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

+ **O.M.P. (COMM) 58/2016, IA Nos.3190/2016 & 15940/2016**

**PRISTINE LOGISTICS & INFRA PROJECTS**

**PVT. LTD. & ANR.**

**..... Petitioners**

Through: Mr Suhail Dutt, Senior Advocate with  
Mr Sankalp Goswami, Advocate.

versus

**M/S. FREIGHTSTAR PVT. LTD. & ORS. .... Respondents**

Through: Ms Diya Kapur and Ms Manjira  
Dasgupta, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER**

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**20.01.2017**

**VIBHU BAKHRU, J**

1. Pristine Logistics & Infra Projects Private Limited (hereafter 'Pristine') and Kanpur Logistics Park Private Limited (hereafter 'Kanpur Logistics') have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 06.11.2015 (hereafter 'the impugned award') made by the sole arbitrator, Justice (Retired) S.N. Dhingra, in relation to the Shareholders Agreement dated 30.04.2011 (hereafter 'Second SHA').

2. By the impugned award, the arbitrator has awarded sums aggregating to ₹7,10,00,000/- in favour of respondent No. 1, M/s Freightstar Private Limited (hereafter 'Freightstar'); Pristine was directed to pay a sum of ₹2,62,70,000/-; Aeren R Logistics & Infrastructure Private Limited

(hereafter 'Aeren') was directed to pay ₹92,30,000/-; and Kanpur Logistics was directed to pay a sum of ₹3,55,00,000/-. The arbitrator has further awarded interest at the rate of 15% per annum on the awarded amounts from the date of the award till the date of realization, if the same are not paid within a period of 30 days from the date of the award. The aforesaid amounts were computed on the basis of the amounts received by the respective parties and interest at the rate of 12% per annum from 06.05.2012, till the date of the award.

3. Pristine and Kanpur Logistics had also made counter-claims of ₹118.11 crores along with interest on account of loss of business opportunity; ₹3.18 crores on account of loss of interest servicing to banks and financial institutions; ₹10 crores on account of loss of reputation; ₹3,49,64,677/- on account of loss of lease rentals; and ₹25 lacs as travelling and clerical expenses and other overheads. These counter-claims were rejected.

4. Pristine and Kanpur Logistics (hereafter collectively referred to as 'the petitioners') have assailed the impugned award principally on the ground that the arbitrator has misunderstood the agreement between the parties to be a simple shareholder's agreement and has disregarded its scope and its primary objective, which was to enable Pristine, Aeren and Kanpur Logistics to have access and benefit of the rail licence held by ETA Engineering Private Limited (hereafter 'ETA'). ETA was the predecessor-in-interest of the logistics business stated to have been transferred to Freightstar. The petitioners are also aggrieved on account of rejection of their counter claims which, according to them, were not considered by the

arbitrator.

5. Briefly stated, the necessary facts to consider the aforesaid controversy are as under:-

5.1 Pristine and Aeren are companies which are engaged in the business of logistics and infrastructure development. At the material time - in the year 2011 - Pristine and Aeren were jointly setting a rail linked container terminal for EXIM and domestic cargo at Panki, Kanpur, Uttar Pradesh. The said project was being set up under Kanpur Logistics - a private company held by Pristine and Aeren in the ratio of 74: 26.

5.2 At the material time, ETA was *inter alia* engaged in the business of operating container trains and held a Category-I licence under the Indian Railways (Permission for Operators to move Container Trains on Indian Railways) Rules, 2006. It is averred that ETA, being a container train operator, was dependent on terminals owned by others to run their container business. Therefore, ETA was desirous of entering into a joint venture with Pristine and Aeren, in respect of their project of rail linked container terminal at Panki. Accordingly, the said parties - Pristine, Aeren, Kanpur Logistics and ETA entered into a 'Shareholders Agreement' dated 05.01.2011 (hereafter 'First SHA').

5.3 In terms of the First SHA, ETA agreed to acquire 26% of the outstanding equity shares of Kanpur Logistics in two stages. In the first stage, ETA would acquire 20% of the equity capital for a sum of ₹7 crores, which was to be paid before 25.03.2011. It was contemplated that further 6% of the shareholding would be acquired by 15.06.2011. Pristine and

Aeren would hold the balance shares of Kanpur Logistics in their *inter se* ratio of 74:26 - that is 54.76% and 19.24% of the total shareholding respectively. Admittedly, ETA paid a sum of ₹2.5 crores for acquisition of the shares, *albeit* with certain delays, but failed to pay the balance consideration.

5.4 By a letter dated 20.04.2011, ETA informed Pristine and Aeren that its logistics business was expected to be transferred to Freightstar and with the said transaction, the ownership of the business would pass from ETA Group to the Jindal Group. ETA requested Pristine and Aeren to extend the closing date of the First SHA from 25.03.2011 to 30.04.2011 and further requested that amendments be made to enable Freightstar to be a shareholder of Kanpur Logistics as a successor to ETA. Pristine and Aeren acceded to the aforesaid request and agreed for extension of the closure date of the First SHA to 30.04.2011 as well as to other changes. They also requested that ETA make a further payment of ₹12,58,544/- to complete its investment to ₹2.5 crores. Indisputably, the said amount was paid by ETA, prior to the execution of the Second SHA, on 30.04.2011.

5.5 On 30.04.2011, the Second SHA was entered into between Pristine, Aeren, Kanpur Logistics and Freightstar. Concededly, the terms of the Second SHA were more or less similar to the terms of the First SHA, however, the payment schedule was different. The Second SHA was to be closed on the date of its execution. In other words, Freightstar was obliged to pay the balance sum of ₹4.5 crores on the date of the closing, that is, 30.04.2011 and as a consequence, would become the owner of 20% of the shareholding of Kanpur Logistics.

5.6 Freightstar paid a cheque of ₹4.5 crores on the said date (30.04.2011), however, the said cheque was dishonoured on account of insufficient funds a few days later (on 04.05.2011). Thereafter, Freightstar remitted a sum of ₹2.5 crores to the account of Kanpur Logistics on 06.05.2011. Thus, in all, ₹5 crores was, admittedly, paid for acquisition of the first tranche of shares of Kanpur Logistics. This included ₹2.5 crores paid by ETA, the credit of which was admittedly available to Freightstar.

5.7 It is averred in this petition that ETA approached Pristine and requested it to consider taking over its Logistics business/ Freightstar. The proposal was discussed and ETA signed a Term Sheet on 08.07.2011; the other two parties being Pristine and India Infrastructure Fund. It is further averred that the said term sheet was acted upon and the due diligence exercise was also undertaken in pursuance thereof. It is stated that on 28.10.2011, Pristine learnt of a disclosure made by Infrastructure India PLC before the London Stock Exchange, to the effect that a company, Vikram Logistics Pvt. Ltd., owned by Infrastructure India PLC was acquiring ETA and Freightstar for a sum of US\$14.42 million. Thereafter certain correspondence including legal notices were exchanged between Pristine and ETA.

5.8 The petitioners also filed a petition under Section 9 of the Act before the Bombay High Court (being Arb. P. No. 813/2012) for restraining the transfer of shares of ETA in favour of third parties. In that petition, ETA filed an affidavit that the transaction had already matured and its business had been sold to Vikram Logistics Pvt. Ltd. Resultantly, the Bombay High Court dismissed the said petition.

5.9 On 02.03.2012, Freightstar addressed a letter to Kanpur Logistics, Pristine and Aeren, *inter alia*, requesting them to provide a written notice proposing a closing date, if they desired to close the transaction as contemplated in “the Shareholders Agreement” (First SHA as amended by the Second SHA). Alternatively, Freightstar requested the said addressees to return the consideration paid for the shares within a period of 15 days from the date of the letter failing which interest at the rate of 18% per annum would be payable and Freightstar would be constrained to avail of any or all remedies as available. Pristine responded to the said letter by making several allegations against ETA/Freightstar, including of fraud.

5.10 Thereafter, ETA and Freightstar caused a legal notice dated 05.06.2012 to be issued to Pristine, Aeren and Kanpur Logistics calling upon them to pay a sum of ₹5,00,00,000/- plus interest at the rate of 18% per annum from 02.03.2012. Aeren responded to the said notice by claiming that time was the essence of the contract and since, Freightstar had failed to pay the amount in time, the initial amount as advanced stood forfeited. Pristine sent a detailed reply demanding that the notice be withdrawn failing which Pristine would be constrained to initiate legal proceedings. Kanpur Logistics responded by stating that it was only a conforming party to the SHAs and there was no obligation on its part. It also claimed that the entire money paid by ETA was to Pristine and Aeren towards dilution of their equity.

5.11 Thereafter, Freightstar by its letter dated 10.07.2013, invoked the arbitration clause under the Second SHA. The said letter clearly referred to the Second SHA, superseding the First SHA. Freightstar also appointed a

sole arbitrator to adjudicate the disputes which had arisen. Pristine and Kanpur Logistics disputed the same and, therefore, Freightstar filed an application under Section 11 of the Act (Arb. P. 355/2013), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that had arisen between the parties.

5.12 The said petition was allowed and by an order dated 20.03.2014, this Court appointed Justice S.N. Dhingra, a former Judge of this Court as the sole arbitrator to adjudicate all claims between the parties arising out of the Second SHA.

5.13 The sole arbitrator entered upon the reference and at the initial stages directed that the arbitrator's fee would be shared in equal proportion by Freightstar on one part and Aeren, Pristine and Kanpur Logistics on the other. The arbitrator observed that ETA, not being the party to the Second SHA, would not bear any fees nor any award in respect of any claim or counter claim would be passed against ETA. The petitioners being aggrieved by the aforesaid observation that ETA was not a party, filed an application for recall/modification of the said order, which was disposed of by the arbitrator by a detailed order passed on 01.08.2014. The arbitrator unequivocally held that ETA was not a party to the Second SHA and could not be compelled to submit to the arbitration proceedings. He further observed that no dispute regarding the First SHA had been referred and only disputes relating to the Second SHA had been referred by this Court.

5.14 Aggrieved by the same, the petitioners filed an application before this Court (being IA No. 16357/2014 in Arb. P. 355/2013) seeking modification

of the order dated 20.03.2014. This Court observed that the submissions sought to be advanced by way of that application had been advanced when the order dated 20.03.2014 was passed and were duly considered. Accordingly, by an order dated 12.09.2014, the application was dismissed as being without any merit.

5.15 The petitioners preferred a special leave petition before the Supreme Court (Special Leave to Appeal being SLP(C) No 2422/2015) seeking to impugn the order dated 12.09.2014 passed by this Court in IA 16357/2014 in Arb. P. 355/2013. The said SLP was disposed of by the Supreme Court by an order dated 16.02.2015 whereby the petition was permitted to be withdrawn with liberty to file a petition under Section 11 of the Act before the appropriate Court in accordance with law.

5.16 Thereafter, the petitioners preferred a petition under Section 11 of the Act (being Arb. P. 255/2015) praying that an arbitrator to be appointed for adjudication of the disputes under the First SHA. This petition was dismissed by this Court by an order dated 19.04.2016 as this Court was of the view that petition was barred by limitation and also that the First SHA stood novated/discharged.

5.17 The petitioners preferred a Special Leave Petition (SLP(C) 20166/2016) impugning the order dated 19.04.2016 passed by this Court dismissing their petition under Section 11 of the Act (Arb. P. 255/2015). The said SLP was dismissed by the Supreme Court on 01.08.2016.

### ***Submissions***

6. Mr Suhail Dutt, learned senior counsel appearing for the petitioners

assailed the impugned award on broadly four fronts. First of all, he submitted that the arbitrator had grossly erred in proceeding on the basis that the Second SHA was merely a shareholder's agreement for subscription of the shares of Kanpur Logistics. He submitted that the SHAs (both, First SHA as well as the Second SHA) were in the nature of a joint venture agreement which would also entail attendant benefits to the business of the parties. He submitted that the fundamental premise on which the SHAs were entered was that ETA had a Category-I license to operate container trains and thus, the association of Pristine and Aeren with ETA would also result in Pristine and Aeren having access to the train operating licence, thus, enhancing the business of the rail terminal being developed under Kanpur Logistics. He submitted that it was agreed that ETA would also use the rail terminal for operating the trains. He emphasised that the business of rail terminal and container train operations were synergetic and the whole purpose of the SHAs was to synergise the two businesses. He submitted that the arbitrator had completely misread the Second SHA and thus, the impugned award was patently erroneous.

7. Secondly, he submitted that the arbitrator had failed to appreciate that ETA had played a fraud. Although, it represented that it had transferred its logistics business to Freightstar, it, infact, did not transfer its licence to operate container trains to Freightstar. He submitted that the counter claims made by the petitioners were in the nature of special damages arising out of the fraud played by ETA/Freightstar. Mr Dutt contended that the arbitrator had not considered their counter claims and the submission that a fraud had been played by ETA/Freightstar. He submitted that the entire purpose of the

SHAs was to secure access to the train licence held by ETA and the opportunity to render logistic services to ETA. The counter claim for damages stemmed from the denial of the access that was contemplated. He submitted that the arbitrator had noted the submissions but had failed to deal with the same.

8. Thirdly, he earnestly contended that the arbitrator had grossly erred in excluding ETA from the purview of arbitration on the ground that it was not a party to the Second SHA. He submitted that ETA was a party to the First SHA and, therefore, was clearly a party to the disputes. He submitted that by the order dated 01.08.2014, the arbitrator had ruled that ETA was not a party to the Second SHA and could not be compelled to submit to arbitration proceedings. He submitted that this order was amenable to judicial review under Section 34 of the Act since it was an order under Section 16 accepting ETA's challenge to the existence of the arbitration agreement.

9. Lastly, Mr Dutt submitted that the arbitrator had held that Freightstar was in breach of the Second SHA and, therefore, ought to have awarded damages against Freightstar. He submitted that the impugned award - which although holds Freightstar to be in breach and yet awards in its favour - is contrary to the fundamental principles of law.

### ***Reasoning and Conclusion***

10. The first and foremost controversy to be addressed is whether the arbitrator has completely misread the Second SHA rendering the impugned award amenable to challenge under Section 34 (2) (b) (ii) of the Act.

11. Undisputedly, the Second SHA, provided the framework for Freightstar to join and participate in Kanpur Logistics. Recital C of the Second SHA - which was strongly relied upon on behalf of the petitioners - plainly indicates that Freightstar desired to enter into a *joint venture in respect of the ownership, management and operation* of Kanpur Logistics. Recital D of the Second SHA indicates the purpose of the Second SHA and reads as under:

"D. The Shareholders desire to enter into this Agreement in order to set forth terms of their collaboration for the proposed business through the Company including their respective rights and obligations in respect of the joint venture which they seek to realize through the Company and define their inter se relationship thereon and to agree upon certain decision making mechanisms and to restrict disposition of the Company's Shares"

12. The term "Shareholders" included Pristine, Aeren and Freightstar. And, Kanpur Logistics was referred to as the Company.

13. Recital E provided for amendment of the Memorandum and Articles of Association of Kanpur Logistics to incorporate the terms of the Second SHA. Article 2 of the Second SHA provided for capitalisation (equity) of Kanpur Logistics and subscription of shares by *Party C* (Freightstar and its associates). Clause 2.1.1.1 provided that twenty percent (20%) of the equity of Kanpur Logistics will be subscribed by Freightstar/its associates before 30.04.2011 and consequently, the shareholding of Pristine and Aeren would be diluted to 59.2% and 20.8% respectively. In terms of Clause 2.1.1.2, Freightstar was obliged to purchase further 6% of the shareholding of Kanpur Logistics before 15.06.2011. Clause 2.1.4 and 2.1.5 of the Second

SHA provided for closing of the Second SHA by 30.04.2011.

14. Article 3 recorded the representations and warranties of the parties. Article 4 *inter alia* provided that Party C (Freightstar & its associates) shall be the “*preferred rail operator*” of Kanpur Logistics for movement of cargo by rail and Kanpur Logistics shall “*try to protect the business of Party C*”. Clause 4.3 expressly provided that tariff policies of Kanpur Logistics would “*always be determined on an arms length principle viv-a-vis its Shareholders and Affiliates*”.

15. Article 6 of the Second SHA provided for the representation on the Board of Directors of Kanpur Logistics and its management. Article 7 listed out reserved matters which would not be decided without the consent of each party. Article 8 provided for appointment of Chairman of the Board of Directors of Kanpur Logistics. Article 10 provided for Shareholders Voting Rights and conduct of business. Article 12 of the Second SHA provided for rights relating to transfer of shares including right of first refusal and “Tag along” rights.

16. As is apparent from the above, the Second SHA was mainly concerned with the manner in which the business of Kanpur Logistics would be conducted and its affairs managed, including rights of its shareholders. Article 15 of the Second SHA contained a non-compete clause wherein the parties *inter alia* agreed that they would not develop/use any other terminal within a radius of 100 Kms from the proposed terminal.

17. Indisputably, the rights and obligations regarding management, shareholders rights, would fructify only on Freightstar becoming a

shareholder; which it did not. It is also relevant to refer to Clause 2.1.4 and 2.1.5 of the Second SHA, which read as under:

“2.1.4 Closing : The closing (the “Closing”) of the transaction of issuance and purchase of 20%, of the shares of the Company shall occur on such time, date and place as may be mutually agreed to in writing by the Parties, and be consequent upon the purchase of shares by Party C, as per Clause 2.1.1.1 above, and shall under no circumstances occur beyond 30<sup>th</sup> of April, 2011. At the Closing Day, i.e. on or before 30<sup>th</sup> April, 2011, the following business shall also be transacted.

(a) A nominee of Party C shall be elected to the Board;

(b) A shareholders meeting shall be held at which the Articles of Association shall be amended to incorporate the terms of this Agreement.

2.1.5 Failure to Close: In the event a Closing does not occur before 30<sup>th</sup> April, 2011, unless such date is mutually extended in writing, this Agreement shall stand automatically terminated.”

18. Undisputedly, the Second SHA did not close; Freightstar did not become a shareholder of Kanpur Logistics; the Articles of Association of Kanpur Logistics were never amended; and the nominee of Freightstar was not elected to the Board of Director The arbitrator considered the above and held as under:

“The claimant could not pay balance amount of Rs.2 Crore by 16<sup>th</sup> May, 2011 i.e. the time till which the offer was kept open. Therefore, the agreement did not close on 30.04.2011 or on 6.5.2011 or thereafter. That means that the agreement

did not take off in the spirit in which it was framed and the respective rights of the shareholders conceived in the agreement did not take birth. Thus in terms of the clause 13.2, there was no termination of the agreement but in the totality of the circumstances, this agreement did not take off at all due to short payment of Rs.2 crore by the claimant even within the extended time. The result was that the rights as a shareholder of Respondent No. 3, as stated in the agreement, did not accrue to claimant. The parties rights and obligations as shareholders of Respondent No. 3, vis-a-vis each other did not mature.”

19. This Court finds no infirmity with the aforesaid view. The Second SHA, read as a whole, is plainly an agreement whereby Freightstar had agreed to acquire a minority stake in Kanpur Logistics and thus, participate in a strategic alliance. As narrated above, there was no closure of the Second SHA as Freightstar did not acquire any rights or shares in Kanpur Logistics.

20. It is also relevant to note the averments made in paragraph 6.20 of this petition wherein the petitioners have averred that *“since the obligations on the part of respondent nos. 1 & 2 (that is, Freightstar and ETA) were not met in terms of Shareholders Agreement dated 30.04.2011, the same ceased to exist, with no obligations remaining between the parties thereto, vis a vis each other which was an acknowledged fact between the parties.”* Thus, even, according to the petitioners, the Second SHA did not fructify and it had ceased to exist with no obligations remaining between the parties. It is, therefore, not the case of the petitioners that Freightstar had any obligation towards Pristine, Aeren or Kanpur Logistics. The contention that the arbitrator has misread or misinterpreted the agreement is without any merit.

21. The next submission to be considered is that the arbitrator had failed to consider that a fraud had been played on the petitioners. It is seen that it was the petitioners' case that ETA had breached the First SHA and lured them into entering into the Second SHA by introducing Freightstar in its place. It was alleged that Freightstar did not have a train operation licence which was *sine qua non* for entering into the Second SHA. The arbitrator noted that the allegations were principally against ETA which was not a party to the Second SHA. Further that most of arguments centred around the Term Sheet dated 08.07.2011, which was not the subject matter of arbitration. Since only the disputes relating to the Second SHA were referred, most of the allegations made by the petitioners could not be considered.

22. In so far as the Second SHA is concerned, the same was to close the same day or till 16.05.2011 (the time till the offer to acquire shares was kept open). The arbitrator held that the agreement did not close and the rights and obligations contemplated therein did not take birth. The question that the petitioners were lured to enter into the same could be considered in the context of the counter claims, which the arbitrator has considered. Thus the contention that the impugned award is to be set aside on account of non consideration of the petitioners' contention cannot be accepted.

23. At this stage, it would be expedient to examine the counter claims raised by the petitioners. Counter Claim No.1 (CC no.1) was for a sum of ₹118.11 on account of loss of business opportunities. The said counter claim is based on the assertion that the petitioners continued to adhere to the conditions of the SHA particularly the reserved items and thus did not

conduct any business contrary to the rights of ETA/Freightstar under the Second SHA. It was claimed that had ETA and Freightstar fulfilled the commitments by the due dates as contemplated under the SHAs, the revenues generated would have been higher. It was alleged that on account of *impasse*, Pristine could not run the trains of ETA nor could control and run the trains of other operators from the Panki Terminal of Kanpur Logistics. It was further alleged that Pristine/Kanpur Logistics was not provided funds by ETA nor could the same be arranged from the third parties due to the covenants in the SHAs. Further business of other operators could not be brought to the Panki Terminal because in terms of the provisions of SHAs, third parties trains could not be brought to the Panki Terminal. It is claimed that because of non-compete clauses of the SHAs, Kanpur Logistics could not expand its business or enter into a strategic alliance for a period of 18 to 24 months. According to Pristine and Kanpur Logistics, the revenues would have grown further, at least to the extent of ₹118.11 crores, being ₹32.44 crores in FY 2011-12; ₹38.94 crores in FY 2012-13; ₹46.73 crores in FY 2013-14.

24. It is seen that the aforesaid counter claim was based on a fundamental erroneous premise that there was any obligation on the part of Aeren, Pristine or Kanpur Logistics to adhere to the SHAs. As noted by the arbitrator, the SHA did not close; Freightstar did not become a shareholder of Kanpur Logistics; and there was no occasion for either of the parties to adhere to the shareholders obligations as explicitly provided under the Second SHA. It is also seen that the claim was primarily based on non-adherence of ETA to the First SHA, which was not the subject matter of the

Arbitral proceedings. The second SHA was entered into on 30.04.2011 and even as per the petitioners had ceased to be effective by 16.05.2011. It is, thus, difficult to understand as to how claims based on hypothetical increase in revenues spread over three years could be sustained.

25. With regard to the aforesaid claim, the arbitrator had also noted that most of the arguments were centred around the Term Sheet which was a different contract and, therefore, the arbitrator could not deal with the same. The arbitrator had further observed that the Second SHA did not take off, the agreement was never closed and, therefore, the obligation would have come into force only if the shares had been allotted. The relevant extract from the impugned order is as under:

“The other aspect is that agreement dated 30.04.2011 was not a share purchase agreement but it was a shareholder agreement to augment the business of Respondent No. 3. However, the agreement would have come into force only if the shares had been allotted to the claimant.....Though the shareholders agreement did not take off, the Respondents all along used the amount of Rs.5 crore for their business at the cost of the claimant. They could not have suffered a loss in business due to usage of Rs.5 crore.”

26. Plainly, the rights and obligations as a shareholder and a JV partner as contemplated under the Second SHA would have arisen only after Freightstar had acquired the shares of Kanpur Logistics. The arbitrator had noted that on account of failure to pay the consideration, even within the extended time, the rights as the shareholder did not accrue to Freightstar and, therefore, the mutual rights and obligations as shareholder of Kanpur Logistics did not mature. Thus, the fundamental premise - that the

petitioners adhered to the SHAs - on which the counter claim (CC No.1) is based is palpably erroneous and has been rightly rejected by the arbitrator.

27. The second counter claim (CC No.2) was for a sum of ₹3.18 crores on account of interest incurred by Pristine and Kanpur Logistics. This comprised of ₹17.48 lacs in FY 2010-11; ₹31.01 lacs in FY 2011-12; ₹71.34 lacs in FY 2012-13; and ₹1.98 crores in FY 2013-14. This was also premised on the basis that there was loss of revenue generation on account of non-adherence to SHA, which consequentially resulted in interest burden during the relevant year. As noted by the arbitrator, the Second SHA did not close and the venture did not take off. The petitioners were thus not impeded in any manner to carry on their business. Further the service charges would be payable irrespective of whether Freightstar had stood as a surety for the loans in question or not. The arbitrator further also observed as under:

“Amit Kumar has stated that interest claim of Rs.3.18 crore has been made in the counter claim as a loan of Rs.3 crore was taken from PNB in the year 2010 and the company had to pay interest on this loan. Strange that this claim could have been made by the Respondents against the claimant as in 2010 when the loan was taken from PNB, the claimant was nowhere in picture neither the agreement dated 30.04.2011 was conceived. Thus there was no loss suffered by respondents on account of service charges. I, therefore, consider that Respondents are not entitled to the claim of Rs.3.18 crore towards service charges to the bank from the claimant.”

The finding that the petitioners and Aeren did not suffer any loss on account of service charges, is neither perverse nor patently illegal and

therefore, is not amenable to challenge in these proceedings.

28. The third counter claim (CC No.3) was on account of loss of growth of opportunity. This was based on the premise that IDFC would have funded the business plan, on the basis of which the future business plan and third party funding was dependent. It is seen that this claim was also partly based on the Term Sheet entered into between Pristine, India Infrastructure Fund and ETA on 08.07.2011, which was not the subject matter of the disputes before the arbitrator. The fourth counter claim (CC No. 4) was made on account of damage to reputation and goodwill. It is averred that other strategic investors wanted to associate with the promoters of Kanpur Logistics but due to delayed development of Kanpur Terminal; failure of acquisition of 74% stake of Kanpur Terminal; and non-realisation of funding from IDFC, the promoters had suffered an irreparable loss of reputation/goodwill and business association. Without commenting on the merits of this claim, it is seen that this was also based largely on Term Sheet dated 08.07.2011 and was outside the scope of the arbitration proceedings.

29. The fifth counter claim (CC No. 5) was on account of claim of loss of expenses for travelling, clerical and other overheads. The arbitrator had rejected the aforesaid claim for the reason that Pristine and Kanpur Logistics had failed to prove the same. This Court is also unable to find any basis on which the claim could be stated to have been established and find no infirmity with the arbitrator's view.

30. The sixth counter claim (CC No. 6) was for a sum of ₹3,49,64,677/- on account of lease rentals. This too was rejected as the arbitrator found that that the claim was not even remotely connected with the Second SHA and

was untenable in law. It is plainly difficult to imagine how such claim could possibly be sustained and this Court finds no infirmity with the decision of the arbitrator in this regard.

31. The next controversy to be addressed is whether Freightstar was entitled to refund of its money notwithstanding the finding that Freightstar had failed to perform its obligation to pay the consideration. And, whether Pristine, Aeren and Kanpur Logistics were entitled to forfeiture of the amount of ₹5 crores?

32. Admittedly, there is no clause in the Second SHA which entitled forfeiture of the amount paid as consideration for the shares. Thus, the question of permitting forfeiture of the said amount did not arise. The only issue that remained for the arbitrator to consider was whether the petitioners and Aeren had suffered any loss on account of failure on the part of Freightstar in acquiring the shares.

33. As discussed at length by the arbitrator, it was not the case of Pristine and Aeren that the value of the shares of Kanpur Logistics had fallen below the price which was contracted to be paid by Freightstar under the Second SHA. On the contrary, the arbitrator noted that the petitioners' case was that the value of the shares were agreed to be sold at a discount. Thus, no direct loss was suffered by Pristine, Aeren or Kanpur Logistics by non-acquisition of shares by Freightstar.

34. The arbitrator had also observed that Rajneesh Kumar (RW1) in his evidence had deposed that they could consider allotment of shares to Freightstar only if it was willing to pay the market price.

35. Even before this Court, it is not the case of the petitioners that they had suffered a loss on account of reduction in the value of the shares agreed to be purchased by Freightstar.

36. In the impugned award, the arbitrator has observed as under:

“I consider that if a contract fails to take off because one party paid part amount and was not able to pay the full consideration for the shares to be provided to it or the benefits to be given to it, the other party who had to give shares on receiving full consideration cannot say that since you did not pay full consideration and were not eligible to take the benefit, I would not refund you even the part amount paid by you since it was not specifically provided in the agreement that I had to refund the amount.”

37. This court does not find the aforesaid view to be perverse or patently illegal. In absence of establishing any direct loss, the petitioners cannot retain any part of consideration paid for the shares. Thus, no interference with the impugned award is called for in these proceedings under Section 34 of the Act.

38. The contention that the arbitrator had grossly erred in not considering claims against ETA, is also bereft of any merit. ETA was not a party to the Second SHA and, therefore, the arbitrator had rightly held that no award in favour of ETA could be passed. It was earnestly contended that the arbitrator had grossly erred in not considering that the disputes also stemmed from the First SHA to which ETA was a party and in any event Freightstar as a successor could also be held liable for the actions of ETA.

39. It is seen that the petitioners have sought to raise this contention on various occasions without success and yet have pressed the same before

court in this proceeding as well. It is apparent that this contention was raised for the first time before this court in Arb. P. 355/2013(This is apparent from the order dated 12.09.2014 passed subsequently). By an order dated 20.03.2014, the said petition was disposed of by appointing the sole arbitrator to adjudicate the disputes arising out of “the SHA as aforesaid”. The order clearly indicates that the reference to the SHA was the Second SHA. Notwithstanding the above, the petitioners raised this issue once again before the arbitrator and called upon him to decide the same. The arbitrator considered the same and unequivocally held that “*no dispute regarding SHA 05.01.2011 has been referred to the Tribunal. Only dispute between the parties to SHA dated 30.04.2011 has been referred*”. The arbitrator further held that ETA not being a party to the Second SHA was not a party to the Arbitration agreement contained therein and could not be compelled to submit to the arbitration proceedings. The said decision was not accepted and the petitioners approached this Court by way of an application in the disposed of petition (IA 16357/2014 in Arb.P. 355/2013). The said application was dismissed as being without any merit by the order dated 12.09.2014. This Court also observed that the arguments sought to be raised were advanced when the order dated 20.03.2014 was passed. The petitioners carried the matter to the Supreme Court by way of a Special Leave Petition (SLP) but withdrew the SLP with liberty to file a petition under Section 11 of the Act.

40. The petitioners once again approached this Court under Section 11 of the Act by way of a petition under Section 11 of the Act (Arb.P. 255/2015) seeking reference of the disputes in relation to the first SHA. The said

petition was dismissed by this Court by an order dated 19.04.2016. This Court, after considering the rival contentions, held that the First SHA was “novated/discharged”. The Court also held that the petition was barred by limitation since the cause of action if any under the First SHA had arisen on 25.03.2011 and, therefore, the period of limitation to file the petition had expired in 2014. The petitioners did not accept the said order and filed an SLP (SLP (C) 20166/2016). The said SLP was also dismissed on 01.08.2016.

41. For the reasons stated above, the petition is dismissed with cost of ₹25,000/-. The cost shall be paid within a period of two weeks from today. The pending applications also stand disposed of.

**JANUARY 20, 2017**  
pkv/rk/mk

**VIBHU BAKHRU, J**