within its control to complete its obligations under the Term Sheet. Thus the Claimant cannot be held responsible for the accident omissions of the Respondent and/or its shareholders by virtue of which sum of the obligations under the Term Fee could not be fulfilled by the Claimant. *Hence, the Claimant is entitled to Specific Performance of the Respondents obligations. However, as Definitive Agreements had yet to be executed, the Tribunal holds that the Claimant is entitled to take appropriate proceedings for Specific Performance and execution of the Definitive Agreements as envisaged for itself and its shareholders under the Term Sheet."*
>
> (Emphasis supplied)

**18.7** Qua Issues 10 and 12

**18.7.1** Issue 10 addressed the prayer of Zostel, for a direction to Oravel to pay US $ 1 million, whereas Issue 12 dealt with the right of Zostel to interest on the said amount.

**18.7.2** The learned Arbitrator noted that the entitlement of Zostel (or, rather, of its founders) to a payout of US $ 1 million arose under Clause 4 of the Term Sheet and was consequent "upon closing". Having reproduced Clause 4, therefore, the learned Arbitrator held that "the Tribunal (could not) grant the relief at this stage as the same (was) dependent on the fulfilment of post-closing obligations which stage will be reached only after the Definitive Agreements are executed". Resultantly, on Issue 12, the learned Arbitrator held that Zostel was not entitled to any interest.

**18.8** Qua Issue 11

Inasmuch as the prayer of Zostel, covered by this Issue, was for 7% of the value of Oravel as per the last round of funding received by Oravel along with US $ 1 million "as an alternative to specific performance", the learned Arbitrator held that, in view of his finding that Zostel was entitled to specific performance, this alternative relief became redundant.

**18.9** Qua Issue 13

This issue dealt with the claim of Zostel for damages to the extent of US $ 17 million, on the ground of loss of goodwill. The learned Arbitrator held, on this issue, as under:

> "*The Tribunal has held that the Claimant is entitled to Specific Performance. Hence, on Specific Performance, the goodwill of Claimant would also be transferred to the Respondent.* Therefore, the Tribunal does not deem it fit to grant relief in respect of loss of Goodwill to the Claimant. *The same will be dependent on the outcome of the proceedings for Specific Performance*."
>
> (Italics and underscoring supplied)

**18.10** Qua Issue 14

Zostel prayed, in the alternative, from Oravel, US $ 8,89,22,768/–, on the principle of *quantum meruit*. The learned Arbitrator held that the principle of *quantum meruit*, statutorily recognised in Section 70 of the Indian Contract Act, 1872, applied only in the case of relationships resembling contract, and not where a binding contractual relationship

existed between the parties. Ergo, the learned Arbitrator held that as a binding contract, in the form of the Term Sheet, was in existence between Zostel and Oravel, no relief could be granted on the basis of the *quantum meruit* principle.

**18.11** Qua Issue 15

On the aspect of costs, the learned Arbitrator held that, as Oravel had benefited by acquiring Zostel's hotel business and had "committed deliberate breach of contract", it was the defaulting party in the transaction and was liable, therefore, to bear the costs of the dispute, for which purpose the learned Arbitrator relied on Section 31A of the 1996 Act. Zostel was, therefore, held to be entitled to costs in the cause.

**18.12** Qua Issue 16

Issue 16 was the standard concluding issue in every *lis*, viz., the relief to which the parties were entitled. The finding of the learned Arbitrator, on this Issue, constitutes the concluding para of the Award, and, though it already stands reproduced earlier in this judgement, merits reproduction, once again, thus:

> "In view of the above findings, this Tribunal holds that *Claimant is entitled to Specific Performance of the Respondents obligations under Term Sheet dated 26.11.2015*. However, *as Definitive Agreements have yet to be executed*, the Tribunal holds that *the Claimant is entitled to take appropriate proceedings for Specific Performance and*

> *execution of the Definitive Agreements as envisaged*, for itself and its shareholders under the Term Sheet."
>
> (Italics and underscoring supplied)

**Rival Submissions**

Zostel's Submissions

**19.** Arguing for Zostel, Mr. Amit Sibal contends that, the learned Arbitrator having held Zostel to be entitled to specific performance of the Term Sheet, Oravel could not be allowed to take any steps as would frustrate the enforcement of the award by Zostel. He took me through the findings of the learned Arbitrator, to which this judgement has already alluded, in detail. He pointed out that there was a specific finding, by the learned Arbitrator, that Zostel had already transferred its hotel business to Oravel and had, therefore, performed its part of the bargain under the Term Sheet. The learned Arbitrator specifically found Oravel to be in default and in breach of its obligations under the Term Sheet, which itself constituted a binding contract, by failing to execute the Definitive Agreements and transfer 7% of its shareholding to Zostel. The entitlement of Zostel, to execution of the Definitive Agreements, and even to transfer of 7% of the shareholding of Oravel in its favour had, points out Mr. Sibal, been positively found in favour of Zostel by the learned Arbitrator. The only hurdle in execution of the Definitive Agreements, the drafts of which had been forwarded by Zostel to Oravel and had been accepted by Oravel, was the objection of Venture Nursery, which did not survive once Venture Nursery exited as a shareholder of Oravel.

**20.** Mr. Sibal also invoked, for the purpose of the relief sought by him, Order XXI Rule 34[5] of the CPC. He further submits that, holistically read, the Award does not indicate any circumstance, short of setting aside of the Award itself, in which 7% of its shareholding would *not* be transferable by Oravel to Zostel. In view of the findings in the Award which, till date, are undisturbed, Mr. Sibal submits that the execution of the Definitive Agreements and the transfer of 7% shareholding of Oravel to Zostel is a foregone conclusion, the entitlement of Zostel to which has been affirmed, many times over, by the learned Arbitrator in the Award.

**21.** Floating of the IPO by Oravel, submits Mr. Sibal, would irreversibly render execution of the Award an impossibility, as the

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[5] **34. Decree for execution of document, or endorsement of negotiable instrument**. –

(1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:—

"C.D., Judge of the Court of
(*or as the case may be*), for A.B., in a suit by E.F. against A.B.",

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) (a) Where the registration of the document is required under any law for the time being in force, the Court, or such officer of the Court as may be authorised in this behalf by the Court, shall cause the document to be registered in accordance with such law.

(b) Where the registration of the document is not so required, but the decree-holder desires it to be registered, the Court may make such order as it thinks fit.

(c) Where the Court makes any order for the registration of any document, it may make such order as it thinks fit as to the expenses of registration."

Term Sheet was predicated on the premise that Oravel is a pre-IPO Company. Once an IPO is floated by Oravel, Mr. Sibal submits that Zostel would no longer be able to obtain specific performance of the Term Sheet, which would render the Award completely unenforceable in law. Mr. Sibal invited my attention, in this context, to Clause 7.1 of the Draft Share Holders Agreement, which was one of the Draft Definitive Agreements forwarded by Zostel to Oravel, which read thus:

> "**7. EXIT**
>
> **7.1** The Company shall consummate a Qualified IPO at any time within 6 (Six) years from the Closing Date ("**Exit Period**"). The Board shall, with the prior Requisite Investors Approval and in consultation with the firm of independent merchant bankers, and subject to such statutory guidelines as may be in force, decide on
>
> **7.1.1** The method of listing their Equity Securities, i.e. either:
>
> (i) Through a public issue of fresh Equity Securities; or
>
> (ii) Through an offer of existing Equity Securities by some or all the Shareholders ("**Offer of Existing Securities**"); or
>
> (iii) A combination of (i) and (ii).
>
> **7.1.2** The price and other terms and conditions of the Qualified IPO.
>
> **7.1.3** The timing of the Qualified IPO.
>
> **7.1.4** The Recognised Stock Exchange on which the Equity Securities are to be listed.

**7.1.5** Any other matters related to the Qualified IPO."

**22.** Mr. Sibal also places reliance on Regulation 5(2) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("the ICDR Regulations"), which reads as under:

"**5. Entities not eligible to make an initial public offer**

*****

(2) An issuer shall not be eligible to make an initial public offer if there are any outstanding convertible securities or any other right which would entitle any person with any option to receive equity shares of the issuer:"

Mr. Sibal submits that this provision operates both ways, to disentitle Oravel from issuing an IPO at this stage. As Zostel is, under the arbitral Award, entitled to receive 7% of the equity shares of Oravel, Oravel is not eligible, at this stage, to make an IPO. Equally, if Oravel were to make an IPO, it would result in Zostel becoming disentitled from receiving the equity shares of Oravel, which would frustrate the Award and render it incapable of execution. The proposed IPO, therefore, submits Mr. Sibal, places Zostel's right to specific performance, which has been repeatedly emphasised in the Award by the learned Arbitrator, in jeopardy.

**23.** In this context, Mr. Sibal also drew my attention to the Draft Red Herring Prospectus (DHRP) filed by Oravel as a precursor to the making of the IPO, on 30th September, 2021 (which, as he points out, was published, after notice had been issued by this Court, in the present petition, on 25th August, 2021), which provided that, upon

consummation of the IPO, the Shareholders Agreement would stand terminated. This was reinforced, Mr. Sibal points out, by Clause 22.1 of the Draft Shareholders Agreement, which provided for termination of the said Agreement "with respect to each Party hereto, upon consummation of the IPO".

**24.** As there was consensus, between Zostel and Oravel, regarding all key terms and conditions of the Definitive Agreements, Mr. Sibal submits that Oravel could not be permitted to renege from its obligations under the Term Sheet and, instead of executing Definitive Agreements, make an IPO and thereby render the Term Sheet incapable of enforcement.

**25.** The "proceedings for specific performance" to which the concluding para in the arbitral award alludes, submits Mr. Sibal, would necessarily be the proceedings for execution of the Award, which Zostel has already taken out, and which are pending before this Court. The learned Arbitrator could never have intended that Zostel would be driven to file a fresh suit for specific performance. Even if it were to do so, such a suit, submits Mr. Sibal, would be barred by *res judicata*, in respect of the findings already returned by the learned Arbitrator. Besides, such a suit would also be barred by Section 8(1)[6] of the 1996 Act as well as by Section 47[7] of the CPC.

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[6] **8. Power to refer parties to arbitration where there is an arbitration agreement**.—
(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

[7] **47. Questions to be determined by the Court executing decree**.—

**26.** In fact, submits Mr. Sibal, the learned Arbitrator chose not to award the alternate or claims for damages on account of loss of goodwill, etc., solely on the ground that he had held Zostel to be entitled to specific performance of the Term Sheet. It could not, therefore, be contended that the learned Arbitrator had not directed specific performance. The intent, at any rate, he submits, was unequivocally to do so.

**27.** To support his submissions, Mr. Sibal places reliance on the judgements of this Court in ***K.S.L. Industries Ltd v. N.T.C. Ltd***[8] and of the High Court of Bombay in ***Dirk India***[2], drawing attention to the following passages from the said decisions:

para 75 from the report in ***K.S.L. Industries***[8]:

> "75. The aspect whether the contract is such that it would require constant supervision is a matter to be considered by the learned arbitrator based on the merits of the case. *Prima facie*, the view has to be based on the MOU working itself to extinction in terms of clause 2.1 and 5.1, i.e. till the execution of the definitive agreements and no further. To my mind, such a process would not require constant supervision. In cases where specific performance has been decreed by a court and documents/instruments are required to be executed for satisfying the decree, a party is not relieved by merely alleging that execution of a definitive instrument is not possible, and the courts are not rendered powerless. Order 21 Rule 34 of CPC deals with such situations."

para 13 from the report in ***Dirk India***[2]:

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(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

[8] **2012 SCC OnLine Del 4189**

"13. Two facets of Section 9 merit emphasis. The first relates to the nature of the orders that can be passed under clauses (i) and (ii). Clause (i) contemplates an order appointing a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings. Clause (ii) contemplates an interim measure of protection for: (a) the preservation, interim custody or sale of any goods which are the **subject-matter of the arbitration agreement**; (b) securing the amount in dispute **in the arbitration**; and (c) the detention, preservation or inspection of any property or thing **which is the subject-matter of the dispute in arbitration**; (d) an interim injunction or the appointment of a receiver; and (e) such other interim measure of protection as may appear to the Court to be just and convenient. The underlying theme of each one of the sub-clauses of clause (ii) is the immediate and proximate nexus between the interim measure of protection and the preservation, protection and securing of the subject-matter of the dispute in the arbitral proceedings. In other words, the orders that are contemplated under clause (ii) are regarded as interim measures of protection intended to protect the claim in arbitration from being frustrated. The interim measure is intended to safeguard the subject-matter of the dispute in the course of the arbitral proceedings. The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement. Now it is in this background that it is necessary for the Court to impart a purposive interpretation to the meaning of the expression "at any time after the making of the arbitral award but before it is enforced in accordance with section 36". Under Section 36, an arbitral award can be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the Court. The arbitral award can be enforced where the time for

making an application to set aside the arbitral award under Section 34 has expired or in the event of such an application having been made, it has been refused. The enforcement of an award enures to the benefit of the party who has secured an award in the arbitral proceedings. That is why the enforceability of an award under Section 36 is juxtaposed in the context of two time frames, the first being where an application for setting aside an arbitral award has expired and the second where an application for setting aside an arbitral award was made but was refused. The enforceability of an award, in other words, is defined with reference to the failure of the other side to file an application for setting aside the award within the stipulated time limit or having filed such an application has failed to establish a case for setting aside the arbitral award. Once a challenge to the arbitral award has either failed under Section 34 having been made within the stipulated period or when no application for setting aside the arbitral award has been made within time, the arbitral award becomes enforceable at the behest of the party for whose benefit the award enures. Contextually, therefore, the scheme of Section 9 postulates an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for the benefit of the party which seeks enforcement of the award. An interim measure of protection within the meaning of Section 9(ii) is intended to protect through the measure, the fruits of a successful conclusion of the arbitral proceedings. A party whose claim has been rejected in the course of the arbitral proceedings cannot obviously have an arbitral award enforced in accordance with Section 36. The object and purpose of an interim measure after the passing of the arbitral award but before it is enforced is to secure the property, goods or amount for the benefit of the party which seeks enforcement."

(Emphasis in original)

Oravel's Submissions

**28.** Arguing in response, Mr. Mukul Rohatgi, on behalf of Oravel, submits that the award, on the basis of which Zostel has approached this Court under Section 9 of the 1996 Act, grants Zostel precisely

nothing. He submits that enforcement can be sought of the operative portion of the Award, and not of the observations contained in the body thereof. What the Award of the learned Arbitrator holds, submits Mr. Rohatgi, is that Zostel would have to take out proceedings for specific performance. The Award does not direct specific performance, and cannot be enforced as though it were a decree for specific performance. Mr. Rohatgi submits that proceedings for specific performance had to abide by the discipline of the Specific Relief Act, 1963. They have to be, therefore, by way of a substantive suit. An enforcement petition, he submits, cannot be in the nature of proceedings for specific performance. Order XXI Rule 34, submits Mr. Rohatgi, applies where there is a decree for specific performance. In the present case, he submits that there is none. Indeed, he submits, the learned Arbitrator can hardly be faulted for not directing specific performance, as there still remains to be consensus *ad idem*, between Zostel and Oravel, regarding the terms of the Definitive Agreements.

**29.** Mr. Rohatgi submits, albeit without prejudice to the rights of his client to contest, that the appropriate course of action for Zostel to follow, following the arbitral Award, would have been to file a suit for specific performance. Such a suit, he submits, would have been maintainable, despite the existence of an arbitration agreement between Zostel and Oravel, as the arbitration clause stood worked out, and the arbitral Award was an enforceable decree at law. The enforcement, however, he submits, would have to be by way of filing of a suit for specific performance. In such a suit, he submits that Zostel could pray for a direction to Oravel to execute the Definitive

Agreements. As to whether Zostel would be entitled to such relief, of course, he submits, would be decided by the Court seized with such a suit.

**30.** Adverting to the principles regarding the ambit of Section 9 of the 1996 Act, when invoked at the post-Award stage, Mr. Rohatgi submits that the Court, in such a case, would have to determine the "fruits" of the Award, which it could then protect. In the present case, however, the Award does not grant, to Zostel, any such fruits.

**31.** The draft Definitive Agreements, forwarded by Zostel to Oravel, on which Mr. Sibal places especial reliance are, submits Mr. Rohatgi, completely irrelevant. They are merely drafts. Even as per the Award of the learned Arbitrator, consensus *ad idem*, regarding the terms of these draft Definitive Agreements, is still wanting. Such draft Definitive Agreements, on which there is still no complete meeting of minds between the parties, he submits, can hardly clothe Zostel with any enforceable right in law. He reiterates his submission that it would be for Zostel to file a suit for specific performance and establish, before that Court, that there was, in fact, consensus *ad idem* between the parties, regarding the covenants of the Definitive Agreements.

**32.** Mr. Rohatgi also took me through the covenants of the Term Sheet. He pointed out that execution of the Definitive Documents was a contractual precursor to "closing" of the Term Sheet, following which, alone, Zostel could claim a right to 7% of the shares of Oravel, as is apparent from the words "upon closing" as contained in Clause 4

of the Term Sheet. We are, at this point, he submits, far from that stage. He also points out that Clause 7 of the Term Sheet, which deals with "Definitive Documents", envisages execution of such Definitive Documents by "mutual agreement" between the parties. He further points out that Clause 7 also envisages the possibility of the parties, pursuant to mutual discussions, agreeing upon execution of further Definitive Documents, other than the five Definitive Agreements enumerated in Clause 7. Such mutual discussions, even as per the said Clause, are intended "to capture the entire understanding arrived at amongst them". In such a situation, where there was yet to be consensus *ad idem* regarding the terms of the Definitive Agreements, Mr. Rohatgi submits that there could never be a clear decree for specific performance of the Term Sheet. It is for this reason, submits Mr. Rohatgi, that the learned Arbitrator chose not to award specific performance in express terms.

**33.** Mr. Rohatgi thereafter drew my attention to a communication, dated 17th September, 2016, from Zostel to Oravel, which read thus:

> "Dear Smriti, Mahinder, Abhishek,
>
> Thanks for arranging the meeting. Capturing below the understanding of our discussion yesterday. Would request you to confirm if the understanding is correct. Orios would need the same for their IC discussion on Monday.
>
> Single shareholder from Zo comes on Oyo's cap table.
>
> Oyo will acquire Zostel's SPV through a court approved merger process. In case, the merger process does not go through or is getting delayed beyond the agreed long stop

date, the parties will find an alternate structure which has the same economic impact on both the parties as the current structure. Oyo will lead the merger process providing adequate visibility to Zo into the progress of the same. Stamp duty needs to be assessed and agreed to.

Post-merger, Oyo will issue common equity shares with free marketability rights to Zostel with restriction on sale to competitors (list as decided previously). To support the merger process, Oyo and SPV need to submit a swap ratio reports to the High Court. We understand that the value of SPV and value of equity issued by Oyo upon merger would be in the vicinity of ₹ 80 crores (subject to study by an independent valuation expert).

Zo Founders would be paid $ 1 Mn upon completion of specific obligations as captured in the earlier agreement – Oyo team to check the understanding captured in the agreement.

In addition, the final deal construct shall ensure Zo shareholders are not out of pocket (for tax) during any stage of the process. Maintaining tax consistency for Zo and Zo shareholders – new structure proposed by Oyo should keep Zo and its shareholders in different from any income tax point of view both at the stage of merger and eventual exit and both the parties would work towards finding an approach to ensure this is achieved.

Both the parties will work towards completing the deal at the earliest. As next steps, we will come back to you as soon as Tiger, Orios confirm the above construct. *Post that, we will sign a term sheet to capture the dual construct following which we can proceed to finalising the transaction documents and initiating the merger process*."

(Emphasis supplied)

Thus, submits Mr. Rohatgi, before finalisation of the transaction documents, a second Term Sheet was envisaged. To the above communication, Oravel replied thus, on 19 September, 2016:

"Oyo and Zo are agreed that in the present circumstance the transaction as contemplated in November 2015 is no longer

> viable. Subject to agreeing to the revised proposal, Oyo will proceed to discuss and agree on mutually agreeable merger framework agreement."

This communication, points out Mr. Rohatgi, was interpreted, by Zostel, as amounting to termination of the Term Sheet. Consequent thereupon, Zostel addressed a legal notice, dated 25th January, 2018 to Oravel, in which it claimed damages. No case for specific performance, he submits, was set up.

**34.** Proceeding from this premise, Mr. Rohatgi submitted, citing for the purpose, the judgement of the Supreme Court in ***I.O.C.L. v. Amritsar Gas Service***[9], that, given the nature of the termination clause in the Term Sheet, it was incapable of specific performance, in view of Section 14(1) of the Specific Relief Act. Mr. Rohatgi also took me through various paras of the judgement of the learned Single Judge of this Court in ***K.S.L. Industries***[8] to distinguish the facts of that case from those of the present. *Inter alia*, Mr. Rohatgi submitted that, in view of the peculiar covenants in the Memorandum of Understanding in ***K.S.L. Industries***[8], this Court held that the MOU was a concluded contract. Such covenants, he submits, are absent in the case of the Term Sheet between Zostel and Oravel.

**35.** In any case, submits Mr. Rohatgi, even if the IPO is floated, the maximum prejudice that Zostel could claim of, would be reduction in the value of the 7% shareholding of Oravel, assuming it to be entitled thereto. Zostel might, in such circumstances, be entitled to claim –

[9] **(1991) 1 SCC 533**

though Mr. Rohatgi submits that such claim, even if preferred, would be meritless – the difference between the value that 7% of the shares of Oravel had prior to the IPO, and their value post-IPO, both of which were arithmetically computable. No case, therefore, for injuncting the issuance of the IPO, therefore, exists, in his submission.

Zostel's submissions in rejoinder

**36.** In rejoinder, Mr. Sibal once again took me through the various paras of the arbitral Award, in order to drive home his submission that the right, of Zostel, for execution of the Definitive Agreements and, further, to 7% of the shareholding of Oravel, already stands crystallised, and can be defeated only if the arbitral Award is set aside, and in no other circumstance.

**37.** Mr. Sibal submits that Zostel could not prefer a suit for specific performance, in view of Section 36 of the 1996 Act[10], which provides

[10] **36. Enforcement**. –
(1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.
(2) Where an application to set aside the arbitral award has been filed in the court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.
(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:
Provided that the court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908) :
Provided further that where the Court is satisfied that a prima facie case is made out that, –
(*a*) the arbitration agreement or contract which is the basis of the award; or
(*b*) the making of the award,
was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under Section 34 to the award.

for execution of arbitral awards, as if they are decrees of Court. The 1996 Act, he submits, constitutes a complete code, and, once parties to an agreement bind themselves thereby, relief cannot be sought outside the 1996 Act. Besides, he submits that, if he were to prefer a suit, the aspects covered by the arbitral Award would operate as *res judicata*, for which purpose he relies on ***K.B. George v. Secretary to Government, Water and Power Department.***[11].

**38.** To a query from the Court as to whether Oravel was proscribed from seeking any major alteration in the terms of the draft Definitive Agreements, Mr. Sibal answers in the negative, relying, for that purpose, on the concluding para of the arbitral Award (already reproduced hereinabove) which entitles Zostel to take appropriate proceedings for specific performance and execution of the Definitive Agreements "as envisaged". The words "as envisaged", submits Mr. Sibal, indicate that Oravel would be bound to execute the Definitive Agreements as envisaged in the Term Sheet. In such a situation, where the terms of the agreement are preset by contract, Mr. Sibal submits that Order XXI Rule 34 of the CPC would squarely apply. The fact that the transaction between the parties stands consummated, he submits, has already been determined in Zostel's favour by the arbitral Award.

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*Explanation*.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

[11] **(1989) 4 SCC 595**

**39.** Mr. Sibal also advanced submissions by way of response to the submission, of Mr. Rohatgi, that the Term Sheet was incapable of specific performance, in view of Section 14 of the Specific Relief Act. However, in view of the findings, by the learned Arbitral Tribunal, that Zostel was entitled to specific performance of the Term Sheet, I do not propose to enter into that aspect.

Oravel's submission in surrejoinder

**40.** Putting in a word by way of surrejoinder, Ms Anuradha Dutt, learned Counsel for Oravel (who was instructing Mr. Rohatgi) submitted that, despite the specific submission having been advanced by Zostel, before the learned Arbitrator, that, after the exit of Venture Nursery, execution of the Definitive Agreements was a mere formality, the learned Arbitrator nonetheless held that there was no complete consensus *ad idem* regarding the terms of the Definitive Agreements, which were yet to be finalised.

**Analysis**

**41.** As ***Dirk India***[1] and ***Hindustan Construction Co***[2] tell us, Section 9 of the 1996 Act, when exercised at a post-award stage, is meant to protect the fruits of the arbitral award and to ensure that the award is not rendered incapable of enforcement.

**42.** To what "fruits", therefore, is Zostel entitled, by virtue of the arbitral Award dated 6th March, 2021?

**43.** Mr. Sibal's submission that the learned Arbitrator has directed specific performance of the Term Sheet is obviously incorrect. The Award dated 6th March, 2021, contains no such direction. All that it vouchsafes is the entitlement, of Zostel, to specific performance of Oravel's obligations under the Term Sheet dated 26th November, 2015. It does nothing more. Following this certification, and noting the fact that Definitive Agreements had yet to be executed, the Award entitles Zostel "to take appropriate proceedings for specific performance and execution of the Definitive Agreements as envisaged".

**44.** The words "as envisaged", quite clearly, have to be understood in the context of the Term Sheet and its covenants. Execution of the Definitive Agreements have to necessarily precede "closing" of the Term Sheet, and it is only "upon closing" that Zostel would become entitled to 7% of the shares of Oravel. This is clear from Clause 4 of the Term Sheet. Though Mr. Rohatgi sought to point out, from Clause 7 of the Term Sheet, that the expression "Definitive Documents" was wider than "Definitive Agreements" and could include documents other than the Definitive Agreements", that distinction, in my view, may not be of particular significance, as Clause 4 makes "closing" dependent on execution of "Definitive Agreements", and not "Definitive Documents".

**45.** Execution of Definitive Agreements has, however, under Clause 7 of the Term Sheet, to be on the basis of "mutual agreement".

"Mutual agreement" is but a synonym for consensus *ad idem*. The learned Arbitrator has, in the arbitral Award, held, in so many terms, that consensus *ad idem*, between Zostel and Oravel, is wanting. As a party seeking reliefs predicated on the Award, Zostel cannot wish away this finding. The learned Arbitrator has, in fact, emphasised this position more than once in the Award.

**46.** Issue No. 5, as framed by the learned Arbitrator, was, specifically, whether there was consensus *ad idem* between the parties on the draft Definitive Agreements. The manner in which the learned Arbitrator has dealt with this issue is instructive. After reproducing rival contentions of learned Counsel, the learned Arbitrator relies on the passage, from the decision in ***Mayawanti***[4], reproduced in para 26.2.2 *supra*, on the requirement of consensus *ad idem* as a necessary condition for specific performance of the contract. In the said passage, the Supreme Court holds, in unequivocal terms, that "the stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus *ad idem*". The passage goes on to state, almost at the cost of repetition, that "if the stipulations and terms are uncertain, *and the parties are not ad idem, there can be no specific performance, for there was no contract at all*". The reliance, by the learned Arbitrator, on this passage, from ***Mayawanti***[4], indicates, clearly, why the learned Arbitrator did not direct specific performance. The Supreme Court having held that, absent consensus *ad idem*, there could not be specific performance of a contract at all, and the learned Arbitrator having gone on to hold that, qua the Definitive Agreements, consensus *ad idem* between Zostel and Oravel was wanting, the

reluctance, by the learned Arbitrator, to award the specific performance was but an inevitable sequitur. The way forward, in such cases, is also shown by the same passage from ***Mayawanti***[4], by the observation that "where there are negotiations, the court has to determine at what point, effect or, the parties have reached agreement". That, quite clearly, is a matter of trial.

**47.** Having thus cited ***Mayawanti***[4], the learned Arbitrator goes on to note that Clause 7 of the Term Sheet required the Definitive Documents to be executed subject to the conditions in the Term Sheet. He then proceeds to hold that, "therefore, one of the primary aspects on which the parties were *ad idem* was the acquisition of identified assets of Claimant No. 1 by the Respondent". In other words, the learned Arbitrator holds that Zostel and Oravel were *ad idem* regarding the transfer of Zostel's hotel business to Oravel.

**48.** The passages, in the arbitral Award, which deal with the aspect of consensus vis-à-vis the Definitive Agreements, stand reproduced in para 26.2.3 *supra*. It is important to read this paragraph carefully. The learned Arbitrator notes the fact that, till January 2016, drafts of the Definitive Agreements were being exchanged between Zostel and Oravel. Thereafter, on 26th January, 2016, Venture Nursery threw a spanner in the works. The learned Arbitrator observes that both parties were waiting for the exit of Venture Nursery, to complete the transaction. No doubt, the learned Arbitrator also goes on to hold that the purchase of stamp papers by Zostel, on the instructions of Oravel, led to a natural conclusion that Oravel was inclined to close the

transaction. The learned Arbitrator, in fact, immediately reiterates this observation by stating that "documents placed on record show that the parties were inclined to close the deal".

**49.** Inclinations, though, howsoever favourable, do not a transaction make. Having held that Zostel and Oravel were both inclined to close the transaction and execute the Definitive Agreements, the learned Arbitrator finds, clearly, categorically and without any equivocation whatsoever, that the Definitive Documents "never came to be finalised by the parties". Issue 5 is concluded, by the learned Arbitrator, with the finding "that there could not have been complete consensus *ad idem* on the Draft Definitive Agreements".

**50.** Mr. Sibal contended, with repeated emphasis, that the only roadblock, in the execution of the Definitive Agreements, was the objection of Venture Nursery. Once Venture Nursery exited, the draft Definitive Agreements were to be suitably amended. Therefore, Oravel had no option but to sign on the dotted line. The execution of the Definitive Agreements, in the draft form as communicated by Zostel to Oravel, according to Mr. Sibal, was mandatory, under the arbitral Award.

**51.** I find myself unable to agree. It was to elicit a specific response from Mr. Sibal on this point that I posed a pointed query to him, as to whether Oravel was completely proscribed from suggesting any changes in the draft Definitive Agreements, as forwarded by Zostel to Oravel. His answer was in the affirmative, and he sought to rely, for

this purpose, on the words "as envisaged", as contained in the concluding passage from the arbitral Award. Mr. Sibal himself acknowledges that the words "as envisaged" have to be understood as relating to the covenants of the Term Sheet; in other words, as envisaged in the Term Sheet. The Term Sheet specifically envisages execution of the Definitive Agreements "as mutually agreed" between the parties. Mutual agreement or, in other words, consensus *ad idem*, was, therefore, the *sine qua non* for the Definitive Agreements to be executed. That consensus *ad idem*, even according to the arbitral Award, is lacking. It would not be far from the truth to state that, even as on date, said consensus is, if anything, still at an inchoate stage.

**52.** Mr. Sibal sought to contend that there was consensus *ad idem* on the "key terms and conditions" of the Definitive Agreements, and that the only aspect for which there was want of consensus was the objection raised by Venture Nursery. Once that crease had been ironed out with the exit of Venture Nursery, he submits, no want of consensus remains, and the draft Definitive Agreements, as forwarded by Zostel to Oravel, had necessarily to be inked and signed by Oravel.

**53.** Unfortunately for Zostel, however, the arbitral Award does not say so. The learned Arbitrator has not opined, anywhere in the Award, that, with the exit of Venture Nursery, Oravel was mandatorily required to execute the draft Definitive Agreements, as there was complete consensus *ad idem* regarding all terms thereof. Nor does the arbitral Award make any particular distinction between the "key terms and conditions" and other terms and conditions. What is required, for

any contract and, therefore, for a Court to direct specific performance of a contract, according to ***Mayawanti***[4], is consensus *ad idem* regarding *all* terms and conditions of the contract. That such consensus *ad idem* was lacking, is a specific finding of the learned Arbitrator, which binds Zostel.

**54.** The findings of the learned Arbitrator on Issues of 9 and 10 place the matter beyond any pale of uncertainty.

**55.** Addressing Issue 9, which examined the entitlement of Zostel to specific performance of the Term Sheet by directing Oravel to issue 7% of its shareholding in favour of the shareholders of Zostel, the learned Arbitrator observes that it was only "upon closing", that such entitlement would arise under Clause 4 of the Term Sheet. "Closing", as he pertinently goes on to observe, "was conditional on fulfilment of certain conditions, one of which was fulfilment of obligations under the Definitive Documents." The learned Arbitrator, thereafter, reiterates his earlier finding that the parties could not arrive at consensus *ad idem* in respect of the Definitive Documents. Though, in the succeeding paragraph, the learned Arbitrator does observe that Zostel did everything within its control to complete its obligations, and could not be held responsible for the acts and omissions of Oravel or its shareholders, owing to which some of the obligations could not be fulfilled by Zostel, the only sequitur that follows, even as per the learned Arbitrator, is that Zostel was "entitled to claim/pray for the relief of allotment of shares from the Respondents to Claimant Nos. 2 to 17".

**56.** A right to claim, or to pray for, allotment of shares, is quite different from a right to allotment of shares *per se*. Though Mr. Sibal sought to wish away this significant distinction by contending that the words "to claim/pray" were used to denote the right of Zostel to raise a claim for relief the benefit of which would enure to other Claimants, the submission cannot undermine the use of the expression "to claim/pray", by the learned Arbitrator.

**57.** Thereafter, the learned Arbitrator, after observing that the non-execution of the Definitive Documents was because of a problem created by Venture Nursery, shareholder of Oravel, and that there was lack of instructions from Oravel to Zostel, and even castigating Oravel for committing a breach of its obligations under the Term Sheet, for which Zostel could not be held responsible, stops short of directing specific performance of the Term Sheet, merely holding that Zostel was *entitled* to specific performance. Thereafter, the learned Arbitrator holds that, as Definitive Agreements were yet to be executed (which, obviously, has to be read in conjunction with the finding, immediately prior thereto, that there was lack of consensus *ad idem* on the terms of the Definitive Agreements), Zostel was entitled to take appropriate proceedings for specific performance and execution of the Definitive Agreements.

**58.** The decision of the learned Arbitrator on Issue 10, which immediately follows, is of particular significance. Issue 10 addressed the question of whether Claimants 4 to 10 (the founders of Zostel)

were entitled to payment of US $ 1 million. The learned Arbitrator notes that the right of the founders to a payout of US $ 1 million arose from the somewhat ubiquitous Clause 4 of the Term Sheet and that, as the said right was "dependent on the fulfilment of post-closing obligations which stage will be reached only after the Definitive Agreements are executed", no such direction could be issued.

**59.** The decision of the learned Arbitrator on Issue 13, in my view, additionally serves to discountenance the submission so assiduously canvassed by Mr. Sibal. The contention of Mr. Sibal that, with the exit of Venture Nursery, execution of the Definitive Documents, and the consequent transfer of 7% shareholding from Oravel to Zostel, was inevitable, is clearly belied by the concluding observation in the decision of the learned Arbitrator on Issue 13, which dealt with the claim of Oravel for damages on account of loss of goodwill. The learned Arbitrator holds, while declining the relief, that "the same *will be dependent on the outcome of the proceedings for Specific Performance*". The outcome of the proceedings for Specific Performance is, therefore, even in the mind of the learned Arbitrator, indeterminate on the date of passing of the arbitral Award.

**60.** This, in my view, substantially dilutes the strength of Mr. Sibal's contention that specific performance, in the wake of the arbitral Award, could be sought by Zostel through an Execution Petition. It also takes the proverbial wind out of the sails of the contention of Mr. Sibal that, absent setting aside of the arbitral Award,

execution of the Definitive Agreements and transfer of 7% shareholding from Oravel to Zostel is a foregone conclusion.

**61.** That an arbitral tribunal may grant specific performance of a contract for immovable property stands settled by the judgement of the Supreme Court in ***Olympus Superstructures Pvt Ltd v. Meena Vijay Khetan***[12]. Zostel, therefore, advisedly sought specific performance from the learned Arbitrator; the learned Arbitrator, however, equally advisedly, did not condescend to so direct. Zostel has not chosen to challenge the arbitral Award, possibly owing to its misconception that the Award *directed* specific performance of the Term Sheet. Mr. Rohatgi is correct in his submission that the arbitral Award, in the present case, cannot be enforced as a decree for specific performance, despite, consequent to the amendment of Section 36 of the 1996 Act with effect from 23rd October, 2015, arbitral awards being enforceable as decrees of Courts.

**62.** Mr. Sibal has emphasised the position, emerging from ***Dirk India***[2], that the concern of the post-award Section 9 court should be to ensure that the award is not rendered incapable of execution, and he is right. Where Mr. Sibal appears, however, to err, is in his contention that the arbitral Award, in the present case, *directs* specific performance. It does not do so. All it does is to recognize the right of Zostel *to take appropriate proceedings* for specific performance, specific performance of the Term Sheet being, as per the Award, Zostel's entitlement. It does not direct Oravel to specifically perform

the Term Sheet, though this was the prayer of Zostel in the arbitral proceedings.

**63.** Zostel cannot, from this Court, either under Section 9 or Section 36 of the 1996 Act, obtain relief in excess of that which the arbitral award grants. That might have been possible only if Zostel had chosen to challenge the arbitral Award. It has not done so.

**64.** Considerable reliance was placed, by Mr. Sibal, on Order XXI Rule 34 of the CPC. In my considered opinion, the provision does not apply. Order XXI Rule 34 applies in the case of a decree for the execution of a document or for the endorsement of the negotiable instrument, in accordance with the terms of the decree. The arbitral Award in the present case is not a decree for the execution of the Definitive Agreements. It is merely a decree enabling Zostel to take proceedings for execution of the Definitive Agreements and for specific performance of the Term Sheet. It does not direct execution of the Definitive Agreements, apparently for the reason that the learned Arbitrator was of the view that consensus, *ad idem*, regarding the terms of the Definitive Agreements, was still wanting. This view, of the learned Arbitrator, expressed in so many words, has remained unchallenged by Zostel.

**65.** Mr. Sibal has sought to contend that, if the IPO is permitted to be floated, Oravel would acquire the status of a post-IPO company and, consequently, the Term Sheet would become incapable of

[12] **(1999) 5 SCC 651**

specific performance. There is nothing, in the Term Sheet, to so indicate. The contractual covenants, on which Mr. Sibal relies and which stand reproduced in para 29 *supra*, are in the Draft Share Holders Agreement, and not in the Term Sheet. There is, as on date, no consensus, *ad idem*, on the terms of the Share Holders Agreement. An injunction, under Section 9 of the 1996 Act, can hardly be granted on the basis of a covenant in an unexecuted draft agreement.

**66.** That apart, in any case, once the arbitral Award reveals itself merely to be an award permitting Zostel *to take appropriate proceedings* for specific performance, the issue of whether, consequent on Oravel floating an IPO, the draft Definitive Agreements, in the form in which they were communicated by Zostel to Oravel, could be executed, ceases to have relevance.

**67.** Equally misconceived, in my considered opinion, is the reliance, by Mr. Sibal, on Regulation 5(2) of the ICDR Regulations. Regulation 5(2) – which stands reproduced in para 30 *supra* – that disentitles the making of an IPO if there are any outstanding convertible securities against the party seeking to make it, as would entitle any person with an option to receive equity shares from the IPO applicant. For the reasons already elucidated hereinabove, it cannot be said that, as on date, the right to receive 7% equity shares of Oravel has crystallised in favour of Zostel. Though Zostel's entitlement, in this regard, stands recognized and, perhaps even certified, by the arbitral Award, the learned Arbitrator has, nonetheless, hedged in the certification by the caveat that the right, in that regard, could be

invoked by Zostel only in terms of Clause 4 of the Term Sheet, "upon closing". "Closing" would necessitate *a priori* execution of the Definitive Agreements and compliance, by Zostel, of the obligations envisaged in Clause 4.

**68.** The learned Arbitrator has even found that Zostel failed to completely discharge its obligations under the Term Sheet, albeit for want of instructions from Oravel. Absent fulfilment of its obligations under Clause 4 of the Term Sheet and execution of the Definitive Agreements in terms of Clause 7, the right to receive 7% shares of Oravel continues to remain inchoate. In such a scenario, Regulation 5(2) of the ICDR Regulations cannot operate as to disentitle Oravel from making an IPO.

**69.** Mr. Sibal has contended, further, that any suit by Zostel, for specific performance of the Term Sheet, would be barred by Section 8 of the 1996 Act, as well as by Section 47 of the CPC. Neither provision, in my considered opinion, would apply. Mr. Rohatgi, in fact, submitted that a fresh suit for specific performance, at the instance of Zostel against Oravel would *not* be barred in law, though, in his submission, the suit may be vulnerable to dismissal on merits. It is well settled that parties to an agreement, containing an arbitration clause, are not constrained to resort to the clause to settle disputes in every case, and are also at liberty to seek ordinary civil law remedies. In the event that a party to an agreement, containing an arbitration clause, moves the civil court for a remedy which would otherwise fall within the province of the arbitration clause, the party cannot be non-

suited on the ground of existence of the clause; however, if the opposite party invokes Section 16 of the 1996 Act, for reference of the dispute to arbitration, the Court would be bound to do so. Mr. Sibal, in fact, candidly concedes this legal position, when put to him by the Court.

**70.** Section 47 of the CPC deals with the determination of questions arising between the parties to a suit in which a decree is passed. All such questions, mandates the provision, would be decided by the executing court, and not by way of a separate suit. This provision, on its face, would have no application in a case such as the present, where the arbitral Award does not direct specific performance, but permits Zostel to take proceedings for specific performance. The questions which may arise for consideration in such proceedings, were Zostel to avail the liberty granted by the arbitral Award and initiated, would obviously arise for consideration before the forum which is *in seisin* thereof. Section 47 of the CPC would not inhibit the exercise.

**71.** I am also of the opinion that the judgement, of a coordinate Single Bench of this Court, in ***K.S.L. Industries***[8], cannot assist the petitioner. The mere fact that, in that case, too, definitive agreements were to be executed between the parties, cannot render it a useful precedent. There are several features, in the said case, which distinguish the position which obtained there, with that which obtains in the present case. In that case, the MOU between the parties contained a specific clause, making it valid for 240 days from the date of its execution or till the execution of Definitive Agreements,

whichever was earlier. There is no such clause in the present case. Further, the MOU was, under Clause 41(ii), enforceable against the parties in express terms. Clause 11 of the MOU, even more significantly, expressly stated that it "constitutes the entire agreement between the parties". In such circumstances, this Court held, relying on the conduct of the parties, that the MOU was a concluded contract. It was especially noted by this Court, in para 87 of the report, thus, in respect of the Definitive Agreements to be executed between the parties in that case:

> "So far as clause (b) of Section 14(1) of the Specific Relief Act is concerned, the purpose of execution of the MOU was to secure the execution of the definitive agreements. *The forms of these agreements are annexed to the MOU itself and the terms and conditions thereof are not open to negotiation. If one party does not agree to any proposal made by the other to alter or amend any term of the definitive agreements, the parties have no option but to proceed to execute the definitive agreements in the form in which they exist.*"
>
> (Emphasis supplied)

The italicised words, in the afore-extracted passage from ***K.S.L. Industries***[8] serve not only to erode the value of the said decision as a precedent in the present case; they also highlight why, in the present case, the relief sought by the petitioner cannot be granted. Unlike the contract in ***K.S.L. Industries***[8], there is no covenant in the Term Sheet in the present case, binding either party to mandatorily execute the draft Definitive Agreements suggested by the opposite party, or foreclosing the option of negotiation on the draft. That option is clearly available to the parties, including Oravel, in the present case. The execution of the Definitive Agreements between Zostel and

Oravel, in the draft form in which they were forwarded by the former to the latter cannot, therefore, be regarded as a foregone conclusion in the facts of the present case, in view of the covenants of the Term Sheet. This position also stands recognised by the learned Arbitrator. This Court, in exercise of its limited jurisdiction under Section 9 of the 1996 Act, cannot revisit either the findings, or the conclusions, of the learned Arbitrator.

**72.** To reiterate, therefore, ***K.S.L. Industries***[8] cannot help Zostel.

**Conclusion**

**73.** In view of the foregoing discussion, no case, for injuncting making of the IPO by Oravel, can be said to exist.

**74.** The petition is, therefore, dismissed with no orders as to costs.

**C. HARI SHANKAR, J.**

**FEBRUARY 14, 2022**
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