

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

Reserved on: 26.04.2017
Pronounced on: 08.05.2017

+ **FAO(OS)(COMM) 53/2017, C.M. APPL.8314, 8316 & 15671/2017**
SHAKTI NATH AND ORS. Appellants

Through : Sh. Salman Khurshid and Sh. Sandeep Sethi, Sr. Advocates with Sh. Vijay Nair, Sh. Manoranjan Sharma, Sh. Prashant Jain, Ms. Sanyogita Jain, Ms. Alpana Malhotra, Ms. Mitali Chauhan and Ms. Gargi Srivastava, Advocates.

versus

ALPHA TIGER CYPRUS INVESTMENT NO.3 LTD. AND ORS.

..... Respondents

Through : Sh. Sanjeev Puri, Sr. Advocate with Sh. Rohit Puri and Sh. Ruchin Midha, Advocates, for Respondent Nos. 1 and 2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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1. The present appeal is directed against an order rejecting a challenge to a majority Award dated 20.01.2015 passed by the Chairman of the Arbitral Tribunal (hereafter "tribunal") and one of its members.

2. The material facts are that M/s. Sarv Mangal Real Tech Pvt. Ltd. ("Sarv Mangal") was allotted a plot of land measuring 1,00,450 sq. metres by New Okhla Industrial Development Authority (hereafter "Noida"), i.e Plot No. 1, Sector-140A, Noida, Uttar Pradesh by a lease deed dated

14.01.2008. IT Infrastructure Park Private Limited (hereafter “ITIPPL”), the third respondent, with its registered office at D-922, New Friends Colony, New Delhi had an agreement with Sarv Mangal for co-development of an SEZ for Information Technology/Information Technology Enabled Services in respect of the allotted land in the ratio of 45:55. Sarv Mangal executed a sub-lease deed dated 04.03.2008 in favour of ITIPPL in respect of a portion of the allotted land, i.e., land measuring approximately 45,202 sq.mts (hereafter “Galaxia Land”).

3. The first two respondents (hereafter “the Investors”) are corporate entities incorporated under the laws of Cyprus engaged in the business of investment in the real estate sector. In relation to the Galaxia Project Land, a Share Holders Agreement (“SHA”) and a Share Subscription and Purchase Agreement (“SSPA”), both dated 21.03.2008 were executed between M/s Shakti Nath and the other petitioner/appellants (collectively, "Shakti" or “promoters” hereafter) and the Investors. As on 16.09.2008, the Investors and Shakti, held 50% shareholding each in the ITIPPL, who had evinced intention to enter into a commercial relationship with the former (the promoter, Shakti). This was for the development of the proposed SEZ for Information Technology/Information Technology Enabled Services. The investors had also entered into agreements with the promoters for development of other projects, viz., the Technika Project and the Technova Project. However, the investors exited from the agreements in respect of those two projects in January and May, 2010. The present litigation, therefore, is concerned with implementation of the Galaxia Agreements tied to the conduct of the investors *vis-a-vis* the Technika and Technova Projects.

4. It is a matter of record that parties terminated the agreement dated 11.07.2009 in terms of which the SHA and SSPA were brought to an end. On 02.07.2009, the parties entered into a Restated Share Holders Agreement (“RSHA”) and a Restated Share Subscription and Purchase Agreement (“RSSPA”) which substituted the earlier SHA and SSPA. These are referred to as the “Amended Galaxia Agreements”. The RSHA visualized *inter alia* that the first stage of the Galaxia Project would be completed no later than two years from the closing date; the promoters, i.e Shakti could have two nominee directors on the Board of Directors of the third Respondent. The conditions also stipulated affirmative votes of either Shakti’s representative or of a nominee director in order for such decisions to be effective (known as “major decisions”). Under the RSHA (Clauses 4.1 and 4.2) the promoters agreed to be bound to arrange for a Term Loan Facility of at least ₹113.50 crores (“Term Loan Facility”) for the third respondent from any of the nationalized banks or other lenders as was agreed by the Investors. They acknowledged ₹ 13.47 crores would be paid by the third respondent to Noida towards the remaining cost of the project land and the balance would be utilized to part finance the construction of the first stage of the project. The terms and conditions of the Term Loan Facility were to be subject to the written approval of the Investors. Clause 4.2 also obliged the promoters to (on the date of payment of the share subscription money by the Investors to the third Respondent) provide a bank guarantee issued by a bank approved by the Investors to the third Respondent in the format given in Schedule VII of the Agreement for ₹ 13.47 crores- (this was equivalent to the remaining cost of the project land payable by the third Respondent to Noida). The object of this was to guarantee that in case the Promoters failed to ensure execution of

the Facility Agreement and disbursal of the first installment of a sum not less than ₹ 13.47 crores of the Term Loan Facility on or before 31.08.2009 (called “Long Stop Date”) or such later date as may have been agreed to by investors in their sole discretion, then the bank would pay the said amount to the third respondent on demand. The Promoters acknowledged and agreed that the execution and delivery of the bank guarantee was a material inducement to the investors in executing the agreement. Clause 5.1.1 of the RSHA, obliged the promoters to fulfill two conditions to the satisfaction of the investors on or before the Long Stop Date. One was the execution of the Facility Agreement; the other was the disbursal of the first installment of the Term Loan Facility of an amount not less than ₹ 13.47 crores by the lender to the third respondent on the terms and conditions set forth in the Facility Agreement and the sanction letter. The parties confirmed that the time frames specified in Clause 5.1.1 were that "time is of the essence under this agreement." The conditions were not subject to delays due to force majeure (Clause 23.20) or any delays or time taken to obtain any government approvals and the time limits would not be extended for any reason whatsoever.

5. Clause 5.2 of the RSHA, embodied “Put Option Rights”. Clause 5.2.1 stated that in the event the conditions subsequent were not fulfilled by the Long Stop Date, the Investors *"shall have the right, though not the obligation, to require the Promoters, to acquire all but not less than all of the shares held by the Investors (put option shares) and the Promoters shall be required to purchase such put option shares within 30 (thirty) business days of being required to do so by the Investors through notice in writing*

(Put Option Notice)." The price at which the Investors would sell the put option shares to the Promoters *"shall be equal to the Investors Capital plus a post tax IRR of 19% on the Investors Capital ("Put Option Price") and the Promoters shall be bound and obligated to pay the Put Option Price to the Investors.*" It was further stipulated that upon exercise of the put option as set out in the clause, the Promoters *"shall have the irrevocable obligation"* to purchase the put option shares held by the Investors and pay the put option price within 30 business days of the put option notice ("Put Option Settlement Period"). If the promoters were unable to remit the put option price to the Investors for any regulatory reason, the entire put option price *"shall be paid by the Promoters to such other person as may be nominated or designated by the Investors to receive such Put Option Price."* Upon receipt of such put option price, the Investors *"shall hand over the share certificates pertaining to the Put Option Shares to the Promoters."* Under Clause 2.4 of the RSHA, the Investors were obliged to repay the remaining amount of the Investors' share subscription money to the third respondent and the Investors' purchase consideration to the Promoters within 10 days from the date of receipt (by the Investors) of all documents evidencing the fulfillment of the conditions precedent to closing to the complete satisfaction of the Investors. Clause 15 provided the composition of the Board of Directors and that the Investors were entitled to appoint the Chairman of the Board as well as the Chief Financial Officer, whereas one of the Promoter's nominee directors would be appointed as the Managing Director. Under Clause 3.3 of the RSSPA, the Investors were to remit an amount of ₹ 11 crores to Sarv Mangal to acquire 10,000 Class A shares held by the third respondent (Promoters Sale Shares). Under Clause 3.4 of the RSSPA, the

Investors were to pay ₹ 34 crores for the subscribed shares to the third Respondent. Both the RSHA and the RSSPA stipulated that upon purchase and subscription of further shares, the ratio of the shareholding of the Investors and the Promoters would continue to be 50:50.

6. The promoters alleged that the investors failed to take steps to execute the Facility Agreement. However, the investors willingly extended the Long Stop Date from 31.08.2009 to 10.10.2009. But the investors did not take any action in furtherance of the sanction letters *"to enable the execution of the Facility Agreement or further extend the Long Stop Date after 10th October, 2009"*. By the time the investors brought in the Investors' Share Subscription Money (in mid December), the Long Stop Date had long expired. On 31.08.2009, parties had by an Agreement agreed to extend *"the period for the fulfillment of the conditions precedent in the [RSHA] and the [RSSPA] for a further period of 25 (Twenty Five) days and accordingly the Conditions Precedent to Closing shall be fulfilled by the' Promoters, to the complete satisfaction of the Investors, on or before 25 September 2009"*. The Parties also extended the Long Stop Date under the [RSHA1] for a further period of 40 (forty) days; the extended Long Stop Date was 10.10.2009.

7. On 08.12.2009, amendments were carried out to the RSHA through a Supplemental Agreement ("SA"). The promoters alleged (before the tribunal) that they were coerced into consenting to the SA as the payment of the Investors' Purchase Consideration and the Investors' Share Subscription Money was made a condition precedent to execution of such documents. According to the promoters the SA substantially modified the RSHA. Clause 5.1 obliged the Investors to remit the Investors' Share Subscription Money

into an Escrow Bank Account which was to be operated by their authorized representatives (of the Investors). This, according to the promoters, was a significant departure and variation from the mode and manner of operation of the designated Bank Account contemplated by the RSHA. Clause 5.2 of the SA provided that the designated Bank account would be operated by two joint signatories, one each to be nominated by the Investors and the Promoters. The SA- according to the promoters, dispensed with their obligation of providing a bank guarantee to guarantee payment of lease rentals of ₹ 13.47 crores under Clause 4.1 of the RSHA. Clause 3.4 read with Clause 5.2 of the SA obliged only the ITIPPL to secure the Term Loan Facility. Under the SA, the investors were sole signatories of the bank account of ITIPPL, referred to by the parties as the HSBC account.

8. The Investors thereafter paid a sum aggregating to ₹ 11 crores to the Promoters towards Investors Purchase Consideration alluded in Clause 3.3 of RSSPA. The Investors also paid a sum of ₹ 34,00,27,747 towards Investors Share Subscription Money for issue and allotment of the shares of ITIPPL in terms of Clause 3.4 of RSSPA. Thus, a sum of ₹ 34,00,27,747 was paid to the bank account of ITIPPL. The Investors' stated position was that they had invested a total sum of ₹45,00,27,747 towards the Galaxia Project and the payments were made as under:

- (a) ₹ 55 lakhs to ITIPPL;
- (b) ₹ 4.73 crores to the promoters
- (c) ₹ 5.72 crores to the promoters; and
- (d) ₹ 34,00,27,747 (Rupees thirty four crores twenty seven hundred and forty seven only) to ITIPPL.

9. On 17.12.2009, the Promoters received confirmation that ₹ 4.50 crores was transferred from the designated bank account to them in partial repayment of the Promoters' Loan. The same day, their counsel through an email- to the Investors- purported to terminate the SHA, SSPA, RSHA, RSSPA, the termination agreement and all documents connected to them. On 06.02.2010, the Investors sent their notice of invocation of arbitration to the Promoters nominating a former Chief Justice of India as their Arbitrator. On 18.02.2010, the Investors sent a request to the International Chamber of Commerce ("ICC Court") for commencement of arbitration. The Promoters informed that they proposed another former Chief Justice of India as their nominated arbitrator. By its letter dated 26.02.2010, the ICC confirmed receiving the request for arbitration. The ICC Secretariat wrote to the Investors about their nominee as arbitrator and that he would be invited to complete a statement of acceptance, availability and independence. A similar letter was written by the ICC Secretariat on the same day to the promoters. After this, preliminary modalities towards confirmation of the nominee arbitrators, their acceptance, the acceptance of the nominees by either party, etc commenced thereafter.

10. On 01.04.2010, ICC wrote to the parties reminding them of the time limit for the coordinators to jointly nominate the Chairman of the AT. On 14.04.2010, counsel for the Petitioners wrote to the ICC for grant of extension of time to file a reply. Here again, there was no objection raised as regards the nomination of M1 as an Arbitrator by the Respondents. One more reminder was sent to the parties by the ICC for two nominated Arbitrators to appoint a third Arbitrator. At that stage, on 28.05.2010, a

Settlement Agreement was entered into between the Respondents and the Petitioners, Clause 2.3 of which reads as under:

"2.3 Notwithstanding anything to the contrary as may be contained in this Agreement or as may be otherwise agreed between the parties herein, it is clearly agreed and understood between the parties that in the event that all the entire Galaxia Consideration or any part thereof is not received by the Investors within the timelines stipulated hereinabove, for any reason whatsoever, or in the event any of the Promoters have failed to fulfil any of their obligations herein or if the Promoters have committed a breach of the terms of this Agreement or if any other act or omissions that has such effect is committed or omitted, then without prejudice to any other rights of the Investors under the Galaxia Agreements, the Investors shall have the right, to be exercised in their sole and absolute discretion, to recommence the Galaxia Arbitration in accordance with the provisions of the Galaxia Agreements.

It is jointly and severally, agreed and acknowledged by the Promoters that in such an event, as stated above, the Investors shall be entitled to all rights that ensue in their favour under this Agreement or otherwise including the right to claim and to forthwith receive the entire outstanding amount of or any such otherwise payable to and claimed by the Investors. The Promoters unambiguously and unequivocally acknowledge and declare that the amounts agreed to be paid to the Investors, i.e., the entire Galaxia Consideration, in terms of this Agreement are undisputed and payable to the Investors."

11. Clause 2.3 was to be read with Clause 1.1.8 which stated that either ₹ 45 crores had to be paid to the Investors under Sections 1.1.6 (i) and 1.1.6 (ii), or the sum of ₹ 50 crores which was required to be paid under Sections 1.1.6 (iii) and Section 1.1.7 would be referred to as the Galaxia Consideration. Following this, on 15.06.2010, a joint letter was addressed to the ICC by which the parties agreed to suspend the ICC administered

arbitration in terms of the SA. Later, alleging non-compliance of the settlement, the investors asked for commencement of arbitral proceedings.

12. In the light of this development, when the ICC wrote to the parties requiring confirmation of appointment of the two arbitrators, on 21.02.2011, the Promoters wrote to the ICC reiterating that the arbitration proceedings should be kept in abeyance. On 11.03.2011, ICC confirmed the appointment of the two arbitrators. On 21.04.2011, the Chairman of the AT was appointed. Thereafter, the Promoters, on 21.05.2011 sought to challenge the nominee arbitrator of the Investors, arguing that he did not possess the special qualification required to act as Arbitrator. The Investors pointed out that the said challenge was time-barred since the said nominee was appointed as an Arbitrator on 06.02.2010. The ICC rejected the challenge on 30.06.2011. An application was filed by the Promoters in which an order was passed directing them to continue paying Noida the lease rentals till such time that the order was modified by the AT. Much later, in August, 2012, the nomination of the arbitrator of the Investor was again challenged before the tribunal, which was rejected on 23.01.2013 on the ground that the appropriate forum to deal with this application was the ICC Court. The Promoters, undaunted by these failures, once again challenged the appointment of the Investors' nominee as arbitrator, before the ICC court, which again rejected the application on 14.03.2013.

13. On 20.01.2015, the tribunal, by its majority award held in favour of the Claimant/Investor and directed the following:

(a) payment of ₹ 45,00,27,747 (Rupees Forty Five Crores Twenty Seven Thousand Seven Hundred and Forty Seven Only) together with simple interest thereon at a rate of 18% p.a. from 31.01.2011 to the date of the Final Award by the promoters to the investors;

(b) payment of simple interest at a rate of 15% per annum on all sums awarded to the Claimants in the Award from the date following the date of it, till date of payment by the promoters to the investors;

(c) it further held that the respondent Promoters were not entitled to repayment from the Claimants of lease rental already paid by them to the NOIDA Authority and also that Claimants were not under an obligation to share future lease rental;

(d) the Promoters were to bear their own legal and other costs and are to pay the costs of the arbitration comprising of:

i) Fees and expenses of the Arbitral Tribunal and the ICC administrative expenses fixed by the ICC Court in the total amount of USD \$ 900,000.00;

ii) a sum of ₹ 2,39,08,082.00 towards the Claimants' legal fees;

iii) Costs of the hearing venue in the amount of ₹ 6,57,635.00;

iv) a sum of ₹ 1,274,931.00 in respect of the Claimants' other costs and expenses.

14. After the publication of the award, the Promoter challenged it on the appointment of the Investor's nominee as well as on the merits. The learned single judge, in the impugned order, repelled this challenge, under Section 34 of the Arbitration and Conciliation Act, 1996, in the following terms with respect to appointment of the arbitrator:

"45. The parties are bound by what was agreed between them. In terms of Section 13(4) read with Section 13 (5) of the Act where a challenge to the Arbitrator fails, then the arbitration continues. The aggrieved party has to wait for the pronouncement of the Award. If it is adverse to such party, then in the petition under Section 34 of the Act such party can also question the rejection of its challenge to the Arbitrator. While it may be disadvantageous to such party if the reasons for the rejection of the challenge are not made known, such party is nevertheless bound also by the rules governing the arbitration which too has been agreed between the parties. In the present case, with the parties have agreed that the arbitration will be governed by the ICC Rules. They are bound by the relevant clause in the ICC Rules that dispense with the ICC Court having to give reasons for rejection of their challenge to M1 and the Chairman of the AT.

46. The Court is not satisfied with the submission of the Petitioners that under clause 23.22 of the RSHA, to the extent the provisions of the clause are inconsistent with ICC Rules, the said clause would prevail and that in terms of Section 16 (5) of the Act, the challenge to the competence and jurisdiction of the AT must be decided by the AT itself. Apart from the fact that that does not appear to be a point raised before the AT or the ICC Court, the Petitioners appear to be under a misconception as to the applicable law governing arbitration on which the parties agreed. It was explicit that the ICC Rules that would apply. Clause 23.22 of the RSHA is in a very different context of the law governing the subject matter of the said agreement and does not affect the challenge procedure which continues to be governed by the ICC Rules.

47. In Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited (supra), it was explained that due regard had to be given to the qualifications in the agreement. However, that was not a case where the parties themselves waived such a requirement as in the present case. With the Petitioners having themselves nominated M1 whose qualifications were no different from M2, it is plain that neither party chose to adhere to what the

agreement required as regards the qualification of the Arbitrator. Likewise, the decisions in *Supriya Kumar Saha v. Union of India* (supra) and *Alcove Industries Limited v. Oriental Structural Engineers Limited* (supra) are clearly distinguishable on facts. In *Union of India v. M.P. Gupta* (supra), the question was whether a sole Arbitrator could have been appointed when the provision required two gazetted Railway officers to be appointed as arbitrators. The facts here are different inasmuch as the Petitioners have themselves nominated M2 who did not strictly fulfil the qualifications and did not raise an objection on that score even after receiving his declaration which made it clear that he did not possess the requisite qualification.

48. The Petitioners would be barred in terms of Article 33 of the ICC Rules from raising any objection as to the constitution of the AT since they chose not to adhere to that requirement in respect of their own nominee i.e. M2. In *Rail India Technical and Economic Services Limited v. Ravi Constructions* (supra), the Supreme Court explained the consequences of such waiver. It was observed there that:

"even if there is any violation or irregularity, by subjecting itself to the jurisdiction of Arbitrator, without challenging his appointment, RITES is also barred under the principles of estoppel and waiver from challenging the award of the Arbitrator on the ground that the Arbitrator was not appointed in terms of the appointment procedure."

49. Consequently, this Court rejects the submission of the Petitioners that the AT was improperly constituted thereby vitiating the impugned Award."

15. By the impugned judgment, the learned single judge negated the challenge to the award on its merits. The relevant observations and findings of the single judge are as follows:

"51. In this regard, it is required to be noticed that according to the Petitioners a sum of Rs.45,00,27,747 was indeed

brought in by the Respondents for the various projects. The Petitioners themselves do not dispute that the following amounts were paid:

52. The Petitioners have also not disputed that out of the above Rs. 45 crores a sum of Rs. 11 crores was transferred on 17th December, 2009 into the accounts of the Petitioners directly and on the same date the Petitioners terminated the RSHA and the RSPSA leading to invocation of the arbitration clause and also seeking interim reliefs under Section 9 of the Act. The fact remains, therefore, that notwithstanding the amount that may have been utilised by the Petitioners, they did owe to the Respondents the amount transferred to Respondent No. 3 company upon failure to meet the obligations under the Galaxia Agreements. The findings of the AT in this regard are consistent with the various clauses of the agreement.

53. The contention of learned counsel for the Petitioners that the Award was an attempt by the Respondents to enforce the put option rights under Clause 5.2 of the RSHA is contrary to the facts on record. It is plain that it was not the put option that was exercised by the Respondents. It requires to be noticed in this context that the right available to the Respondents under Clause 18.3.2 of the RSHA i.e., claiming damages for breach of contract under Section 73 of the Indian Contract Act ("ICA") was "in addition to and not in substitution for" any remedy available to the Respondents in respect of an event as set out in Clause 18.3 of the RSHA. In fact, before the AT, the Respondents had made it clear that the relief they were seeking was not pursuant to the exercise of the put option but damages for breach of contract.

54. As regards Clause 23.18.1 of the RSHA it is the Petitioners who benefitted from the said clause in the agreement and, therefore, cannot now be heard to question its validity. Even assuming it is invalid, it is severable and the remaining agreement would continue to bind the parties.

Award not an attempt to enforce the put option

55. It is next contended that the AT has failed to appreciate the

impact of RBI Circular No. 4 of 2014 dated 15th July, 2014 and the Gazette Notification in respect of Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) (12th Amendment) Regulations, 2014 dated 10th July, 2014. It is pointed out that RBI Circular No. 4 of 2014 dated 15th July, 2014 concerns the transfer of shares and enforcement of "put option". In terms thereof, the transfer of shares shall be at prices worked out as per internationally accepted methodology. The governing principle is that a non-resident investor is not guaranteed any assured exit price and shall exit at the fair price as may be computed.

56. As regards the amount invested by the Respondents, it is submitted by the Petitioners that the selling of the Galaxia Project land was the only method by which the investment could be returned as was ordered by this Court in OMP No.99/2011 in Alpha Tiger Cyprus Investments No. 3 v. Shakti Nath and that the auction has been arranged on 11th April, 2017.

57. The Respondents on the other hand point out that they were not exercising the put option. They were exercising their right to recover damages. Clause 18.3.2 of the RSHA makes it explicit that it is open to the Respondents to either enforce the "put option" under clause 18.3 of the RSHA or claim damages for breach of contract under Section 73 of the ICA.

58. There is no merit in the contention that the impugned Award is an attempt by the Respondents to enforce the put option rights under Clause 5.2 of RSHA. The pleadings make it clear that the Respondents did not choose to enforce the "put option." The Petitioners were bound by the clauses of the contract. In the decision of State of Haryana v Jage Ram AIR 1980 SC 2018, the Supreme Court observed that "those who contract with open eyes must accept the burdens of the contract along with its benefits."

59. The AT examined the Respondents' claim as one for damages. The directions issued by the AT did not touch on the aspect of exercise of put option by the Respondents. With the

Respondents not exercising the option of the "put option" but claiming damages for breach of the contract under Section 73 of the ICA, the question of any violation of RBI Circular No. 4 of 2014 in relation to exercise of "put option" did not arise. There is, therefore, no merit in the contention of the Petitioner that the impugned Award, if implemented, would lead to violation of FEMA/RBI guidelines or any of the circulars thereunder.

60. It is then submitted that the AT had re-written the Galaxia Agreements since it had ignored the inviolable and non-derogable binding terms of the contract documents operating between the parties. The submissions of the Petitioner in this regard are vague. It has not been pointed out in what manner the majority of the AT has re-written the contract. On the other hand, the majority Award has commented on the breach of the agreements by the Petitioners.

61. The award of interest appears to be in consonance with the RSHA and the Act. Given the long history of litigation and the several attempts of the Petitioners to frustrate the arbitration proceedings, the costs had to follow the Award and that is what has been done by the majority Award.

62. No ground has been made out by the Petitioners to demonstrate that the impugned majority Award suffers from any legal infirmity attracting Section 34 of the Act."

16. The appellant/Promoters argued that Investors failed to act in a bona fide manner to give effect to the Galaxia Agreements. Mr. Salman Khurshid, learned senior counsel urged that the funds brought in by the Investors for the Galaxia Project were utilised for the ostensible purchase of the Technova Project and ₹25 crores was remitted back into the Investors account. He contended that in December 2009, the Investors transferred ₹34,00,27,747 into an escrow bank account opened for the purposes of funding the Galaxia Project. This escrow account remained under the Investors' control.

Furthermore ₹25 crores was transferred by the Investors from the escrow account to VC Solutions, the promoters' affiliate, (developer of the Technova Project) further to an agreement signed between the parties.

17. The Promoters, according to its counsel, were under economic coercion of the Investors to buying back their shares in the Technova Project as a result of which ₹25 crores was remitted back to their account. It was alleged that the Investors intentionally withheld a substantial portion of funds from the Galaxia Project, rendering the development and performance of the project impossible and later terminated the Galaxia Agreements.

18. It was also argued that the award, in effect was nothing but an enforcement of the "Put option" clause. Mr. Khurshid argued that the tribunal and the learned single judge failed to appreciate or overlooked that the condition was unenforceable and opposed to public policy, as it was contrary to the directives of the Reserve Bank Circular, i.e No. 4/2014 dated 15.07.2014 which required such options to be worked out only in accordance with internationally accepted methodology. Counsel submitted that the said option in the present case did not fulfill such conditions; therefore, the imposition of interest rates that matched with the put option clause in effect amounted to its enforcement, which was contrary to public policy.

19. Mr. Khurshid next argued that the arbitral tribunal and the single judge failed to act according to law. He said that the award was contrary to public policy of the country for the simple reason that it is based on a principle of damages that does not accord with law: i.e Section 73 of the Indian Contract Act, 1872. It was argued that the obligation of the arbitrators to adhere to the said provision has been repeatedly emphasized in several Supreme Court

rulings, notably *Oil and Natural Gas Commission vs Saw Pipes*, (2003) 5 SCC 705 and *Kailash Nath Associates v. DDA* (2015) 4 SCC 136.

20. Mr. Sanjeev Puri, learned counsel appearing for the Investors, resisted the appeal and urged that the single judge correctly interpreted the law after a complete analysis of the circumstances of this case. He emphasized that the amount ₹ 45 crores and a sum of ₹ 11 crores was concededly transferred by the Investors. The Promoters did not show any inclination to fulfill their part of the bargain. Furthermore, they did not even pay NOIDA the ground rent for substantial periods and allowed encroachers to occupy the land. The Investors had to move the court, under Section 9; local commissioners were appointed who established that the Promoters brought the encroachers into the land. Given all these facts, the Investors were of the opinion that no purpose would be served in granting further time to the Promoters to repay the money. The arbitral award upheld the claim, in accordance with law.

Analysis and Findings

21. Section 34 of the Act deals with applications for setting aside an arbitral award. Of relevance are Sections 34(2)(a)(v), which allow for the setting aside of an award when the arbitral procedure was “*not in accordance with* [Part I of the Arbitration Act], and Section 34(2)(b)(ii), when the arbitral award is in conflict with the public policy of India. In addition, Section 28(1) of the Act enacts that (in arbitrations which are not international commercial arbitrations), the arbitrator shall decide the dispute “*in accordance with the substantive law for the time being in force in India.*” S. 28(3) requires the arbitrator to “*decide in accordance with the terms of the contract.*” The

Supreme Court in its landmark 2003 judgment *Oil and Natural Gas Commission vs Saw Pipes* (supra) explained these provisions. In that case, the Court clarified that when Section 34(2)(a)(v) states that the arbitral procedure must be in accordance with Part I, it means that the mandatory requirements of Section 28 must be followed by the arbitral tribunal, and failure to do so entails a setting aside of the award (paragraph 12). Therefore, the Court held:

“If the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.” (paragraph 14)

The Court also held that “*public policy*”, under S. 34(2)(b)(ii), was to be given a “*broad meaning*”, and included situations where an award was “*patently illegal*”:

“Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.” (paragraph 30)

22. In *ONGC (supra)*, the Supreme Court set aside the arbitral award on the ground that the tribunal had failed to consider Sections 73 and 74 of the Contract Act, and relevant precedents, in awarding damages. What is “*patent illegality*” has been clarified in subsequent cases. Let us consider some of them. In *Hindustan Coal Ltd. vs Friends Coal Carbonisation*, (2006) 4 SCC 445, the Court set aside an arbitral award which – in the opinion of the Court – was clearly contrary to the wording of the price-escalation clause in the

contract between the parties. The Tribunal had calculated price-escalation based on the price of a certain grade of coal, whereas a different grade was actually being used at the time. The Court held:

“But on account of apparent error in the Award, the calculation of escalation has been done with reference to the prevailing price of superior quality of coal (washery grade I) and the base price of inferior quality of coal (washery grade II) instead of calculating escalation with reference to the prevailing price of the superior quality of coal (washery grade I) and the base price of superior quality of coal (washery grade I). In fact, when queries by us, the learned Counsel for respondent could not explain with reference to contrary terms, how the base price of washery grade II coal could be applied to calculate the escalation in coke price produced by using washery grade I coal.”

23. *J.G. Engineers vs Union of India*, (2011) 5 SCC 758, is a case where the Court refused to set aside an award on the ground that the arbitrator had erred on questions of fact, holding that factual conclusions were within the domain of the tribunal. The Court held:

“Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge.”

Similarly, in *MSK Projects vs State of Rajasthan*, (2011) 10 SCC 573, the Supreme Court noted that:

“If the dispute is within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute on the issue not referred to it. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere

with such an award.”

A survey of the several judgments reveals that Section 34 authorizes a very narrow jurisdiction to set aside the arbitral tribunal’s award. Firstly, the court does not act as if it were an appellate court, re-visiting the evidence and undertaking an extensive factual review of the merits of the dispute with the mandate to cure or correct the errors (*Ref Sumitomo Heavy Industries v ONGC Ltd* 2010 (11) SCC 296 and *Kwality Manufacturing Corporation v Central Warehousing Corporation* 2009 (5) SCC (Civ) 406). The Court can set aside an award if it finds that the tribunal has made an error on the face of the contract, or provided a “*patently illegal*” interpretation of the law. Equally, if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction (*Ref MSK Projects (I) (JV) Ltd. v. State of Rajasthan* 2011 (10) SCC 573; *G. Ramachandra Reddy v Union of India* 2009 (6) SCC 414; *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 and *Renusagar Power Co. Ltd. v. General Electric Co.* 1984 (4) SCC 679). In *Mc Dermott International (supra)*, the Supreme Court clarified the Court’s inherent limitation by reason of Section 34 in such matters:

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the

arbitrator to determine, even if it gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. ONGC [(2003) 8 SCC 593] and D.D. Sharma v. Union of India [(2004) 5 SCC 325]).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

24. Unless the Tribunal commits a patent error of law in adjudicating upon a question submitted to it, the Court will not intervene (*J.G. Engineers Pvt. Ltd v Union of India* 2011 (5) SCC 758). The expression "patently" illegal was explained as an error "*which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice.*" (*Union of India v. Col. L.S.N. Murthy* 2012 (1) SCC 718). *J.G. Engineers (supra)* said that patent illegality is one which goes "*..to the very root of the matter and not a trivial illegality..*" The Supreme Court had recognized the high threshold of error of law in *Mc Dermott International*, (*supra*) where it was emphasized that the illegality should go to "*the root*" of the matter. *Oil and Natural Gas Commission v Western Geco* 2014 (9) SCC 263 outlined what is contrary to "public policy" in an award, warranting interference under Section 34:

"all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country." In particular, a court could assess whether a tribunal: (i) has applied a "judicial approach", i.e. has not acted in an arbitrary manner; (ii) has acted in accordance with the principles of natural justice, including applying its mind to the relevant facts; and (iii) has avoided reaching a decision which is so perverse or irrational that no reasonable person

would have arrived at it..”

The law was succinctly re-visited and the correct principles re-stated in a recent decision reported as *Associate Builders v Delhi Development Authority* 2015 (3) SCC 49.

25. In this case, the Arbitral Tribunal considered all the documents adduced by the parties and by the majority award held that the events that led to extension of the "long stop date" of the Restated Share Holder's Agreement (RSHA) on account of the promoter's failure to fulfill the condition precedent which included provision for the term loan facility. Significantly, the Tribunal noticed that the promoters did not lead any evidence suggesting that they had requested the investors to pass an affirmative vote in respect of the purported sanction letters. The submission of the promoters that sanction letters existed and that the parties were aware of it because of the 31.08.2009 agreement, was rejected. The Arbitral Tribunal went to cite the terms of the said agreement and then held that the remittance by the investors of their share subscription money did not amount to confirmation that the sanction letters were adequate or sufficient. In the light of these facts, the Tribunal concluded that the promoter's obligation to arrange for the term loan facility continued and that they had failed to fulfill that condition which led to the notice of 17.12.2009, terminating all agreements relating to the Galaxia Project. Most importantly, the Arbitral Tribunal was of the opinion that since the parties' arrangement stood terminated, the promoters could not have it both ways, i.e. on the one hand accept the investor's performance and on the other hand, reject it by terminating the RSHA and retaining the investment. It, therefore, held that the termination of the restated Galaxia agreements on 17.12.2009 coupled with the intention of keeping the investor's amounts

constituted a breach of that agreement.

26. The Tribunal also examined the promoter's objections that no damages were payable under Section 73 of the Contract Act. It was held that the damages arose directly from the actions of the promoters. It rejected the promoter's submission that return of the investment was contingent upon success of the Galaxia Project. It also significantly overruled the submission by the promoters based upon clause 6.3, holding that it only determined how any proceeds earned from Galaxia could be distributed but was not connected with interest rates. It, at the same time, accepted the promoter's argument and clause 23.22.3 of the RSHA which prescribed the rate of base interest in respect of all sums awarded, both at 15% per annum. It also referred to Section 31(7)(a) of the Act to stipulate that 15% per annum was a reasonable rate. It consequently directed and awarded a sum of ₹45,00,27,747 with simple interest @ 18% per annum on that amount from 31.03.2011 to the date of the final award; future interest @ 15% till date of payment, was also awarded.

27. In the light of the analysis by the Tribunal of the circumstances, particularly with respect to the stipulations under the contract, the Court is unpersuaded by the appellant/promoter's argument in that the interest rates awarded are nothing but a disguised affirmation of the put option clause. This argument was pressed into service before the Tribunal which explained - on the basis of Section 31(7) that an arbitral tribunal has autonomy to award a specific rate of interest; in the event of default, the statutory rate would apply. There cannot be any doubt in the circumstances of the present case that the investors had been ploughing substantial amounts towards Galaxia project

venture. As to the reasons why that project could not materialize into a successful commercial venture, the Tribunal by majority award returned elaborate and substantial findings. Those findings could not have been interfered with under Section 34 as they are based upon appreciation of the evidence such as documents and depositions. The promoter/objector could not point to any important finding that could be termed unreasonable or shocking the judicial conscience. As far as the rule of damages is concerned, this Court is of the opinion that the Tribunal as well as the learned Single Judge were correct in their conclusions that the award did nothing more than directing the return of the amounts that belonged to the investors given that the arrangement had terminated. The rate of interest awarded in these circumstances could not be said to be disproportionate or excessive, so as to attract jurisdiction under Section 34.

28. For the above reasons, this Court is of the opinion that there is no merit in the appeal. FAO(OS)(COMM)53/2017 is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

YOGESH KHANNA
(JUDGE)

MAY 8, 2017