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

*Judgment reserved on: 15.04.2024*

*Judgment pronounced on:01.07.2024*

+ **ARB. A. (COMM.) 78/2022 & I.A. 18317/2022, I.A. 1455/2023**

**ASSETS CARE AND RECONSTRUCTION ENTERPRISE  
LIMITED**

..... Petitioner

Through: Mr. Jayant Mehta, Sr. Adv  
with Ms. Amrita Singh, Mr. Ankit  
Gupta, Mr. Raghav Dutt, Adv.

Versus

**DOMUS GREENS PRIVATE LIMITED & ORS.**

.....Respondent

Through: Mr. Ajay Bhargava, Ms.  
Wamika Trehan, Mr. Siddhant Kumar,  
Ms. Radhika Khanna, Adv. for R5-7  
Mr. Apoorv khator, Mr. Ankit Bashisht,  
Adv. for R7  
Mr. Kartik Nayar, Mr. Krish Kalra, Mr.  
Divyansh Rai, Adv. for R 1-4 and R8-  
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**CORAM:**

**HON'BLE MR. JUSTICE JASMEET SINGH**

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

1. This is an appeal filed under section 37 of the Arbitration and Conciliation Act, 1996 ("*Act of 1996*") seeking setting aside/quashing and/or modification of the impugned orders dated 12.10.2021 and 05.11.2021 passed by the learned Sole Arbitrator in the arbitration matter titled as "*Almond Infrabuild Pvt Ltd. & Anr vs. Dalmia*



*Family Office Trust” and other connected matters. The operative part of the order dated 12.10.2021 reads as under:-*

**“VI. OPERATIVE PART OF THE ORDER**

*In view of the undisputed factual matrix of the case, for reasons and discussions afore-recorded, the Arbitral Tribunal hereby passes the following orders and directions:*

*1. The Claimants are hereby directed to furnish security by way of bank guarantees from a nationalized bank, to the extent and in favour of, as follows:*

<b>CASE NO.</b>	<b>PARTICULARS</b>	<b>PERCENTAGE OF INVESTMENT</b>	<b>AMOUNT OF BANK GUARANTEE</b>	<b>IN FAVOUR OF</b>
1	Almond Infrabuild Pvt. Ltd. v. Dalmia Family Office Trust	12.4%	18.6 Crores	Dalmia Family Office Trust
2	Domus Green Pvt. Ltd. & Ors. v. Dalmia Family Office Trust	8.39%	12.48 Crores	Dalmia Family Office Trust
3	ATS Infrastructure Limited v. Dalmia Family Holdings LLP	10.61%	15.19 Crores	Dalmia Family Holdings LLP
10.&11	Getamber Anand v. Rasbehari Traders & ATS Infrastructure Limited v. Rasbehari Traders	6.03%	9.05 Crores	Rasbehari Traders

*2. The Claimants are further directed to furnish the list of flats/units to the extent and in favour of, as directed hereinafter. The list of the flats/ units so furnished along with allotment letters, shall be of the flats/units which are unencumbered, free of charge in all respects and the third*



*parties have no interest, whatsoever, in those flats/units.*

*The details thereof are as follows:*

<b>CASE NO.</b>	<b>PARTICULARS</b>	<b>NUMBER OF UNITS/FLATS</b>	<b>IN FAVOUR OF</b>
1.	Almond Infrabuild Pvt. Ltd. v. Dalmia Family Office Trust	5.9 Flats Rounded off to 6 flats/units	Dalmia Family Office Trust
2.	Domus Green Pvt. Ltd. & Ors. V. Dalmia Family Office Trust	4.02 Flats Rounded off to 4 flats/units	Dalmia Family Office Trust
3.	ATS Infrastructure Limited v. Dalmia Family Holdings LLP	5.01 Flats Rounded off to 5 flats/units	Dalmia Family Holding LLP
10. & 11.	Octamber Anand v. Rasbehari Traders & ATS Infrastructure Limited v. Rasbehari Traders	2.89 Flats Rounded off to 3 units/flats	Rasbehari Traders

*3. These flats/units will remain as security in favour of the Respondents and will not be alienated, transferred or possession parted with in any manner, whatsoever, till disposal of the present proceedings.*

*4. The Claimants should comply with the above directions within a period of three weeks from today.*

*5. The Claimants are hereby restrained from alienating, transferred or parting with the possession of any flat/unit, in favour of any third party/financial institution, out of the seven stated projects, i.e. ATS Picturesque Reprieves, ATS Rhapsody, ATS One Hamlet, ATS Dolce, ATS Triumph, ATS Tourmaline and Pristine Golf Villas, without specific orders of the Tribunal for which the Claimants are at liberty to file*



*appropriate application with complete details.*

*5.1 This direction would remain in force till a period of three weeks or earlier, till the time the Claimants comply with the above direction in its entirety.*

*6. However, in the event of default, the injunction granted under this clause shall remain operative and effective in all respects. The Claimants are hereby injuncted and restrained from transferring, conveying or selling in any manner, whatsoever, and/or parting with the possession of any of their flats/units in favour of any party, till compliance of the directions contained in this order in regard to the above seven projects.”*

2. Further, the operative part of the order dated 05.11.2021 reads as under:-

*“..... Be that as it may, in the interest of justice and as last and final opportunity, the Tribunal grants three weeks' time from today to the Claimants to comply with the directions contained in the Order of the Tribunal dated 12.10.2021. Needless to notice that the complete injunction/prohibition passed in the said order would remain operative against the Claimants and in favour of the Respondents till the Claimants comply with all the directions contained in the Order.....”*

3. Members forming part of the “**ATS Group**” consist of respondent No. 1 to 4 and 8 to 10 herein have initiated arbitration proceedings (i.e.,



claimants in the arbitral proceedings) against “*Dalmia Group*” consisting of respondent No. 5 to 7 (i.e. respondents in the arbitral proceeding).

4. The ATS Group availed financial facilities from the appellant aggregating to an amount of Rs. 1100 Crores. The ATS Group has created first exclusive equitable mortgage over the projects “*ATS Picturesque Reprieves*” and “*ATS Dolce*” in favour of the appellant. Further, the ATS Group has also created first charge by way of hypothecation and assignment over all receivables, including sale proceeds from the aforesaid two projects, in favour of the appellant. The receivables from the projects are utilized for servicing the financial facilities advanced by the appellant.
5. This Court *vide* order dated 08.01.2021 appointed the learned Sole Arbitrator and referred eleven arbitration petitions for adjudication of disputes by the Sole Arbitrator. Thereafter, the learned Sole Arbitrator entered the references and commenced the arbitration proceedings.
6. During the arbitration proceedings, applications under Section 17 of Act of 1996 were filed by the ATS Group and Dalmia Group which were decided by the learned Sole Arbitrator *vide* Order dated 12.10.2021 wherein ATS Group was restrained from alienating, transferring or parting with the possession of any flat/ unit in seven projects of ATS Group, including “*ATS Picturesque Reprieves*” and “*ATS Dolce*”, in favour of any third party/ financial institution. This direction was to remain in force for a period of three weeks or earlier, till the ATS Group complied with other directions regarding furnishing of bank guarantee/ providing list of properties to be



furnished as security.

7. Thereafter, vide order dated 05.11.2021, learned Sole Arbitrator directed the aforesaid injunction would remain operative till the ATS Group complies with all the directions contained in the order dated 12.10.2021.
8. By way of the instant appeal, the appellant herein is before this Court challenging the orders dated 12.10.2021 and 05.11.2021.

#### **SUBMISSIONS ON BEHALF OF THE APPELLANT**

9. Mr. Jayant Mehta, learned Senior Counsel appearing for the appellant submits that the ATS Group has failed to comply with the directions regarding furnishing of bank guarantee, list of properties etc., hence the restraining order qua the seven projects including 'ATS Picturesque Reprieves' and 'ATS Dolce' continues to be operative. In this regard, he submits that the appellant herein is not a party to the arbitration proceedings pending between the ATS Group and Dalmia Group, however, the impugned orders directly interfere with the contractual rights and security interests created in favour of the appellant. Reliance is placed on *State Bank of India v. Ericsson India Pvt. Ltd. (2018) 16 SCC 617* and *Edelweiss Asset Reconstruction Co. Ltd. v. GTL Infrastructure Ltd., 2020 SCC OnLine Del 2081*, wherein third party appeals against order passed under section 17 of Act of 1996 were held to be maintainable.
10. He further submits that ATS Picturesque Reprieves is held under ATS Homes Pvt. Ltd. (Respondent No.8) and ATS Dolce is held under Domus Greens Pvt. Ltd. (Respondent No.1). The charges created in favour of the appellant in 'ATS Picturesque Reprieves' and 'ATS



Dolce’ and the receivables there from have been duly registered with Registrar of Companies (“**ROC**”) under Section 77 of Companies Act, 2013 (“**Act of 2013**”) and all the documents have been placed on record.

11. He further relies on section 80 of Act of 2013 to submit that where a charge on any asset of a company is registered under Section 77, any person acquiring such asset or any interest in such asset shall be deemed to have notice of the charge from the date of registration. Thus, Dalmia Group is deemed to have notice of charge created in favour of the appellant from the date of registration of charge.
12. Further, Section 77(3) of Act of 2013 unambiguously provides that no charge created by a company shall be taken into account by any other creditor unless the charge is duly registered under Section 77 and a certificate of registration of charge is given.
13. He submits that assuming for the sake of argument that Dalmia Group has a charge on the said projects, the said charge is not registered and therefore the registered charge created in favour of the appellant shall take precedence. To buttress his arguments, he relied on *Escorts Finance Ltd. v Fidelity Industries Ltd. &Anr. – 2002 SCC Online Mad 853* (Paras 6, 9, 22) and *Punjab National Bank v. Official Liquidator of Aesculapius Remedies Ltd.– 2015 SCC Online Guj 4459* (Paras 27, 28, 29).
14. The projects ‘ATS Picturesque Reprieves’ and ‘ATS Dolce’ and the receivables there from are exclusively charged in favour of the appellant under the following loan accounts of ATS Group:



<b><u>Loan AccountNo.</u></b>	<b><u>Borrower</u></b>
6580227971	ATS Estates Pvt Ltd/
6580287784	ATS Estates Pvt Ltd
6580248316	ATS Homes Private Ltd (Respondent No.8)
6580248309	ATS Homes Private Ltd
6580262039	ATS Homes Private Ltd
6580280770	ATS Homes Private Ltd
6580295349	ATS Homes Private Ltd
6580295679	ATS Homes Private Ltd
6580243531	ATS Infrastructure Ltd
6580287519	ATS Infrastructure Ltd
6580215958	Domus Greens Pvt Ltd (Respondent No.1)
6580236379	Domus Greens Pvt Ltd
6580241120	Domus Greens Pvt Ltd
6580287801	Domus Greens Pvt Ltd
6580287791	Domus Greens Pvt Ltd
6580287162	Domus Greens Pvt Ltd

15. The report i.e. Security Interest Id Based Search Report and Debtor Based Search Security Report of Central Registry of Securitisation





Asset Reconstruction and Security Interest of India (“**CERSAI**”) shows charge created in favour of the appellant in the immovable assets of the project ATS Picturesque Reprieves and ATS Dolce and the receivables from the above-mentioned projects. Further, both the mentioned projects are registered with UPRERA and showing charge of the appellant on these projects.

16. Relying on letters dated 04.05.2021, 16.10.2021 and 09.11.2021 of Dalmia Group, learned senior counsel submits that Dalmia Group had full knowledge and admitted the appellant’s charge over the said projects. Relevant portion of the letter dated 09.11.2021 reads as under:-

*“It is understood from the records that while ATS Group remains the owner of said Projects/lands, the same are mortgaged/charged to the Lender. Therefore, the authority of selling the units/flats in the underlying said Projects lies solely with ATS Group, for which it may have to seek an appropriate NOC from the Lender. Spirit of the said Order bars ATS Group to even seek such NOCs, as it would tantamount to an intention to alienate units/flats in the underlying Projects.”*

17. He further draws my attention to the judgment passed by the Co-ordinate bench of this Court in **Asset Reconstruction Co. India Ltd. v. ATS Infrastructure Ltd., 2023 SCC OnLine Del 7337** wherein L&T Finance Ltd. (later substituted by Asset Reconstruction Company India Ltd.), another lender of ATS Group, had filed a similar appeal against the same impugned orders herein, in so far as the orders



pertained to the projects, ‘ATS Triumph’ and ‘ATS Tourmaline’. The said judgement pertains to the identical defenses raised by the Dalmia Group which were rejected by the Court. Also, against the said judgment, SLP (C) No. 2989/ 2024 was filed by Dalmia Group which was dismissed by the Hon’ble Supreme Court *vide* Order dated 15.03.2024.

18. As the present appeal arises out of the same impugned orders and involves identical facts, the present appeal is squarely covered by the said judgment passed in Arb. A. (Comm) 7/ 2022 which has been upheld by the Hon’ble Supreme Court.
19. Learned senior counsel concluded his arguments by stating that the appellant is immensely prejudiced by the impugned orders. The restrain on sale of units has affected the servicing of loans. All receivables from the projects are charged in favour of the appellant and therefore restrain on sale of units directly impacts the rights of the appellant.

#### **SUBMISSIONS ON BEHALF OF THE DALMIA GROUP**

20. Mr. Siddhant Kumar, learned Counsel appearing for Dalmia Group states that the Dalmia Group invested Rs 113 Crores in various projects of the ATS Group. To secure this investment, exclusive charge over 80,000 (Eighty Thousand) sq. ft. of saleable area in ATS Dolce was created in favour of the Dalmia Group under Clause 3 of the Investment Agreement dated 03.09.2013.
21. He argues that the present appeal is liable to be dismissed because (a) the appeal is not maintainable as it raises contested question of facts that require adjudication by adducing evidence; (b) the appellant has



colluded with the ATS Group and acquiesced to the impugned orders; and (c) the Dalmia Group is a secured creditor and has a prior charge as against the appellant.

**(a) The present appeal is not maintainable as it raises contested question of facts that require adjudication by adducing evidence.**

22. Mr Kumar states that the Arbitral Tribunal passed the impugned orders having found the twin condition, i.e., a *prima facie* case in Dalmia Group's favour and ATS Group's intention to defeat the purpose of Award which may eventually be passed, being met in this case. The impugned orders are akin to an order passed under Order XXXVIII Rule 5 of Code of Civil Procedure, 1908 ("**CPC**"). [*Natrip Implementation Society v. IVRCL Limited; 2016 SCC OnLine Del 5023*].
23. Pertinently, as per Section 17 (2) of Act of 1996, any order passed under Section 17 shall be deemed to be an order of the Court for all purposes. Therefore, the provisions of CPC are applicable to all ancillary and enforcement proceedings in relation to an order passed under Section 17 of Act of 1996. In this respect, Section 17(2) is entirely distinct from Section 36 of Act of 1996 where an Award is only to be enforced in the same manner as a decree under the CPC. There is no deeming fiction for all purposes in relation to an Award. Consequently, the law laid down with respect to enforcement for Awards by the Supreme Court in terms of Section 36 of the Act will have no application.
24. The combined reading of Section 17(2) and Order XXXVIII Rule 5 and 8 of CPC, governs the adjudication of claims of third parties in



relation to property attached before judgment. Order XXXVIII Rule 8 provides for the procedure for adjudication of such claims including the opportunity to lead evidence.

25. The High Court of Andhra Pradesh in *Satyamsetti Somaraju v. Ramiseti Naidu alias Venkata Rao &Anr.*, AIR 2004 AP 87 has held that to set aside an order of attachment passed under Order XXXVIII Rule 5, an enquiry is to be held as provided in execution proceedings, i.e., Order XXI Rule 58. It was held that such enquiry is to be conducted like a trial in a regular suit, i.e., by leading evidence.
26. Admittedly, the present appeal raises contested questions of fact for the first time in appellate proceedings, without these pleas having been considered in the first instance by any adjudicatory body. These contested questions of fact include (a) the priority of charge among the Appellant and the Dalmia Group; and (b) the Dalmia Group's defense of acquiescence and collusion between the Appellant and ATS Group. The adjudication of these factual issues without the opportunity to lead evidence in appellate proceedings is a breach of the principles of natural justice as it denies to parties the full opportunity to present their case.

**(b)The appellant has colluded with the ATS Group and acquiesced to the impugned orders**

27. Learned Counsel further states that the appellant by asserting its charge is trying to vitiate the impugned orders by colluding with the ATS Group. The collusion between the appellant and ATS Group is clear, *inter alia*, from the fact that the appellant has approached this Hon'ble Court only when the Dalmia Group succeeded in the



arbitration proceedings, despite of being aware of the arbitration proceedings and the orders passed, creating charge in favor of the Dalmia Group. The ATS Group in the Supplementary Agreement dated 18 October 2019 has expressly stated that the exclusive charge created in Dalmia Group's favor is intact. However, the ATS Group concealed that after creating an exclusive charge in favour of the Dalmia Group, it has also created a charge in favor of the appellant.

- 28.** The ATS Group in the Section 9 Order dated 08.01.2021, gave a false assurance that the interest of Dalmia Group is secured by earmarking 48 flats which are not encumbered and will not be alienated. In furtherance to this false undertaking, the ATS Group also filed an affidavit dated 16 February 2021 before the Arbitral Tribunal stating that it has not alienated the 48 flats, earmarked in favor of the Dalmia Group, however, it failed to comply with the Section 9 Order by not providing NOCs for these 48 flats. Therefore, the Dalmia Group once again approached this Hon'ble Court in the disposed Section 9 petitions. The ATS Group once again made a false statement before this Hon'ble Court that the units are not encumbered or alienated as recorded in the order dated 16 April 2021.
- 29.** However, the multiple undertakings and statements given on oath by the ATS Group were all false as admittedly, all these 48 flats were charged to various banks, including the appellant, and the 141 units allotted in favor of the Dalmia Group were alienated in favor of third parties without any consent of the Dalmia Group. This contemptuous conduct of the ATS Group has been specifically observed by the Arbitral Tribunal in its order dated 12.10.2021.



30. At the time, charge was created in favor of Dalmia Group in the said projects, the appellant despite of being put to notice by letter dated 4 May 2021 did not avail any legal remedy. The fact that the appellant waited till Dalmia Group to succeed in arbitration proceedings, establishes the connivance between the Appellant and ATS Group to frustrate the proceedings. The Arbitral Tribunal noted the mischievous and contemptuous conduct of the ATS Group.
31. Pursuant to the impugned orders, the Dalmia Group by its letter dated 16 October 2021 intimated the appellant of the charge created by the operation of the impugned order dated 12 October 2021. Notably, the Appellant, in complete disregard to the Section 9 Order and the impugned orders which restricted the ATS Group from alienating or encumbering the said projects, executed another Master Facility Agreement dated 12 November 2021, extending its charge over the Projects. Therefore, the appellant and the ATS Group have acted together in collusion with each other to frustrate the arbitration proceedings and prevent the Dalmia Group from recovering the debt payable by the ATS Group.
32. Mr Kumar further argues that the present appeal is barred by Doctrine of Acquiescence. It is an admitted case of the appellant that it was immediately informed of the Section 9 Order and the impugned order dated 12.10.2021, which created charge in favor of the Dalmia Group and restrained the ATS Group from dealing in any way with the Projects. The appellant despite of being put to notice of the above orders did not challenge it for more than almost 1.5 years and hence assented to the orders so passed. Further, it is trite law that one who



stands by and sees its rights being prejudiced and does not dispute it immediately, gives its assent to the act and is therefore, barred from raising any challenge afterwards.

**(c)Dalmia Group is a secured creditor and has a prior charge as against the appellant.**

33. Learned counsel argues that Dalmia Group under the Investment Agreement and the Supplementary Agreement is a secured creditor, as ATS Group unequivocally secured the Dalmia Group to the extent of 80,000 sq. ft. saleable area in ATS Dolce along with 18 flat which were allotted in its favor pursuant to the Investment Agreement of 2013. Notably, this Investment Agreement was entered between the parties prior to the transaction between the Appellant and the ATS Group. The clause 3.1 reads as under:

*“3.1 The Investor shall have an exclusive charge on an area of 80,000 (Eighty Thousand) square feet of developed saleable area in the Project as security for the Investment Amount (hereinafter referred to as "Security Charge"), The Security Charge shall be exercised by the Investor as ownership rights on the said area (including but not limited to the right to transfer the said area to any person in case of any default by Developer or the Guarantor of the provisions of this Agreement) till the payment of the Investment Amount and/or the Minimum Repayment Amount along with amounts prescribed in Clause 5.2 below, as the case may be, by Developer to the, Investor in terms of the provisions of this Agreement.”*



34. This Investment Agreement and more particularly the above mentioned clause establishes the express intention of the parties to create exclusive charge over ATS Dolce in favor of Dalmia Group. This intent is sufficient to create charge in praesenti, reliance is placed on *J.K. (Bombay) Pvt. Ltd. v. New Kaiser-I-Hind Spinning and Weaving Co. Ltd.; 1968 SCC OnLine SC 32*. Therefore, the exclusive charge created in favor of the Dalmia Group is prior to the charge created in favor of the appellant.
35. In terms of Section 77 (3) of Act of 2013, non-registration of charge does not make the security void, especially against the company, i.e., the ATS Group with which the arbitration proceedings are ongoing. The charge is invalidated for non-registration only in event of liquidation against the creditors. Further, non-registration of charge does not invalidate the security when the company is a going concern. Reliance is placed on *Maturi Umamaheswara Rao & Ors. v. Pendyala Venkatrayudu & Ors., 1968 SCC OnLine AP 204* followed by the Division Bench of Hon'ble Kerala High Court in *State Bank of India v. Viswaniryat, 1987 SCC OnLine Ker 435*. Further, as per Section 77 (4) of Act of 2013, the ATS Group under no circumstances can be absolved from repaying its debt which was secured by exclusive charge.
36. Admittedly, the appellant executed a Master Facility Agreement on 31 March 2015 by which a charge was created in favor of the appellant. However, this charge was created after the exclusive charge created in favor of the Dalmia Group in the year 2013. Therefore, the charge created in favor of the appellant cannot be perfected as a prior





exclusive charge in favour of Dalmia Group was already created by the ATS Group.

37. In the Investment Transaction between the Dalmia Group and ATS Group, the amounts invested by the Dalmia Group were secured by allotment of eighteen (18) flats admeasuring approximately 40,000 sq. ft. The ATS Group was obligated to buy back these flats, on failure of which, the Dalmia Group had the right to sell these flats. It is submitted that various allotment letters were also issued in favour of the Dalmia Group from time to time which by itself amounts to creation of security under Section 11(4)(h) of the Real Estate Regulatory Act, 2016 (“*Act of 2016*”).
38. Lastly, learned counsel submits that the *Asset Reconstruction Co. India Ltd. (supra)* does not consider the above questions of law and therefore is not applicable. This Court in the above mentioned judgment had no opportunity to consider the applicability of Order XXXVIII Rule 8 of CPC and maintainability of appeal at the instance of a third party.
39. Therefore, in terms of the above defenses, the present appeal is liable to be dismissed as section 37 of Act of 1996, being of a summary nature cannot adjudicate disputed questions of fact which requires evidence.

**Rejoinder on behalf of the Appellant**

40. Mr Mehta urges that the argument advanced by Dalmia Group that the challenge raised by the appellant cannot be decided under Section 37 i.e. the present appeal and that remedy lies under Order XXI Rule 58 read with Order XXXVIII Rule 8 of CPC, is completely misconceived



and untenable on the following grounds:-

**A.** Firstly, there is no factual controversy involved which requires leading of evidence, as contended. The charges in favour of the appellant are duly registered under Section 77 of Act of 2013. Whereas, no charge has been registered in favour of Dalmia Group. Further, in the letters addressed by Dalmia Group to HDFC/ ATS Group, the Dalmia Group has acknowledged the charge created in favour of the appellant. In similar facts in the L&T case, this Hon'ble Court has already held against the Dalmia Group.

**B.** Further, Order XXXVIII Rule 8 of CPC which has been relied upon by the Dalmia Group does not apply in the present case. Under Section 17(2) of Act of 1996, there is a deeming fiction by which an order passed by the Tribunal under Section 17 is deemed to be an order of the Court for the purpose of enforcing the order. Thus, only the provisions which pertain to enforcement of orders would be applicable. Order XXXVIII of CPC does not pertain to enforcement proceedings and is therefore not applicable.

**41.** He places reliance on the following judgments passed by Hon'ble Supreme Court where the Hon'ble Court has held that the Act of 1996 is a complete code and the Courts have also examined the limited applicability of the provisions of Code of Civil Procedure to proceedings under the Act.

***A. Sundaram Finance Ltd. v. Abdul Samad, (2018) 3 SCC 622, (Para 19)***



*B. Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333, (Para 89-91)*

*C. Pam Developments (P) Ltd. v. State of W.B., (2019) 8 SCC 112, (Paras 20, 26, 27)*

*D. Amazon.Com NV Investment Holdings LLC v. Future Retail Ltd., (2022) 1 SCC 209, (Para 89-96)*

42. Likewise, the reliance placed by the Dalmia Group on Order 21 Rule 58 of CPC is also misconceived. Assuming without admitting that the provisions of Order 21 Rule 58 of CPC are applicable in the context of orders passed by the Tribunal under Section 17 of Act of 1996, the said provision would at best come into play when enforcement proceedings are initiated. Order 21 Rule 58 does not in any manner undermine the powers of the Court hearing an appeal under Section 37 of Act of 1996 against order/award passed by an arbitral tribunal. The provision does not bar raising of any objections before the Court hearing an appeal under Section 37. Under Section 37(2) of Act of 1996, this Hon'ble Court has the jurisdiction to entertain and adjudicate appeals from orders passed by Arbitral Tribunals under Section 17. This would include the power to decide all objections raised against orders passed under Section 17, including such objections as have been raised by the appellant in the present appeal.

#### **ANALYSIS AND FINDINGS**

43. I have heard the submissions advanced by the learned counsel for the parties and perused the material placed on record.
44. Before proceeding with the submissions advanced by the learned counsel for the parties, it is necessary to refer to the judgment



rendered by a Co-ordinate bench of this Court in *Asset Reconstruction Co. India Ltd. (supra)*, wherein the impugned orders assailed herein were also questioned. After hearing the parties, the Court arrived at the conclusion that:-

- A.** As regards to the maintainability of the Appeal by third party, the Court held that the Arbitral Tribunal has no jurisdiction to affect the rights and remedies of the third party secured creditor unless the third party has been put to notice. The principles of natural justice have to be adhered. Reliance was placed on *Ericsson (supra)* and *Acqua Borewell Private Limited vs Swayam Prabha & Others 2021 SCC OnLine SC 1065*.<sup>1</sup>
- B.** As regards to the creation of charge, the Court held that the Dalmia Group failed to show any registered document evidencing creation of security or registration of charge/security. Further, the appellant therein has duly executed documents for creation of charge pursuant to its Facility Agreements for the two projects and the charge created has been duly registered with the ROC as evident from the CHG-1 forms and certificates of registration of charge.<sup>2</sup>
- C.** As regards to the Appellant being a Secured Creditor, the Court while relying on section 80 of Act of 2013 held that registration of charge is deemed notice of the charge created

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<sup>1</sup> Para 30 and 31 of *Asset Reconstruction Co. India Ltd. (supra)*.

<sup>2</sup> Para 19 of *Asset Reconstruction Co. India Ltd. (supra)*.



and puts the appellant therein in a preferential position as compared to all unsecured creditors. Dalmia Group failed to create/ register charge in its favour under Section 77 of Act of 2013 and hence cannot contend that it is a secured creditor.<sup>3</sup>

**D.** All units allotted to Dalmia Group have been sold. Thus, no security existed in favour of Dalmia Group in terms of Section 11(4)(h) of Act of 2016. Even otherwise Section 11(4)(h) of Act of 2016 does not create any security or charge.<sup>4</sup>

**E.** As regards to the prior knowledge of charge, the Court held that the letters addressed by Dalmia Group to the appellant shows that Dalmia Group suppressed this fact from the Sole Arbitrator.<sup>5</sup>

**45.** As already noted above, the said judgement was challenged before the Hon'ble Supreme Court by Dalmia Group by way of filing SLP (C) No. 2989/ 2024. The said SLP was dismissed *vide* Order dated 15.03.2024. Hence the judgement rendered by a Co-ordinate bench of this Court has attained finality.

**46.** In the present case also, the impugned orders are challenged by a third party who was not before the Arbitral Tribunal. The principle argument advanced by the learned counsel for the appellant while relying on section 77 and 80 of the Act of 2013 is that there is a registered charge created in favour of the appellant and by virtue of this registered charge, the impugned orders are affecting their rights.

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<sup>3</sup> Para 20 of *Asset Reconstruction Co. India Ltd. (supra)*.

<sup>4</sup> Para 21 and 22 of *Asset Reconstruction Co. India Ltd. (supra)*.

<sup>5</sup> Para 25 and 26 of *Asset Reconstruction Co. India Ltd. (supra)*.



On the other hand, Dalmia group has refuted the above argument by submitting that they have prior charge over the said projects and relying on Investment Agreement and Settlement Agreement, ATS Group has secured Dalmia Group before the ATS Group and the appellant transacted.

47. The Co-ordinate bench of this Court in *Asset Reconstruction Co. India Ltd. (supra)* has already returned a finding that the documents relied upon by the Dalima Group cannot be so construed so as to defeat the registered charge created in favour of the appellant therein.
48. The facts being similar in the present case as well, the appellant herein is also having charge duly registered before the ROC and the certificates of charge have been issued in favour of the appellant under the provisions of Act of 2013 by the ROC. The details of charge identification nos. and the date/s of registration of charge/s in favour of the appellant in *ATS Picturesque Reprieves* and *ATS Dolce* are as under:-

**A. ATS Picturesque Reprieves**

<b><u>Charge ID</u></b>	<b><u>Date of Creation of Charge</u></b>
100510201	24.11.2021
100497568	12.11.2021
100242342	08.02.2019
100142004	06.12.2017
100143925	06.12.2017



**B. ATS Dolce**

<b><u>Charge ID</u></b>	<b><u>Date of Creation of Charge</u></b>
100510254	24.11.2021
100497966	12.11.2021
100501875	26.09.2021
100417643	15.02.2021
100417588	15.02.2021
100417606	15.02.2021
100242300	08.02.2021
100143916	06.12.2017
100142128	06.12.2017
100125854	11.09.2017
100093341	30.03.2017
100054869	03.10.2016
10562341	31.03.2015

49. Hence, the appellant herein has charge duly registered in its favour and that being the position, the charge in favour of the appellant cannot be diluted/interfered as done by the impugned orders and more so in the absence of the appellant being a party in the impugned orders or the appellant being put to prior notice.
50. Merely placing reliance on the clauses mentioned in Investment Agreements and Supplementary Agreements and to aver that the prior



charge over the said projects have been made would not suffice as per section 77 of Act of 2013 which clearly mandates that the charge has to be registered before the ROC. Furthermore, Section 80 of Act of 2013 holds that the registration of charge is a deemed notice to the person acquiring such asset. Intention of the parties to the agreement may not be relevant here as the appellant herein has a registered charge in its favour which puts them in a preferential position. Reliance placed on *J.K. (Bombay) Pvt. Ltd. (supra)* will not help Dalmia Group as in that case the Hon'ble Supreme Court was dealing with the issues arising from winding up of a company based on the agreement/scheme which was approved by the Court whereas in the present case, the appellant herein has a registered charge in its favour as per the law and therefore, puts them in a preferential position in view of section 80 of Act of 2013. Section 77 and 80 of Act of 2013 reads as under:-

*“77. Duty to register charges, etc.—(1).....*

*(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.*

*(3) Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by*





*the Registrar under sub-section (2).*

.....  
*80. Date of notice of charge.—Where any charge on any property or assets of a company or any of its undertakings is registered under section 77, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration.”*

- 51.** The argument of Dalmia Group that the charge created in their favour is not invalid due to non-registration need not detain me as I am of the view in terms of section 77 and 80 of Act of 2013, the appellant has a preferential charge over an unregistered charge.
- 52.** Dalmia Group has also contended that various allotment letters issued by ATS Group in their favour amounts to creation of security under section 11(4)(h) of Act of 2016. The Co-ordinate bench in **Asset Reconstruction Co. India Ltd. (supra)** has rightly observed that Section 11(4)(h) protects the allottee to the extent that such units/flats allotted cannot be further mortgage to anyone else. It is admitted position of the fact that all the flats/units allotted in favour of Dalmia Group have been alienated to third party. Therefore, Dalmia Group is no longer secured creditor.
- 53.** As regards to the maintainability of the present appeal is concerned, the argument of Dalmia Group that the impugned orders passed under section 17 of Act of 1996 are akin to Order XXI Rule 58 read with XXXVIII Rule 5 and 8 of CPC and the present appeal raises contested question of facts which requires evidence, the same is bereft of merits



for the reasons noted below.

54. Section 17(2) of Act of 1996 reads as under:-

*“17. Interim measures ordered by arbitral tribunal.—*

*(1).....*

*(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”*

55. The orders passed under Section 17 of Act of 1996 is an order for interim measure for protection/preservation of the subject matter of the arbitration proceedings. The Hon’ble Supreme Court in ***Alka Chandewar v. Shamshul Ishrar Khan, (2017) 16 SCC 119*** has held that any interim orders passed by the Arbitral Tribunal are now deemed to be the orders of the Court for all purposes and thus would be enforceable under the CPC in the same manner as if they were orders of the Court. In the present case, the order passed by the learned Sole Arbitrator is on an application filed under section 17 of Act of 1996 and the same impugned orders are challenged by way of filing present appeal under section 37 of Act of 1996. The relevant part of section 37 of Act of 1996 reads as under:-

*“37. Appealable orders.—(1).....*

*(2) Appeal shall also lie to a court from an order of the arbitral tribunal—*

*(a) accepting the plea referred to in sub-section (2) or sub-*



*section (3) of section 16; or*

*(b) granting or refusing to grant an interim measure under section 17.”*

- 56.** The above sub section categorically permits the Court to entertain an appeal from an order passed by the Arbitral Tribunal under section 17 of Act of 1996.
- 57.** Now coming to the objection raised by Mr Kumar, Order XXI Rule 58 of CPC reads as under:-

*“58. Adjudication of claims to or objections to attachment of, property.—(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:*

*Provided that no such, claim or objection shall be entertained—*

*(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or*

*(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.”*

- 58.** On perusal, the said provision enables the parties to file an application to claim property that has been attached in execution of a decree on the grounds that it is not subject to such attachment. It is evident that the said provision will only come into play when the execution proceedings are invoked and the order of attachment is passed then



such party is at liberty to move an application objecting the same. While in the present case, this Court is not dealing with the execution of the impugned orders but hearing the appeal challenging the correctness of the impugned orders passed under section 17 of Act of 1996 by the learned Sole Arbitrator.

**59.** Further, Order XXXVIII Rule 8 of CPC reads as under:-

*“8. Adjudication of claim to property attached before judgment.—Where any claim is preferred to property attached before judgment, such claim shall be adjudicated upon in the manner hereinbefore provided for the adjudication of claim to property attached in execution of a decree for the payment of money.”*

**60.** Likewise in the same manner, the above said provision is to be read with Order XXI Rule 58 of CPC as it also provides for adjudication of claims or objections regarding attachment of property. Further, in the present case, the claim preferred by the Dalmia Group no longer survive as the appellant herein has the registered charge created in its favour over the said projects as already noted above. Hence, the appeal filed by the appellant is maintainable.

**61.** Another argument raised by Dalmia Group that the appellant and ATS Group are in collusion with each other is also bereft of merits. The appellant has done what was required in law to secure its loan and the appellant has duly registered documents in its favour and the same is reflected in the certificates of charge. Section 80 of Act of 2013 mandates that the registration of charge is deemed notice of charge to the general public. That being the mandate of law, nothing more is



required to be done by the appellant such as seeking impleadment before the Arbitral Tribunal, seeking further injunction orders against the respondents etc. Further, there are letters written by Dalmia Group to the appellant and the ATS Group which shows that Dalmia Group had full knowledge of the fact that the charge has been created in favour of the appellant. Therefore, it was incumbent upon both the ATS Group and Dalmia Group to have brought to the notice of the learned Sole Arbitrator the documents and charge created in favour of the appellant on their own accord. The learned Sole Arbitrator cannot be expected to know the nature of the documents in favour of the appellant unless so informed by either of the parties appearing before the Arbitral Tribunal.

### **CONCLUSION**

62. For the reasons noted above, the present appeal is allowed and the directions contained in the impugned orders 12.10.2021 and 05.11.2021 are hereby set aside to the extent of the said projects i.e. ATS Picturesque Reprieves and ATS Dolce.
63. However nothing prevent the Dalmia Group from initiating any/all legal action in law.
64. The instant appeal is disposed of along with the pending applications, if any.

**JASMEET SINGH, J**

**JULY 01, 2024/(MSQ)**