

# Thota Gurunath Reddy & Ors vs Continental Hospitals Pvt. Ltd. & Ors on 18 July, 2018

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 160 of 2017

(Arising out of Order dated 20th April, 2017 passed by the National Company Law Tribunal, Hyderabad Bench, Hyderabad in CA No. 51 of 2016 in CP No.19/241/HDB/2016)

IN THE MATTER OF:

Thota Gurunath Reddy & Ors.

...Appellants

Versus

Continental Hospitals Pvt. Ltd. & Ors.

...Respondents

Present:

For Appellants :

Shri Amit Sibal, Senior Advocate assisted by Ms. Amita Katragadda, Shri Russel A. Stanets, Shri Bipin Aspatwar, Shri Anirudh Wadhwa, Shri Hires Chaudhary, Shri Indrajeet, Shri Rahul Kumar, Ms. Shruti Khanijow, Ms. Vanshika Mohta and Ms. Sanjana Kale, Advocates

For Respondent No. 1:

Shri Arun Kathpalia, Senior Advocate assisted by Shri V.P. Singh, Shri Aditya Jalan, Shri Priyank and Shri Abhijan Jha, Advocates

For Respondent No. 2 :

Shri Rajiv Nayar, Senior Advocate assisted by Shri Arjun Pant, Advocate

## JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

Mr. Thota Gurunath Reddy and 2 Ors. (hereinafter referred to as "Petitioners") preferred a petition before the National Company Law Company Appeal (AT) No. 160 of 2017 Tribunal (hereinafter

referred to as "Tribunal"), Hyderabad Bench, Hyderabad, under Sections 241 to 244, 337 to 341 and other provisions of the Companies Act, 2013 by seeking several reliefs. In the said petition, on appearance, the Respondent- 'Gleneagles Development Pte. Limited' who is the 2nd Respondent, filed an application under Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act, 1996"), by seeking a direction to refer the parties i.e. the 1st to 3rd Respondents/Petitioners and the Petitioners/2nd Respondent to arbitration in accordance with the Arbitration Agreement as set out in Shareholders Agreement etc.

2. Against the impugned order dated 20th April, 2017, the Appellants ('Petitioners') preferred this appeal under Section 421 of the Companies Act, 2013.

3. On notice, the parties appeared and filed their respective affidavits, made submissions on merit and on question of law.

4. Learned Senior Counsel for 2nd Respondent challenged the maintainability of the appeal before this Appellate Tribunal under Section 421 of the Companies Act, 2013. Therefore, before going into the question of merit, it is desirable to decide the question as to whether the appeal preferred by the Appellants under Section 421 of the Companies Act, 2013 against the impugned order dated 20th April, 2017, passed by the Tribunal is maintainable or not.

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5. To decide the aforesaid issue, it is necessary to refer to the basic facts as was pleaded by the Petitioners and not disputed by the Respondents.

6. 'Continental Hospital Private Limited' is the Company which was the 1st Respondent before the Tribunal. It was incorporated under the provisions of the Companies Act, 1956 on 16th January, 2007 in the name and style of "Continental Hospitals Limited" and subsequently, it was converted into Private Limited on 21st July, 2015.

7. The 1st Petitioner, Thota Gurunath Reddy is a shareholder, Director and one of the Core Promoters of the 1st Respondent Company by holding its equity shares of 39.28% of the paid up capital. The 2nd Petitioner is a shareholder, Director and one of the Core Promoters of the 1st Respondent Company holding three equity shares in the Company. The 3rd Petitioner i.e. 'Paradigm Corporation Private Limited' is also a shareholder having equity shares of 8.60% of the paid up capital of the 1st Respondent Company. Thus, all of them together hold 47.88% of the total paid up capital of the 1st Respondent Company.

8. The 2nd Respondent i.e. 'Gleneagles Development Pte Limited', the Company registered in Singapore and its shareholders of the 1st Respondent Company holding equity shares of 51% of the paid up capital of the 1st Respondent Company.

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9. According to the Petitioners, the 2nd Respondent approached the 1st Respondent Company and expressed its willingness to invest in the said company and to purchase shares from the existing shareholders. The Petitioners and the Respondents, including the 2nd Respondent thereafter entered into several agreements including the 'Share Purchase Agreement', 'Share Subscription Agreement' and 'Share Holders Agreement', all dated 18th February, 2015.

10. Pursuant to the aforesaid agreements, the 2nd Respondent purchased 2,26,97,798 equity shares of Rs. 10/- each for a consideration of Rs. 41.22 (Rupees Forty-One and Twenty-Two paise only) per share from the Petitioners Group amounting to Rs. 170 Crores. The 1st Respondent Company has allotted 4,83,87,426 equity shares of Rs. 10/- for a consideration of Rs. 38.92 (Rupees Thirty-Eight and Ninety-Two paise only) per share amounting to Rs. 123 Crores. After the aforesaid transaction, the 2nd Respondent holds 51% whereas the Petitioners and other Respondents hold 49% of the total shareholding in the Company.

11. The case of the Petitioners before the Tribunal was that a sum of Rs. 145 Crores out of Rs. 170 Crores would be used to clear various liabilities and to strengthen the operation of the hospital. It was also understood to set up an Escrow Account to which a sum of Rs. 30 Crores would be deposited out of the sale consideration of Rs. 170 Crores.

12. The Petitioners alleged that 2nd Respondent, after acquiring major shareholding in the 1st Respondent Company, started acting against the Company Appeal (AT) No. 160 of 2017 interest of the 1st Respondent Company using the 1st Respondent Company as a vehicle to enrich its associates Companies viz. 'Parkway Health Care India Private Limited' and 'Parkway Holdings Limited'. It was also submitted that the 2nd Respondent adopts a strategy to pay more commission to their own group of Companies and used to show losses in the 1st Respondent Company so as to put pressure on Petitioners to dilute their present shareholding by way of bringing more capital into 1st Respondent Company.

13. The allegation of the Petitioners was that the Respondents tried to held meeting of the Board of Directors of the 1st Respondent Company on 26th August, 2016 for exploring the means and methods of raising Rs. 29 Crores towards working capital for 1st Respondent Company. The Petitioners objected to the said proposal by pointing out various acts of mismanagement, which are contrary to the shareholders' agreement. The Petitioners also alleged that they have given personal guarantee for the loans availed by 1st Respondent but 2nd Respondent was siphoning off the funds of the said Company by virtue of their brute majority.

14. The allegations were made referring to the various acts of mismanagement contrary to the 'Shareholders Agreement', the 2nd Respondent filed application under Section 45 of the Arbitration Act, 1996, in terms with the agreement for reference to Arbitrator which has been done by impugned order dated 20th April, 2017. Company Appeal (AT) No. 160 of 2017

15. Learned Counsel appearing on behalf of the 2nd Respondent submitted that the impugned order has been passed not under the Companies Act, 2013 but under Section 45 of the Arbitration Act, 1996, in the capacity of 'judicial authority' in exercise of power conferred by the Arbitration Act,

1996, therefore, the appeal filed under Section 421 of the Companies Act, 2013 is not maintainable.

16 Similar issue fell for consideration before the Hon'ble High Court of Punjab and Haryana in 'Smt. Sudershan Chopra vs. Vijay Kumar Chopra, (2003) 117, Company Cases 660". In the said case, the Division Bench considered a case where the Respondent had filed a Company Petition under Sections 397 and 398 of the Companies Act, 1956 (now Sections 241/242 of the Companies Act, 2013) before the erstwhile Company Law Board (hereinafter referred to as "CLB"). The Appellant in the said case filed an application under Section 8 of the Arbitration Act, 1996. The CLB held that the application was not sustainable and refused to refer the disputes to arbitration. The decision of the CLB was challenged in the appeal before the Hon'ble High Court under section 10-F of the Companies Act, 1956. The Respondent of the said case raised the question of maintainability. The Division Bench held:

"In our view, in order to adjudicate upon the aforesaid contention, it would be imperative for us to first determine the legislative provision under which the impugned order Company Appeal (AT) No. 160 of 2017 dated December 8, 2000, has been passed. If in the aforesaid determination, this court arrives at the conclusion that the order was passed by the CLB in exercise of its jurisdiction to settle a dispute flowing out of the provisions of the Companies Act, 1956, then and only then, the instant plea advanced on behalf of the appellants would merit acceptance. In such an eventuality, it would have to be concluded that the search for the appellate forum would have to be restricted to the Companies Act, 1956.

However, if this court arrives at the conclusion that the impugned order dated December 8, 2000, had been passed by the CLB in its capacity of 'judicial authority' in exercise of obligations flowing out of the Arbitration Act, 1996, in furtherance of the provisions of the Arbitration Act, 1996, then certainly, the remedy must be searched for, from within the provisions of the Arbitration Act, 1996. In such an eventuality, the contention advanced on behalf of the appellants would not merit acceptance. Company Appeal (AT) No. 160 of 2017 Undoubtedly, when the petition was filed by the respondents (herein) before the CLB, the CLB was exercising jurisdiction under the provisions of Sections 397 and 398 of the Companies Act, 1956. However, when the appellants (herein) moved an application under Section 8 of the Arbitration Act, 1996, before the CLB, the CLB while deciding the said application acted in its capacity as "judicial authority" under Section 8 of the Arbitration Act, 1996. There can be no doubt that the impugned order determines rights flowing out of the provisions of the Arbitration Act, 1996, and not the provisions of the Companies Act, 1956. Since the CLB did not adjudicate the dispute between the parties under Sections 397 and 398 of the Companies Act, 1956 (which was really the subject matter of Company Petition No. 76 of 1999) through the order impugned before us it is not possible for us to accept the contention advanced on behalf of the appellants that in disposing of the application filed under Section 8 of the Company Appeal (AT) No. 160 of 2017 Arbitration Act, 1996, the CLB was exercising jurisdiction vested in it under the Companies Act, 1956. The conclusion

has to be, as noticed in the foregoing paragraphs, that the right to prefer an appeal against an order passed by the CLB in its capacity as "judicial authority" while deciding an application filed under Section 8 of the Arbitration Act, 1996, must be searched for, from within the provisions of the Arbitration Act, 1996, more so, because the impugned order is not referable to any provision of the Companies Act, 1956."

17. The aforesaid decision of the Punjab and Haryana High Court has been followed by the Hon'ble Bombay High Court in "Conros Steels Pvt. Ltd. Vs. Lu Qin (Hong Kong) Company Ltd. & Ors." Civil Appeal No. 806 of 2011 in Suit No. 2358 of 2010".

18. The Hon'ble Supreme Court in "Sumitomo Corporation v. CDC Financial Services (Mauritius) Ltd. (2008) 142 Comp Cas 114 (2008) 4 SCC 91" held:

"To our mind, the reading of Section 50 clearly suggests that an appeal shall lie from the order of CLB to the court authorised by law to hear the Company Appeal (AT) No. 160 of 2017 appeals from such order of CLB. To make it clear that in the event the order under Section 45 is passed by CLB, the forum which is provided under law for hearing the appeal from the order of CLB, will be the appellate forum. In other words, while Section 50 of the Arbitration Act provides for the orders which can be made the subject-matter of the appeal, the forum to hear the appeal is to be tested with reference to the appropriate law governing the authority or forum which passed the original order, that is, in the case on hand, CLB. Section 10-F read with Section 10(1)(a) of the Companies Act provides for such forum to hear the appeal from the orders of CLB as the High Court within the jurisdiction of which the registered office of the company in issue is situated...

In view of our conclusion, we are satisfied that the appellant has wrongly based its arguments on matters such as ouster of jurisdiction, overriding effect of special statute over general statute, overriding effect of subsequent statute, etc. Since they have no application whatsoever to the matter in issue, there is no need to refer various decisions in those aspects. Ouster of jurisdiction arises only in regard to original jurisdiction and it cannot have any Company Appeal (AT) No. 160 of 2017 application to appellate jurisdiction as the one provided in Section 50 of the Arbitration Act. The appeal is a statutory remedy and it can lie only to the specified forum. The appellate forum cannot be decided on the basis of cause of action as applicable to original proceedings such as suit which could be filed in any court where part of cause of action arises. In such circumstances, we are unable to accept the lengthy arguments advanced on the abovementioned subject by learned Senior Counsel for the appellant. Likewise, the submission of the appellant, namely, the Arbitration Act being a special and subsequent statute has no relevance to the present case."

19. The decision of the Hon'ble Supreme Court has been followed by the Hon'ble Delhi High Court in "Vijay Sekhri and Another vs. Tinna Oils and Chemicals and Ors." (2010) 160 Comp Cas 550 (Delhi)".

20. In "Kandla Export Corporation & Anr. Vs. M/s. OCI Corporation & Anr." Civil Appeal No. 1661-1663 of 2018", the Hon'ble Supreme Court by judgment dated 7th February, 2018, while considering Section 50 of the Arbitration Act, 1996 and question of Company Appeal (AT) No. 160 of 2017 maintainability of the appeal under section 13(1) of the Commercial Courts Act, observed and held:

"16. Thus, an order which refers parties to arbitration under Section 8, not being appealable under Section 37(1)(a), would not be appealable under Section 13(1) of the Commercial Courts Act. Similarly, an appeal rejecting a plea referred to in sub-sections (2) and (3) of Section 16 of the Arbitration Act would equally not be appealable under Section 37(2)(a) and, therefore, under Section 13(1) of the Commercial Courts Act.

17. So far, so good. However, it is Shri Giri's main argument that Section 50 of the Arbitration Act does not find any mention in the proviso to Section 13(1) of the Commercial Courts Act and, therefore, notwithstanding that an appeal would not lie under Section 50 of the Arbitration Act, it would lie under Section 13(1) of the Commercial Courts Act.

18. To answer this question, it is necessary to advert to the judgment in Fuerst Day Lawson (supra). The common question that arose for consideration in the batch of cases before the Court was whether an order, though not appealable under Section 50 of the Company Appeal (AT) No. 160 of 2017 Arbitration Act would, nevertheless be subject to appeal under the Letters Patent of the High Court. In answering this question, this Court exhaustively reviewed the authorities and then stated, in paragraph 36, that the decisions noticed so far lay down certain broad principles. We are directly concerned with the principle laid down in sub-section (vii), which reads as under:

"(vii) The exception to the aforementioned rule is where the special Act sets out a self-

contained code and in that event the applicability of the general law procedure would be impliedly excluded. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred."

21. Given the judgment of this Court in Fuerst Day Lawson (supra), which Parliament is presumed to know when it enacted the Arbitration Amendment Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Company Appeal (AT) No. 160 of 2017

Commercial Courts Act was brought into force, it is clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in paragraph 89 of Fuerst Day Lawson (supra) that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act.

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23. This, in fact, follows from the language of Section 50 itself. In all arbitration cases of enforcement of foreign awards, it is Section 50 alone that provides an appeal. Having provided for an appeal, the forum of appeal is left "to the Court authorized by law to hear appeals from such orders". Section 50 properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be attracted as laying down the forum which will hear and decide such an appeal. Company Appeal (AT) No. 160 of 2017

24. In fact, in Sumitomo Corporation vs. CDC Financial Services (Mauritius) Ltd. and Ors., (2008) 4 SCC 91, this Court adverted to Section 50 of the Arbitration Act and to Sections 10(1)(a) and 10F of the Companies Act, 1956, to hold that once an appeal is provided for in Section 50, the Court authorized by law to hear such appeals would then be found in Sections 10(1)

(a) and 10F of the Companies Act. The present case is a parallel instance of Section 50 of the Arbitration Act providing for an appeal, and Section 13(1) of the Commercial Courts Act providing the forum for such appeal. Only, in the present case, as no appeal lies under Section 50 of the Arbitration Act, no forum can be provided for.

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26. What is important to note is that it is Section 50 that provides for an appeal, and not the letters patent, given the subject matter of appeal. Also, the appeal has to be adjudicated within the parameters Company Appeal (AT) No. 160 of 2017 of Section 50 alone. Concomitantly, where Section 50 excludes an appeal, no such appeal will lie."

21. Learned counsel for the Appellants has relied on the decision of the Hon'ble Supreme Court in "State of Goa Vs. Praveen Enterprises" (2012) 12 SCC 581. In the said case, the Hon'ble Supreme Court, while explained "reference to arbitration" and the parties who can refer the same, observed that the "reference to arbitration" can be in respect of reference of disputes between the parties to arbitration, or may simply mean referring the parties to arbitration.

22. In view of the aforesaid findings, learned counsel for the Appellants submitted that the dispute relates to 'oppression and mismanagement' by the Respondents against the members, including the Appellants. It cannot be a subject matter of dispute for arbitration; the Arbitral Tribunal has no jurisdiction to decide the same.

However, such question of jurisdiction of the Tribunal to refer the dispute or not and the facts and merits of the case can be looked into only if we hold that the present appeal is maintainable against the impugned order dated 20th April, 2017.

23. Section 50 of the Arbitration Act, 1996 provides for order which can be made subject matter of the appeal and reads as follows:

"50. Appealable orders. -- (1) An appeal shall lie from the order refusing to--

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(a) refer the parties to arbitration under section 45;

(b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

24. The Tribunal, in its capacity as 'judicial authority' in exercise of power conferred by Section 45 of the Arbitration Act, 1996 is empowered to refer the dispute to the international court, which reads as follows:

"45. Power of judicial authority to refer parties to arbitration. --Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

25. Section 50 of the Arbitration Act, 1996 applies to international arbitration and stipulates that the appeal shall lie against an order Company Appeal (AT) No. 160 of 2017 refusing to refer the parties to arbitration under Section 45 of the Arbitration Act, 1996.

On examination of Section 50 of the Arbitration Act, 1996, we are of the view that the statutory bar and prohibition to appeal under any provision, would not be maintainable except against the order as mentioned in Section 50 of the Arbitration Act, 1996.

26. The matter can be looked into from different aspects. The National Company Law Tribunal has been constituted under Section 408 of the Companies Act, 2013, consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may



be, conferred on it by or under the Companies Act, 2013 w.e.f. 1st June, 2016.

27. Section 420 of the Companies Act, 2013 deals with 'Orders of Tribunal' as under:

"420. Orders of Tribunal. □(1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any Company Appeal (AT) No. 160 of 2017 order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned."

28. Any person aggrieved by an order, passed by the Tribunal under the aforesaid provisions of the Section 420, is entitled to file an appeal from the order of the Tribunal under Section 421 of the Companies Act, 2013, which reads as follows:

"421. Appeal from orders of Tribunal. □(1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal. (2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such Company Appeal (AT) No. 160 of 2017 form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against. (5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal."

29. However, under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code"), under sub-section (1) of Section 60 read with Section 5(1), the same very Tribunal constituted under Section 408 of the Companies Act, 2013 have been empowered as the 'Adjudicating Authority'. Therefore, when the Tribunal passes an order as Company Appeal (AT) No. 160 of 2017 an 'Adjudicating Authority' either under Section 7 or Section 9 or Section 10 or sub-section (5) of Section 60, the appeal against such an order of the Adjudicating Authority (National Company Law Tribunal) does not lie before this Appellate Tribunal under Section 421 of the Companies Act, 2013 but under Section 61 of the 'I&B Code'.

30. Similarly, the NCLT though constituted under Section 408 of the Companies Act, 2013, while passes an order under Sections 43 and 45 of the Arbitration Act, 1996, such order is not passed as a Tribunal constituted under Section 408 but in the capacity of 'judicial authority'.

31. From the aforesaid provisions, it is clear that under Section 420 of the Companies Act, 2013, the National Company Law Tribunal passes an order as a 'Tribunal', whereas under the provisions of Section 7 or Section 9 or Section 10 or sub-section (5) of Section 60, the same very Tribunal passes an order as an 'Adjudicating Authority' and the same Tribunal in the capacity of 'judicial authority' passes order under Section 8 or Section 45 of the Arbitration Act, 1996. As the Tribunal is empowered to pass orders in different capacities under different provisions of the Act, we are of the view that the appeal will lie before the competent forum under the said very Act under which the Tribunal passes the order. If it passes order under Section 420 of the Companies Act, the appeal will lie under section 421 before the National Company Law Appellate Tribunal. If the Tribunal passes order under the capacity of the 'Adjudicating Authority' under the 'I&B Code', the appeal will lie under section 61 of the 'I&B Code' before the Company Appeal (AT) No. 160 of 2017 National Company Law Appellate Tribunal. If the Tribunal passes order in the capacity of 'judicial authority' under Section 45 of the Arbitration Act, 1996, the appeal will not lie under Section 421 of the Companies Act but before an appropriate forum.

32. In view of the aforesaid observations, we hold that the impugned order dated 20th April, 2017 having passed by the Tribunal in the capacity of 'judicial authority' under Section 45 of the Arbitration Act, 1996, the present appeal under Section 421 of the Companies Act, 2013 is not maintainable before this Appellate Tribunal.

33. For the reasons aforesaid, though we have not gone into the merit of the allegations made by the parties, but we find that all the allegations levelled by the Petitioner are based on the basis of agreements, including the 'Share Purchase Agreement', 'Share Subscription Agreement' and 'Share Holders Agreement' reached between the parties.

34. The appeal is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya) Chairperson (Balvinder Singh) Member(Technical) NEW DELHI 18th July, 2018 AR Company Appeal (AT) No. 160 of 2017