NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

C.P NO.(IB)-22(PB)/2017
CA NO.

CORAM: **PRESENT: CHIEF JUSTICE M. M. KUMAR**
Hon'ble President

SH. R.VARADHARAJAN
Hon'ble Member (J)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF PRINCIPAL BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 24.03.2017

NAME OF THE COMPANY: Annapurna Infrastructure Pvt. Ltd. & Ors.
Vs
Soril Infra Resources Ltd.

SECTION OF THE COMPANIES ACT: U/s 7 of Insolvency And Bankrucptcy Code 2016

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
1.	Mr. Chetan Sharma,	Sr. Adv.	for the Respondent.	
2.	Mr. Abhishek Swaroop,	Adv.		
3.	Mr. Abhishek Shivpuri,	Adv.		
4.	MR. VIJAY NAIR,	Adv.	FOR OPERATIONAL CREDITORS	P. Jain
5.	MR. PRASHANT JAIN,	ADV.		
6.	MS. SANYOGITA JAIN,	ADV.		
7	MS. APARNA MALHOTRA,	ADV.		
8	MR. P. R. Gupta,	In-Person		

ORDER

M/s Annapurna Infrastructure Pvt. Ltd. & Ors – applicants (for brevity 'the applicants) have invoked the provision of Section 9 of Insolvency and Bankruptcy Code 2016 (for brevity 'the Code') with a prayer to trigger Insolvency Process against M/s SORIL Infra Resources Limited – Respondent (for brevity 'the respondent). The applicants have made the following prayers:

1. To admit the application and pass an order for initiating the Corporate Insolvency Resolution Process under section 9 of the Insolvency and Bankruptcy Code 2016;
2. To appoint an interim resolution professional in terms of section 16 of the Code;
3. To cause a Public announcement of the initiation of Corporate Insolvency Resolution Process and calling for submission of claims under section 15 of the Code; and
4. To declare a moratorium in terms of section 14 of the Code.

2. In order to put the controversy in its proper perspective it would first be necessary to notice few material facts. The applicants have some claims against the Respondent and in pursuance of the order passed by Hon'ble High Court of Delhi Justice (Dr.) Mukundakam Sharma (Retd.) was appointed as Sole Arbitrator to adjudicate all disputes arising out of the lease deed dated 23.11.2005 between the applicants and respondents. It is pertinent to mention that respondent have changed their name and is now known as M/s SORIL Infra Resources Limited-Respondent. The applicants claimed that applicants are 'Operational Creditor' and the Respondent is a 'Corporate Debtor' within the meaning of code.

3. The arbitrator passed an award on 9.9.2016 in favour of the applicants granting the following reliefs:-

a. Rs. 2,67,52,283/- on account of rend from 1.4.2008 upto 22.3.2010 along with interest @ 12 % per annum w.e.f. 23.3.2010 upto the date of the Award.
b. Rs.1,11,56,145/- on account of damages equivalent to rend for a period of 6 months from 22.3.2010.

c. Future interest @ 12% per annum on the amounts, as calculated above, from the date of the award till the date of realization.

4. The Respondent then challenged the award u/s 34 of the Arbitration and Conciliation Act, 1996 (for brevity the 'Arbitration Act') with a prayer to set aside the award. However the application was dismissed on 19.12.2016. As a consequence each of the applicants issued Demand Notice on 13.1.2017 under section 8 of the Code. In response to the Demand Notice Respondent filed reply on 27.1.2017. It is conceded by the applicants that in the reply sent by Respondent the existence of 'Operational Debt' has been disputed and it also stated that an appeal being numbered as FAO(OS)(COMM) 20 of 2017 has been filed under section 37 of the Arbitration Act against the order dated 19.12.2016 passed by learned single Judge while dismissing the appeal under section 34 of the Arbitration Act. It has also been pointed out that execution proceedings to recover the amount due under the award dated 9.9.2016 have also been initiated and are pending consideration before Hon'ble Delhi High Court. It is thus evident that the dispute has arisen on account of payment of rent and interest/damages on the rental amount.

5. Mr. Vijay Nair learned counsel for the Petitioner has vehemently argued that the applicant has to be regarded as a 'Operational Creditor' within the meaning of section 9 read with section 5(20) and 5(21) of the Code. A reference has also been invited to the definition of words the 'debt' and 'default' as defined in section 3(11) and section 3(12) of the Code. It has been submitted that the Demand Notice dated 13.1.2017 was served on 16.1.2017. According to the learned counsel on the date of service of Demand Notice the award of the Arbitrator had attained finality as the application u/s 34 of the Arbitration Act was dismissed on 19.12.2016 and no appeal u/s 37 was filed or pending. According to the learned counsel filing of appeal subsequent on 20.1.2017 would be immaterial.

6. In order to buttress his stand that applicant is an 'Operational Creditor' learned counsel has placed reliance on a portion of para 3.2.2 of the report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design and has argued that the report clearly brings out that the obligation to pay rent is certainly cover by the definition of expression 'Operational Creditors'. According to the learned counsel the expression 'Operational Creditor' used in section 5(20) and

5(21) of the Code must be construed to include the obligation to pay rent to the applicant as an 'Operational Creditor'. According to the learned counsel the definition of 'Operational Creditor' as adopted in section 5(20) of the Code is not exhaustive but it is illustrative as it is evident from the use of word 'include'. Mr. Nair has submitted that it is well settled principle of law that wherever the expression 'include' is used to define an expression then it has room to imply many other things as the definition is not exclusive.

7. Mr. Nair has then submitted that application u/s 34 of the Arbitration Act cannot be regarded as continuation of arbitration proceeding because the arbitrator is the final judge of the facts and the High Court while hearing objections u/s 34 is not expected to scrutinize the award as an appellate forum. In support of his submissions learned counsel has placed reliance on para 30 of a judgment of Hon'ble High Court of Delhi in the case of ***M/s Raj Kishan & Company v. National Thermal Power Corporation 2012VIIIAD(Delhi)53***. It has been pointed out that in some-what similar circumstances a Division Bench of Hon'ble High Court of Madras in the case of ***N. Poongodi and Anr v. Tata Finance Limited 2005(4) CTC 577*** has rejected the objections to the issuance of the insolvency notice and rejected the objections as is evident from the perusal of para 7 of judgement.

8. Another submission made by Mr. Nair is that expression 'arbitration proceedings' used in section 8(2)(a) of the 'Code' cannot be deemed to be pending because under section 21 the Arbitration Act arbitration proceedings commence, on the date on which a request for referring such a dispute to arbitration is received by the respondent. The 'arbitration proceedings' and it comes to an end in terms of section 32 on the date of announcing the final award or by an order of the arbitral Tribunal in accordance with sub section (2) of section 32 of the Arbitration Act. According to the learned counsel there are no arbitral proceeding pending in accordance with the provision of section 32 which have come to an end on 9.9.2016. The proceeding could be considered pending between the period contemplated by section 21 and section 32 of the Arbitration Act. In support of his submission learned counsel has placed reliance on the observations made in para 10 of the judgement rendered by Hon'ble High Court of Bombay in the case of ***Rendezvous sports World v. Board of Control for Cricket in India 2016 SCC Online Bom 6064*** and

argued that the term "arbitral proceedings" would not include post-award proceedings i.e. proceedings for enforcement of the arbitral award or proceedings to challenge the arbitral award, which arise only after the award is made. Therefore the pendency of appeal u/s 37 of the Arbitration Act and the execution proceeding in any case would not constitute a Bar in triggering the insolvency process in accordance with the provision of section 9 o the Code.

9. Mr. Nair has also submitted that there is well known yardstick applicable to test and ascertain whether renting of property would be regarded as service or not. According to the learned counsel renting a property for commercial purpose is certainly a service and has value for the service receiver. In that regard reliance has been placed on para 22 of the Division Bench judgment rendered by the Punjab & Haryana High Court in the case of ***M/s Shubh Timb Steels Limited v. Union of India and Another 2011(1) ILR (Punjab & Haryana) 1008***. Learned counsel has also placed reliance on the observations made by Division Bench of Gujarat High Court in the case of ***Cinemax India Limited v. Union of India 2011 SCC online Guj 4584.***

10. Mr. Nair further argued that pendency of appeal without any interim order would not constitute a bar for initiation of execution of the award because the main purpose of the Arbitration Act has been to provide a speedy remedy. In that regard learned counsel has placed reliance on the observations made in para 7 of the Division Bench judgment rendered by the Hon'ble High Court of Delhi in the case of ***Décor India Pvt. Ltd. v. National Building Consti. Corpon Ltd. 2007 (97) DRJ 428 (DB***).

11. Mr. Chetan Sharma leaned counsel for the Respondent has made few preliminary submissions. According to him instant petition u/s 9 of the Code per se is not maintainable because the Respondent does not owe any 'Operational Debt' to the applicant. The applicant is not an 'operational creditor'. Operational debt is clearly defined in section 5(21) of the Code. According to Mr. Sharma Ipso-facto an Operational Debt arises only in respect of the claim of 'goods' and 'services'. The expression goods and service include 'employment'

12. Mr. Sharma maintains that it is clear from the bare reading of the statute, the applicant ipso-facto and ipso-jure does not and cannot qualify to be by any stretch of imagination an Operational creditor by any stretch of imagination as there is no operational Debt. Learned counsel has maintained that the 'debt' is not arising under any law for the time being in force, as is the mandate of sub section 21 section 5 of the Code and it would be attracted only when the said debt is payable to (i) Central Government; (ii) State Government; and (iii) Local Authority.

13. According to the learned counsel sections 8, 9, 5(2), 5(21) must be construe in accordance to the object of the Code as outlined in the long title. Learned counsel has maintained that any external aid for construction of the provisions in the Code like the Committee report must be avoided because it was after the report that the Parliament has passed the code. The Code as it stands must be construed strictly. In support of his submissions learned counsel has invited out attention to para 9 & 10 of the judgement rendered in the case of ***Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate AIR 1958 SC 353***

14. Mr. Sharma has placed reliance on the judgement delivered by us in Sajive Kunwar v. AMR infrastructure (IB-06(PB) 2017 decided on 16.2.2017) where it has been held that a person who claims to be 'Operational Creditor' must show that he is covered by section 5(20) of the Code which defines the expression 'Operational Creditor'. Such person is also required to satisfy the requirement of section 5(21) by showing that his claim is in respect of provision of goods or services including employment or debt in respect of repayment of dues arising under any law payable to the Centre/State Government to acquire *locus standi* and to file a petition u/s 9 of the Code. According to the learned counsel this judgment is in terms against the applicant and the application is liable to be dismissed on that score alone.

15. Mr. Sharma then submitted that on 27.1.2017 the Respondent served a notice under section 8(2) of the Code clearly pointing out that there is no default in terms of section 8(1) of the Code and has raised the dispute with regard to any such claim. Once there is a dispute raised then the Insolvency Process cannot be triggered in the face of section 8(2). Learned counsel has also pointed out that no affidavit in pursuance of section 9(3)(b) has been filed and no notice has been given by the 'Corporate Debtor' relating to a dispute of unpaid 'Operational Debt'. It has been

maintained that such an affidavit could not have been filed in view of notice sent u/s 8(2) dated 27.1.2017 disclosing the detail of pendency of appeal filed u/s 37 which came up for hearing on 30.1.2017. Therefore the application is liable to be rejected.

16. Mr. Sharma has also submitted that there is deliberate suppression of material facts as notice dated 27.01.2017 disputing the demand raised by the applicant has not been disclosed and no disclosure has been made with regard to execution of the proceeding as per the prescribed performa (form V). Therefore on that score also the petition is liable to be dismissed. It has also been pointed out that sections 75 and 76 of the Code would also be attracted on account of non – disclosure. A reference has also been made to the order dated 30.1.2017 passed by Division Bench of Hon'ble High Court of Delhi in which appeal preferred by the Respondent under section 37 of the Arbitration Act. It has further been pointed out that the execution proceedings for enforcement of award dated 9.9.2016 have also been filed which are listed on 23.5.2017.

17. Mr. Sharma has pointed out that the initiation of Insolvency process has serious consequences and if person like the petitioner has already availed a remedy of execution then the draconian Insolvency Process should not be triggered which may bring a profit making corporate entity to a complete halt. According to the learned counsel it would result in delirious effect and a profit making corporate entity may suffer in its reputation and irreparable loss.

18. It has further been pointed out that arbitration proceeding do not in terms come to an end on the announcement of award which is to pass through the process of challenge u/s 34 and then u/s 37 of the Arbitration Act as well as subject to any further proceedings before Hon'ble the Supreme Court. In support of his submissions learned counsel has placed reliance on the observations made in para 10 by a Division of Bombay High Court in the case of ***DSL Enterprises Pvt. Ltd. v. Mrs. N.C. Chandratre Income tax Officer, TDS-I, Nasik & Ors. (manu/MH/0187/2013)*** and has argued that award would attained finality only after remedies available to a party are exhausted u/s 34 & 37 of the Arbitration Act or even in further appeal to Hon'ble the Supreme Court. For the same proposition reliance has also been placed on an another judgement of Bombay High Court

rendered in the case of ***Rajendra N. Mehtra and Ors. v. Prabhudas Liladhar P. Ltd. 2013(1) Mh.L.J. 532***

19. Mr. Nair for the applicant in rebuttal has argued that there is no concealment and the factum of dispute as raised by the Respondent in its reply, has been duly disclosed in para 4 of the brief synopsis. Learned counsel has further pointed out that the factum of filing appeal u/s 37 of the Arbitration Act has also been disclosed in the list of dates and events and that there is no further obligation on the part of the applicant to disclose any other fact.

20. Having heard the learned counsel for the parties and perusing the paper book with their able assistance we proceed to take up the issues raised before us. It is a classical case where dispute between the parties has already been subjected to arbitration proceedings which are yet to attain finality. The expression 'dispute' has been defined in section 5(b) of the Code and it must be read with section 8(1) & (2) thereof. It would thus be profitable to read the above mentioned provisions which are as under :-

Definition

5. *In this Part, unless the context otherwise requires,—'*

(6) "dispute" includes a suit or arbitration proceedings relating to—

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c)the breach of a representation or warranty;

Insolvency resolution by operational creditor.

8. *(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

21. A co-joint perusal of the aforesaid provisions makes it clear that a corporate debtor has option available under section 8(2) of the Code. The corporate debtor could either place on record material disclosing the existence of a dispute or to pay the unpaid debt. According to section 5(b) of the Code the expression dispute includes a suit or arbitration proceedings relating to (a) the existence of the amount due; (b) the quality of goods or service or (c) the breach of representation or warranty. The definition of the word 'dispute' is not exhaustive but is, in fact illustrative. In other words a 'corporate debtor' is not left with the only option of showing the existence of dispute by way of a pending suit, arbitration or to show the breach of representation or warranty. The corporate debtor would be well within his right to show that 'goods' and services were not supplied at all or the supply was far from satisfactory in case of demand raised by an 'operational creditor'. Hence a corporate debtor would be well within his rights to reject the demand on any sustainable grounds. It would therefore, depend on the facts and circumstances of each case.

22. In the instant case an arbitral award has been announced on 9.9.2016 and the application for setting aside the award filed under section 34 of the Arbitration Act has been rejected on 19.12.2016. It has been mentioned by the respondent in its

reply dated 27.01.2017 sent under section 8(2) of the Code to the notice issued under section 8(1) of the Code by the applicant that the debt is disputed and appeal under section 37 of the Arbitration Act is pending. The reply dated 27.1.2017 reads as under:-

> "1. At the outset, kindly note that our client is disputing the existence of the 'operational debt' allegedly payable to you by our client. Our client is vigorously contesting the Award dated 9.9.2016 (Award) passed by Mr. Justice Mukundakam Sharma (Retd.), Sole Arbitrator, in Arbitration Case No.3 of 2013, before the Hon'ble Delhi High Court.
>
> 2. As you are aware, our client had filed a petition under section 34 of the Arbitration and Conciliation Act, 1996 (Act) bearing No. OMP (Comm.) No.570 of 2016, before the Hon'ble Delhi High Court vide order dated 19.12.2016. Please note that our client has filed an appeal against the said order under section 37 of the Act, bearing No.FAO(OS)(COMM) 20 of 2017, for setting aside the order dated 19.12.206, and the same is presently pending adjudication before the Hon'ble Court.
>
> 3. In view of the above, please note that no default has occurred in terms of section 8(1) of the Code and, therefore, no process for Corporate Insolvency Resolution can be initiated at this stage. Any action in this regard would be at your won cost, risk and consequences.
>
> Kindly note that this reply is without prejudice to any other rights or remedies available to our client under contract and in law."

23. A close examination of the aforesaid reply would show that the respondents have disputed the existence of 'Operational Debt' by disclosing that

its application under section 34 of the Arbitration Act was dismissed and the appeal under section 37 of the Arbitration Act bearing No. FAO(OS)(COMM) 20 of 2017 was pending adjudication. It is also pertinent to mention that the applicant has filed a caveat for issuance of notice to it before passing any order. Therefore the applicants are contesting the litigation tooth nail before this forum. In this backdrop respondent has claimed no default within the meaning section 8(1) read with section 3(12) of the Code is deemed to have occurred. It is also pertinent to notice that execution proceedings for enforcement of the award have also been initiated and are pending for consideration of the Hon'ble Delhi High Court on 12.5.2017.

24. In the face of the aforesaid facts we find that there is complete answer to the claim made by the applicant in terms of section 8(2)(a) read with section 9(1) of the 'Code' which bars initiation of insolvency process. It cannot be said that arbitration proceedings have come to an end merely on the dismissal of application under section 34 of the Arbitration Act as sought to be canvassed on behalf of the applicant. The proceedings are yet to attain finality as appeal under section 37 of the Arbitration Act is pending. On behalf of the respondents reliance has rightly been placed on the judgement of the Bombay High Court rendered in the cases of DSL Enterprises Private Ltd. (DB) and Rajendra (SB) (Supra)

25. We have not been able to persuade ourselves to accept the submission advanced on behalf of the applicant that 'arbitration proceedings' stand concluded by virtue of section 32 of the Arbitration Act. The argument is wholly unsustainable once we take into account the provisions of section 33 of

the Arbitration Act itself. It provides for corrections and interpretation of award and even for additional award after the award has been announced. As already observed section 34 and section 37 of the Arbitration Act provide for setting aside of the award and the remedy of appeal. The appeal under section 37 of the Arbitration Act is still pending. The judgements of Bombay High Court has been rightly relied upon by the learned counsel for respondents.

26. The other judgment that no proceedings were pending on the date of issuance of demand notice in terms of section 8(1) of the Code is equally falicious. Admittedly appeal under section 37 of the Arbitration Act could be preferred within 30 days against an order passed under section 34 of the Arbitration Act. Merely because no appeal was pending on 16.1.2017 when the respondent have time to prefer the appeal would not entitle the applicant to invoke section 9 of the Code. If that view is taken then extreme technicality would result in nullifying the remedy of appeal within 30 days provided by section 37 of the Arbitration Act. No reasonable person would take such a view. Thus the argument is wholly devoid of merit and therefore we have no hesitation to reject the same.

27. We are further of the view that already proceedings for execution of the award have been initiated. An effective remedy has been availed by the applicant. We have not been able to accept that a party can invoke more than one remedy simultaneously. It is in fact against the fundamental principles of judicial administration to allow a party to avail more than one remedies. Ordinarily only one remedy at one time could be availed as is evident from the fundamental principles laid down in section10 CPC. It would promote forum

shopping which is wholly impermissible in law. For the aforesaid view we draw support from the observations in paras 22,23 & 24 of the judgment of the Supreme Court rendered in the case of Dr. Aloys Wobben and Another v. Yogesh Mehta & Ors. (2014) 15 SCC 360. Accepting the aforesaid contention their lordships of the Supreme Court observed as under:-

> *"22. We do not have the slightest hesitation in accepting the above contention (fifth in the series of contentions), that even though more than one remedies are available to the respondents in Section 64 of the Patents Act, the word "or" used therein separating the different remedies provided therein, would disentitle them, to avail of both the remedies, for the same purpose, simultaneously. On principle also, this would be the correct legal position.*
>
> *23. Keeping in view the submissions advanced at the hands of the learned counsel for the appellants (as have been noticed in the foregoing paragraphs), the question which arises for determination is, that having chosen both the above remedies, which one of the two, should the respondents, be permitted to pursue. The answer to the above query, will, if possible, have to be determined from the provisions of the Patents Act itself. In this behalf we may at the outset record, that learned counsel for the rival parties, did not invite our attention to any provision from the Patents Act, which would provide a clear pointer, to the course to be adopted. Whilst it was undoubtedly submitted, on the one hand, that the choice should fall in favour of the superior forum. Details about the locus, in respect of other challenges have been narrated in paragraph 16 hereinabove. We may in the*

passing record, that the determination of the "counter-claim" would be with the superior forum, i.e., the jurisdictional High Court (Sections 64(1) and 104 of the Patents Act). The above submission was sought to be countered, on the other hand, by pointing out, that the opportunities provided by the legislature to assail the order(s) passed under the Patents Act, could not be reduced. In this behalf, it was submitted, that the remedies provided by the legislature, where a "revocation petition" is filed, were far in excess of the remedies, in case revocation was sought through a "counter-claim". The legitimate inference derived from the former submission, was thus equally legitimately, repudiated by the latter contention. Since no legitimate solution could emerge from the provisions of the Patents Act, it would be essential, to rely 26 on known principles of law, to resolve the issue. We shall therefore attempt to resolve the issue, on accepted principles of law.

24. A "counter-claim" for all intents and purposes, must be understood as a suit, filed by one who is impleaded as a defendant. A "counter-claim" is essentially filed to obstruct the claim raised in a suit. A "counter-claim" is tried jointly, with the suit filed by the plaintiff, and has the same effect as a cross-suit. Therefore, for all intents and purposes a "counter-claim" is treated as a plaint, and is governed by the rules applicable to plaints. The court trying a suit, as well as, the "counter-claim", has to pronounce its judgment on the prayer(s) made in the suit, and also, those made in the "counter-claim". Since a "counter-claim" is of the nature of an independent suit, a "counter-claim" cannot be allowed to proceed, where the defendant has already instituted a suit against the plaintiff, on the same cause of action. The above conclusion is drawn on the basis of the accepted principle of law

crystallized in Section 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as, the CPC) read with Section 151 of the CPC. Both the above provisions are being extracted hereunder:-

> *"10. Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.*
>
> *Explanation- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action. 27.*
>
> *151. Saving of inherent powers of Court.- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."*

Therefore, where an issue is already pending adjudication between the same parties, in a Court having jurisdiction to adjudicate upon the same, a subsequently instituted suit on the same issue between the same parties, cannot be allowed to proceed. A similar question arises for consideration before this Court, in the present controversy. If the respondents in their capacity as "any person interested", had filed a "revocation petition" before the institution of an "infringement suit", they cannot be permitted to file a "counter-claim" on the same cause of action. The natural conclusion in the above situation would be, the validity of the grant of the patent would have to be determined in the "revocation petition". Therefore, in the above situation, while the "revocation petition" will have to be permitted to be pursued, the "counter-claim" cannot be permitted to be continued. Therefore, in the above eventuality, it is apparent that the situation would be resolved, in the same

manner, as it would have been resolved in cross-suits filed by the rival parties, before different jurisdictional courts. In our considered view, the above conclusion is imperative for a harmonious interpretation of the relevant provisions of the Patents Act."

28. In view of the above we do not feel the necessity of expressing our views on the other issues which are left open. Accordingly we hold that application does not warrant admission and the same is dismissed with cost of Rs.1,00,000/- (Rs. One Lac).

Sd/-

(CHIEF JUSTICE M.M. KUMAR)
PRESIDENT

24.03.2017

Sd/-

(R. VARADHARAJAN)
MEMBER (J)