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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 18th May 2018

Pronounced on: 28th May, 2018

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O.M.P. (I)(COMM) 143/2018 & IA No.5731/2018

METAFFINITY PRIVATE LIMITED & ANR. Petitioners

Through Mr.C.A.Sundaram and Mr.Parag
Tripathi, Sr. Advocates with
Mr.Sohil Shah, Mr.Shikhar Khare
and Mr.Apoorva Tripathi,
Advocates.

versus

RELIGARE ENTERPRISES LIMITED & ORS. Respondents

Through Mr.P. Chidambaram, Senior
Advocate with Mr.Alok Tiwari,
Ms.Archana Lakhotia, Mr.Karan
Bhambri, Mr.Dakshayani Saxena,
Mr.Adhish Rajvanshi and
Ms.Sumegha Dhillon, Advocates
for respondents No.1 and 2.

Mr.Jayant Bhushan, Sr. Advocate
with Mr.Ravindra Bandhkavi,
Mr.Vipul Wadhwa, Mr.Vishal
Binod and Mr.Tushar Bhushan,
Advocates for respondent No.3

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') has been filed by the petitioners for interim directions against the respondents in respect of the

Share Purchase Agreement dated 09.04.2017 (hereinafter referred as '**SPA**').

2. The brief facts leading to the filing of this petition, as alleged, are as under:-

- a)** on 09.04.2017, the SPA was executed amongst the petitioner No.1, M/s. Faerig Capital India Evolving Fund and one Shree Nirman Limited for sale of all the shares of the respondent No.2 held by the respondent No.1 to the petitioner No.1 and other purchasers for an agreed sale consideration (as defined in the SPA) which shall mean the amount equal to the aggregate consideration (i.e. ₹ 1300 Crores) multiplied by the ratio the sale shares bear to the total number of shares on the closing date on a fully diluted basis payable in the proportion set out in Schedule III of the SPA by each of the purchasers to the respondent No.1 for the purchase of sale shares, on the terms and conditions as specified in SPA;
- b)** Pursuant to the Deed of Novation and Accession dated 11.01.2018 executed amongst the parties, including the respondents No.1 & 2, the rights and obligations of Shree Nirman Limited stood assigned to the petitioner No.2 & M/s. Mridu Hari Dalmia Pariwar Trust;
- c)** The sale of the said shares is subject to fulfillment of certain conditions precedent that are to be fulfilled by the parties. The key conditions precedent to be fulfilled are *interalia* obtaining the approval of the Indian Insurance and Regulatory Authority of India (hereafter referred as '**IRDAI**') by the respondent No.2 Company and written consent/no objection from respondent No.3 by the respondent No.1

- d)* Clause 3.3 (a) of the SPA read inter-alia together with Clause 3.3 (b) and 3.3 (c) of the SPA imposes an obligation on all the parties to take all necessary steps to ensure the respective conditions precedent of each party are fulfilled at the earliest;
- e)* clause 10.2 of the SPA provided that in the event the Closing has not occurred on or prior to the Long Stop Date i.e. 08.01.2018, unless otherwise agreed in writing between the petitioner No.1 and the respondent No.1, the SPA shall stand automatically terminated, and the transactions contemplated therein stand abandoned;
- f)* however, Long Stop Date has been subsequently extended by the parties by Supplemental Agreement dated 11.01.2018. The respondents No.1 and 2 have failed to take active steps towards early fulfillment of their respective conditions precedent including in relation to approval from IRDAI and written consent /no objection of respondent No.3. Further, there were certain breaches committed by the respondent No.1, as enumerated in the petition;
- g)* since the conditions precedent were not fulfilled by 08.01.2018, (the Long Stop Date as per the SPA, prior to amendment), the parties executed a Supplemental Agreement on 11.01. 2018 wherein inter-alia the Aggregate Consideration was increased from ₹ 1300 Crores to ₹ 1350 Crores and the Long Stop Date was extended to 20.02.2018 (with option of the petitioners to further extend till 31.03.2018;
- h)* the petitioners state despite increasing the consideration amount and proceeding on the basis of the assurances the respondent Nos.1 & 2 will take necessary steps to expeditiously fulfill the conditions precedent, the respondent Nos.1 and 2 have failed to take active steps to ensure the

conditions precedent are fulfilled at the earliest. The Long Stop Date has been extended to 31.03.2018;

i) however, the respondents are in deliberate manner not working towards earliest fulfillment of conditions precedent. In fact as the past events/facts will indicate the respondents No.1 & 2 have been acting in malafide manner so as to engineer automatic termination of the SPA (as amended by the Supplemental Agreement) by non fulfillment of the conditions precedent. The conduct of the respondent Nos.1 & 2 is ex-facie apparent that mala-fide attempt is being made to illegally cause abandonment of the transactions contemplated in the SPA by engineering non-fulfillment of conditions- precedent. The petitioners apprehend (which is fully justified having regard to the past conduct of the respondent Nos.1 &2) the said respondents will unless restrained by appropriate order/direction, purport to create third party rights/interest in the shares of the respondent No.2 and may take steps contrary to the provisions of the amended SPA; and

j) since, Long Stop Date is fast approaching the petitioners are constrained to file the present proceedings to protect their rights and are seeking reliefs as more particularly prayed for in the petition.

3. The learned senior counsel appearing on behalf of the petitioners referred to three pertinent objections raised by the respondents in its replies– *a)* the consent of the International Finance Corporation/ respondent No.3 (hereinafter referred as '**IFC**') has not been obtained; *b)* the permission of the IRDAI could not be obtained as is dependent upon

the consent of the IFC; and c) the Long Stop Date has been changed by the parties once and it cannot be *extended further*.

4. The learned senior counsel for the petitioners referred to following paragraphs of the reply of the respondents no. 1 and 2:-

"16. The Petition is liable to be rejected forthwith by this Hon'ble Court on the ground that the grant of reliefs sought by the Petitioners thereunder shall, in the absence of receipt of IRDA Approval and IFC Consent, both of which are beyond the power or control of the Answering Respondents and are otherwise incapable of being waived, be contrary to law as well as the Articles of Association of Respondent No.1.

21. The Petition is liable to be rejected forthwith by this Hon'ble Court on the ground that the conditions and contingencies expressly stipulated under the Agreement as constituting conditions precedent to the "Closing" of the Agreement did not occur prior to the specified Long Stop Date (nor by the date extended by this Hon'ble Court vide its order dated 23rd March, 2018) for reasons beyond the power or control of the Answering Respondents (for example, want of IRDA Approval and IFC Consent).

38. In each instance, the Answering Respondents also diligently followed up with IRDA and IFC, as the case may be, in connection with the requested approvals, consents and permissions.

40. xxxx In particular, illustratively, the Answering Respondents submit documents concerning the following conditions precedent that were duly actioned by Respondent No.1 & 2 as per their respective responsibilities (Condition Precedents) as outlined in the Agreement:

- a. Board Approvals, authorization and resolutions collectively attached as ANNEXURE R-4;*
- b. Shareholders Approvals by way of Special Resolution collectively attached as ANNEXURE R-5;*
- c. Application for IRDA Approval and related correspondence collectively attached as ANNEXURE R-6,*
- d. Request for IFC Consent and related correspondence collectively attached as ANNEXURE R-7;*
- e. Application under Section 281 of the Income Tax Act, 1961 attached as ANNEXURE R-8;*
- f. Correspondence with Union Bank of India and Corporation Bank with regard to Tag Along/Drag Along options collectively attached as ANNEXURE R-9;*
- g. Certificates/ Approvals received under Shops & Establishments Act are collectively attached as ANNEXURE R-10;*
- h. Appointment of Purchaser nominated Observer (Mr. Rajiv Sabhanval) on the Board and other committees (he attended Respondent No. 2's board and committee meetings held 29.04.2017 for the financial year ended on 31.03.2017, on 25.07.2017 for the quarter ended 30.06.2017) and*

Special Invitee, Mr.Parmod Kabra who attended board meetings held on 07.11.2017 for the quarter ended on 30.09.2017 and as Observer in the Board and committee meetings held on 15.02.2018 for the quarter ended on 31.12.2017. Further Mr.Vikram Narula, representative of Petitioner 1 also attended the Board meeting of Respondent No.2 held on 15.02. 2018 for the quarter ended on 31.12.2017;

i. Other Conditions Precedent actioned by the Answering Respondents, the documents for which are collectively attached as ANNEXURE R-11”

5. The learned senior counsel for the petitioners referred to Annexure R-3 of the reply viz. a chart of obligations of respective parties to say all that was required to be done by the petitioners was all-post 31.03.2017 and the only prominent thing was to get an insurance but it was also on the closing date and even if it was not done the only remedy under the contract was to increase the consideration of the agreement.

6. The learned senior counsel for the petitioners then referred to various provisions of SPA dated 09.04.2017, viz a tri-partite agreement between the petitioners, respondent No.1 and the respondent No.2 as under:-

"Closing" shall mean completion of the sale and purchase of the Sale Shares in accordance with the provisions of this Agreement and the collective consummation of all transactions set out in Clause 5 of this Agreement;

"Closing Date" has the meaning ascribed to such term in Clause 5.1 of this Agreement;

3. CONDITIONS PRECEDENT

3.1 Notwithstanding anything contained in this Agreement, the Purchasers' obligation to complete the Transaction shall be subject to fulfillment and satisfaction of the following conditions by the Seller Company and/or the Company, as the case may be, and the execution and delivery of the documents set out herein, unless otherwise duly waived in writing by the Purchaser 1 (for and on behalf of itself and the other Purchasers), at any time at its sole discretion (with or without conditions), if so permitted under applicable Laws:

(a) to (x) xxx xxx

(y) the Seller Company shall have received the written consent/no-objection from the IFC for transactions contemplated hereunder.

3.2 Notwithstanding anything contained in this Agreement, the Seller Company's obligation to complete the Transaction shall be subject to fulfillment and satisfaction of the following conditions by the Purchasers and/or the Company (applicable only in case of Clause 3.2(d)), as the case may be, and the execution and delivery of the documents set out herein, unless otherwise duly waived in writing by the Seller Company (with or without conditions), if so permitted under applicable Laws: xxxxx

4. INTERIM MANAGEMENT

4.1 Unless otherwise consented to in writing by the Purchaser 1, the Company shall, and the Seller Company shall ensure that the Company shall, during the period between the Execution Date and earlier of the:

- (i) Closing Date; and*
- (ii) the date of termination of the Agreement ("Interim Period"),*

- (a) carry on the Business in the Ordinary Course of Business;*
- (b) use best efforts to preserve its Business and keep available the services of the present ELT in the Ordinary Course of Business; and*
- (c) use best efforts to preserve its relationships with key customers, suppliers and distributors.*

4.2 The Parties hereby agree that, during the Interim Period, neither the Seller Company nor the Company shall, other than as required for the completion of a Company Condition Precedent and/or Seller Company Condition Precedent, without the prior written consent of the Purchaser 1 (with such consent, if accorded, being communicated by the Purchaser 1 to the Seller Company in writing within 3 (three) Business Days from the consent being sought):

- (a) solicit, encourage, initiate or participate in any inquiry, negotiations or discussions or enter into any agreement for the direct or indirect sale of the Company, other than to the Purchasers ("Acquisition Proposal")*
- (b) to (u) xxx xxx'*

4.3 Subject to applicable Law, during the Interim Period, the Purchasers shall collectively have the right to nominate an observer on the Board and the committees thereof ("Observer") and such Observer shall have the right to attend the meetings of the Board and the committees thereof Further, the following shall be applicable to the Observer: (i) the Observer shall not have the right to participate in any discussions or vote at such meetings; (ii) the Observer shall not be taken into account for fulfilling any quorum requirements; and (iii) the Company shall not be responsible or required to bear or reimburse the Observer for, any travel or other out-of-pocket expenses incurred by the Observer towards attending the meetings of the Board and the committees thereof."

5. CLOSING

5.1 Subject to Clause 10, the Closing shall take place at the registered office of the Company or such other place as may be mutually agreed in writing by the Seller Company and the Purchaser 1, on a date to be mutually agreed in writing by the Seller Company and the Purchaser 1, which falls on a Business Day which is no later than 3 (three) Business Days prior to the Long Stop Date ("Closing Date").

5.6 In the event that:

(a) any of the Purchasers do not receive credit of their respective pro rata share of the Sale Shares in their respective Purchasers DP Accounts within 2 (two) Business Day from the Closing Date then, unless otherwise agreed in writing by the Purchaser 1 and the Seller Company, the Purchasers shall have the right to demand refund of the Sale Consideration paid by the Purchasers; or
(b) the Seller Company does not receive credit of Sale Consideration from all the Purchasers into the Bank Account within 2 (two) Business Day from the Closing Date then, unless otherwise agreed in writing by the Purchaser 1 and the Seller Company, the Seller Company shall have the right to demand return of the Sale Shares transferred by the Seller Company.

10. TERMINATION

10.1 Notwithstanding anything stated in this Agreement and without prejudice to Clause 10.2 of this Agreement, this Agreement may be terminated at any time on or before the Closing Date:

(a)-(d) xxx xxx

(e) automatically, under Clause 3.3(f) or upon the completion of the actions under Clause 5.6 of this Agreement

10.2 Long Stop Date: This Agreement shall stand automatically terminated, and the transactions contemplated herein abandoned if and at the earlier of:

(a) the Closing has not occurred on or prior to the Long Stop Date, unless otherwise agreed in writing between the Purchaser 1 and the Seller Company;

(b) the IRDAI unconditionally rejects the application for the IRDAI Approval, in writing; or

(c) any of the regulatory approvals required to be obtained by the Purchasers under Clause 3.2(h) is rejected unconditionally by the relevant Governmental Authority, in writing, and:

(i) the relevant Purchaser(s) fails to make a fresh application for such regulatory approval within 45 (forty five) days of the unconditional rejection of the first application for such regulatory approval; or

(ii) the fresh application made pursuant to Clause 10.2(c)(i) above, is unconditionally rejected.

"Long Stop Date" shall mean: (a) the date at the expiry of 9 (nine) months from the Execution Date, unless extended automatically by 6 (six) Business Days therefrom pursuant to the provisions of Clause 3.3(f); or (b) such other date as may be mutually agreed in writing by the Seller Company and the Purchaser 1;"

7. The following terms of the supplemental agreement date

11.01.2015 are also relevant:-

"(B) Certain Seller Company Conditions Precedent, the Company Conditions Precedent and the Purchaser Conditions Precedent (including obtaining of the IRDAI Approval) are likely to take longer than envisaged by the Parties at the time of execution of the SPA and

the Closing of the transaction may not be possible prior to the Long Stop Date. In the circumstances, the Parties have agreed to extend the Long Stop Date so that the Seller Company Conditions Precedent, the Company Conditions Precedent and the Purchaser Conditions Precedent can be fulfilled and the Closing can occur and have agreed on certain additional commercial and other terms and conditions in relation to the purchase of Sale Shares by the Purchasers."

"1. ADDITIONAL OBLIGATIONS AND WAIVER OF CERTAIN PAST ACTS & OMISSIONS

The Parties and the Purchaser I Confirming Parry hereby agree that:

(a) the validity of the SPA shall be deemed to have been automatically extended with effect on and from January 8, 2018 and the- SPA shall continue to be in full force and effect in accordance with the terms thereof (all supplemented or amended by this Supplemental Agreement);

*(b) each of the Parties and the Purchaser I Confirming Parry hereby **unconditionally**, irrevocably and without recourse, waive if any and all breaches, if any existing prior to and as of the date of this Supplemental Agreement, by each of the Parties and the Purchaser I Confirming Party of the terms of the SPA Provided however that. Nothing contained in this Section I(b) shall be deemed to be a waiver of any breach of or affect in any manner the Company Warranties, Seller Company Warranties and/or the Purchasers Warranties, other than those. Company Warranties and/or the Seller Company Warranties that relate, directly or indirectly to the Company adhering to the solvency requirements prescribed under applicable Law;*

(c) the timelines specifically mentioned under Clauses 3.1 (o), 3.1 (p), 3.1 (q), 3.1 (r), 3.1 (s) 3.2 (e) (ii) and 4A(c) of the SPA, for fulfillment of the respective 'conditions therein shall not be applicable and these conditions shall be fulfilled within the same timelines as for the completion of the other conditions precedent under Clause 3 '01' the SPA and in any event prior to the Closing Date;

(e) within 3 (three) Business Days of the execution of this Supplemental Agreement,

(i) the Seller Company shall file an application with the concerned Governmental Authority for obtaining an approval under Section 281(I)(ii) of the IT Act in relation to the sale of the Sale Shares as envisaged under Clause 3.1 (u) of the SPA; and

(ii) the Seller Company shall send appropriate correspondence/ applications to IFC for obtaining their written consent/no-objection as envisaged under Clause, 3.1 (y) of the SPA;"

2. AMENDMENT TO LONG STOP DATE

The definition of the term "Long Stop Date" in Clause 1.1 of the SPA, shall stand amended as follow:

"Long Stop Date" shall mean the earlier of:-

(a) February 28 2018, unless extended to March 31, 2018 by Purchaser I in its sole discretion by giving written notice to the Parties and the Purchaser I Confirming Party on or prior to February 28, 2018; and

(b) xxx xxx

4. Miscellaneous

4.1 This Supplemental Agreement shall be deemed to have come into effect on and from January 8, 2018 ('Effective Date') **and shall be coreminous with the SPA.**

4.2

xxx xxx

4.3 This Supplemental Agreement shall be deemed to form an integral part of the SPA as from the Effective Date and any reference to the SPA shall be deemed to include this Supplemental Agreement. The SPA shall stand modified supplemented as provided in this Supplemental Agreement. This Supplemental Agreement and the SPA shall be read as a whole. Except to the extent modified/supplemented by this Supplemental Agreement, all the other terms and conditions of the SPA shall continue to remain unaffected, valid and binding on the Parties hereto and none of the rights and obligations of any Party to the SPA, shall, except for the modifications contained in this Supplemental Agreement, be deemed to be altered or modified in any manner whatsoever.

"**IFC**" shall mean the International Finance Corporation, an international organization established by Articles of Agreement among its member countries with its headquarters located at International Finance Corporation 2121 Pennsylvania Avenue, NW Washington, DC 20433, United States of America."

8. The learned senior counsel for the petitioners then referred to a letter dated 05.06.2017 written by respondent No.3 to the respondent No.1 stating *inter alia*:-

"1. We are in receipt of the postal ballot notice dated 11 May 2017 ("Notice") in respect of the resolutions proposed to be passed (through postal ballot) for approving the transactions specified in the Notice. With specific reference to Item No. 1 of the Notice, we understand that the Company is proposing to sell its entire stake in its subsidiary, Religare Health Insurance Company Limited ("RHICL") to a consortium of buyers ("Proposed Divestment"). As you are aware, in terms of Section 2.07 (a) (i) of the Shareholders' Agreement dated November 5, 2012 among the Company, Sponsors and IFC (the "Shareholders' Agreement"), and Article 164 (a) of the Company's Articles of Association IFC's prior written consent is required in the case of any arrangement for disposal by the Company of shares of a Key Subsidiary, that results in the Company owning less than 51% of such subsidiary's shares.

2. The Proposed Transaction will therefore require IFC's prior, written consent and we are considering your Notice and the Proposed Divestment and will revert in case we need any clarifications."

9. A resolution dated 23.06.2017 was also passed (annexure R-5 to the reply) and it notes:-

*"RESOLVED THAT pursuant to the provisions of Section 180(1)(a) and other applicable provisions, if any, of the Companies Act, 2013 ("Act") and relevant Rules framed thereunder (including any statutory modification(s) or re-enactment thereof, for the time being in force), enabling provisions in Memorandum & Articles of Associations of the Company, **subject to such other approvals, consents, permissions and sanctions, as may be necessary, and subject** to such conditions and modifications as may be prescribed or imposed by any person or authority while granting such approvals, consents, permissions and sanctions which may be agreed to and all other applicable laws, consent of the members of the Company be and is hereby granted to the Board of Directors (hereinafter referred to as the "Board" which term shall be deemed to include any committee which the Board may have constituted or hereinafter constitute to exercise one or more of its power including the powers conferred hereunder) to sell and transfer (in one or more tranches) the entire investment of the Company in the equity shares of Religare Health Insurance Company Limited, a subsidiary company, to such person(s) as mentioned in the explanatory statement and on such terms and conditions and in such manner as the Board may at its absolute discretion determine.
RESOLVED FURTHER THAT the Board be and is hereby authorized to do all such acts, matters, deeds and things and give all such directions as it may in its absolute discretion deem necessary, expedient or desirable, in order to give effect to this resolution."*

10. It is alleged in the resolution above IFC-respondent no.3 was also a party. It is argued letter dated 05.06.2017; the resolution dated 23.06.2017 read with para No.40 of reply (*supra*) reveal IFC had approved of the transaction and there was no occasion for obtaining its consent again. Moreso, the conduct of respondent no.3 since 23.06.2017 did not reveal it may refuse to consent for the transaction. Rather its refusal to consent after filing of the petition amounts to commercial fraud.

11. The learned senior counsel for the petitioners repeatedly argued there being no need of any further consent of respondent No.3 as it had already approved the Board's Resolution dated 23.06.2017 and consent as is alleged in clause No.3.1(y) is merely formal. Secondly, it was argued IRDAI had no occasion to take any decision; and lastly Long Stop

Date being not rigid is changeable as parties have changed it earlier and the time being not an essence of the contract.

12. The learned senior counsel for the petitioners then referred to a letter dated 20.12.2017 of IRDAI to respondent No.1 (Annexure P-10) and it notes:-

"

xxxxx

We note with concern that, within a span of 21 days, REL has withdrawn its stand and has requested the Authority to grant approval for transfer of the equity shares, Please do let us know the grounds I reasons which has made you to change the decision. Also, confirm whether the letter dated 15.12.2017 has been endorsed to all the above stated entities.

Due to frequent changes in the stand of REL, the Authority would not be in position to process the application unless a fresh resolution of REL endorsing the stand is submitted to the Authority.

xxxxx

We note with concern that the said fact was not disclosed in the Application filed with the Authority for transfer of the equity shares, Please give reasons for the same. Further, please furnish the status of the consent of International Finance Corporation (IFC),

xxxxx

The Authority has already communicated its decision vide letter dated 06.12.2017, Accordingly, you are advised to infuse the capital in Religare Health Insurance Co. Ltd to maintain the stipulated solvency level. Any violation shall be dealt with in accordance with the provisions of the Insurance Act, 1938, As stated in the first para of your letter on page 2 of your letter dated 24.11.2017, you shall be the sole point of contact as Executive Chairman, please instruct CEO and other top Officials of Religare Health Insurance Co. Ltd. not to approach IRDAI in this matter and submit the authorization letter from the Board to this effect. On getting confirmation of the above requirements, the matter will be processed further."

and the letter dated 29.12.2017 written by the respondent No.1 to IRDAI notes:-

"Re: Sale of Religare Health Insurance to True North (Private Equity)

Dear Sir,

This has reference to your letter ref no. IRDA/FNA/HRG/LR/008/2017-18/162 dated 20.12.2017 addressed to Shri Lakshminarayanan, Executive Chairman of the Company.

In this regard, the point wise reply of the Company is as under:

1. The Board of Directors of REL has reaffirmed the transaction of the sale of shares of Religare Health Insurance Company Limited ("RHICL") by REL to the Buyers under the Share Purchase Agreement

'SPA') dated 09 Apr 2017. Shortly after receipt of the IRDA approval, and completion of the other conditions precedent as set out in the SPA, the transaction of the sale of shares of RHICL by REL to the Buyers under the SPA shall be completed.

Therefore, in the interim, we would make a humble request to the Authority to grant forbearance on compliance with the solvency requirement in RHICL.

2-5. xxxxx

6. The requirement for International Finance Corporation ("I Fe's") written consent is one of the conditions precedents to the SPA, and is a contractual requirement. The copy of the SPA was duly submitted with your good office with our Application. The Company is already in touch with IFC and their consent will be obtained prior to the transfer of shares. "

13. It is argued throughout the respondent No.2's stand in correspondences with others was the petitioners were always ready and willing to execute its part of the SPA and it even referred to resolutions dated 28.12.2017 and dated 22.03.2017. It is alleged the letter dated 20.12.2017 of IRDAI cannot be taken lightly as was written by Regulatory Authority to respondent No.1.

14. Reference was also made to a letter dated 20.06.2017 the respondent No.1 had written to the Insurance Company and it notes:-

"Metaffinity Private Limited being apart of True North group, has strong creditability and will be financially backed up by True North Fund V LLP through further draw downs."

This letter reveals the confidence the respondent No.1 had in the financial capability and commercial viability of the petitioners viz. having funds sufficient to complete the sale.

15. It was further argued though in para No.14 of its reply (supra) the respondents no.1 and 2 have talked about petitioners having not given *purchaser satisfaction certificate* but it was not necessary since the petitioners were always inclined and ready to complete the transaction.

16. Hence it was argued the respondents cannot back out of its obligation to sell its shares as the petitioner was always ready and willing to complete its obligations and had requisite financial capacity.

17. During the course of arguments the petitioner moved **IA No.5731/2018** under **Order 11 Rule 14 CPC** asking for certain documents as are mentioned in para 9 of the application viz., the correspondence exchanged between respondents No.1 and 2 with respondent No.3 seeking consent of respondent No.3 (IFC) for the proposed transaction under the Share Purchase Agreement dated 09.04.2017 and the Supplemental Agreement dated 11.01.2018.

18. Thus case set out by the petitioner herein is the respondent no.1 and 2 in blatant violation of *good faith obligations* under Clause 3.4 of the SPA, are illegally attempting to delay/frustrate fulfilment of the conditions precedents with a view to wriggle out of SPA and from its conduct it is ex-facie apparent that malafide attempt is being made to illegally cause abandonment of the transactions by engineering non fulfilment of conditions precedent. It is alleged the respondent acts reeks of malafide intent to resile from SPA in a systematic manner despite the parties having agreed they shall strictly adhere to all its obligations under the SPA, including in particular, but not limited to obligations under Clauses 3.4 to 3.7 of the SPA. Clause 3.4 says:

*“The Parties hereby agree to cooperate with each other in **good faith** and provide **all requisite assistance** and documentation **for the satisfaction of the conditions precedent** set out in this Clause 3 upon being reasonably requested to do so by any of the Parties hereto, provided however that:
(a)-(b)...”*

19. The learned senior counsel for the petitioner says even prior to the refusal of its consent by the respondent no.3, the petitioner sent an email dated 05.02.2018 to respondent no.1 but respondent no.1 sent a cryptic email dated 15.02.2018 saying "Yes, we have requested IFC for the same". However, copies of documents as sought vide emails dated February 5, 2018 and February 9, 2018 were never provided. Furthermore emails were sent and lastly a notice dated 13.04.2018 was written by the petitioner to respondents No.1 and 2 to provide them with the copies of its correspondences it had with respondent No.3. Even a letter dated 13.04.2018 was sent to respondent No.3. On 18.04.2018 reminders were sent to respondents No.1 and 2 on the one hand and respondent No.3 on the other. However on 18.04.2018 a response was received from respondents no.1 and 2 wherein it was alleged (a) the subject letters are not relevant for adjudication of the referenced position; (b) they cannot share it since is confidential in terms of the shareholder's agreement dated 05.11.2012 executed between the respondents no.1 and 2 on the one hand and respondent No.3 on the other; and (c) respondents are not liable to furnish such documents at the present stage of proceedings.

20. The learned senior counsel for the petitioner also referred to the correspondence dated 06.06.2017 viz. an email at 10:42 AM by respondent no.3 to the petitioner which runs as under:

*"Thanks for the call yesterday and great to connect with you. As discussed, we have a consent clause on the sale of all Religare Enterprises subsidiaries (incl Religare Health for which you are in discussions to purchase the entity from Religare, along with others) as per our SHA with the holding company we haven't provided the consent so far but remain in discussion with the promoters/company on the same. **The discussions are moving positively.** Happy to provide any clarifications if required."*

21. Thus considering the email above as also clauses 3.4, 3.1(y) where the consent of IFC was mandatorily required, the petitioner seeks to have copies of the correspondence between the respondents.

22. It was argued for considering of this application the allegations as set out in the petition under Section 9 need to be looked into viz:

“ 33. In view of complete lack of transparency and no information being forthcoming regarding the fulfilment of conditions precedent, once again a letter was addressed by the Advocates of the Petitioners to the Respondents on February 16, 2018, inter-alia pointing out that despite the repeated follow up by the Petitioners regarding the progress made towards the fulfilment of the conditions precedent by the Respondents, there has either been no response or very vague and delayed response and it appeared that no concrete steps had been undertaken to ensure expeditious fulfilment of the conditions precedent and closure of the transaction under the SPA. xxxxx.

xxxxx.

40. The Petitioners state that from the aforesaid, it is clear that the Respondents have no intention of honouring their obligations under the SPA and in fact are guilty of inter-alia breach of their obligations under clause 3.3 (c) of the SPA as also clause 3.6 of the SPA. The Respondents are attempting to engineer non-fulfilment of conditions precedent with the intention to cause automatic termination I frustration of the SPA. The conduct of the Respondents, in particular the failure to take steps for speedy fulfilment of the conditions precedent speaks volumes of their intention. The Petitioners have fulfilled the conditions precedent to the extent the same can be done by them without involvement I cooperation of the Respondents. In fact, as late as on December 12, 2017, with the regular follow up and furnishing the required documents etc. the Petitioner No.1 have been granted an approval from the Ministry of Finance, which fulfils the conditions precedent under Clause 3.2(h). The petitioners have duly informed the respondents about the fulfilment of the said condition along with the documents. However, some of the conditions precedent to be fulfilled by the Petitioners by their nature necessarily require assistance/ co-operation from the Respondents. The Respondents are duty bound to render such co-operation, more particularly in view of Clause 3.4 of the SPA. However, the Respondents are not co-operating at all towards the fulfilment of those conditions precedents. The Petitioners have always been ready and willing to perform their part of their obligation and to complete the transaction at the earliest.

xxxxx

43. xxx The Petitioners state that this deliberate attempt on part of the Respondent No. 1 is to indefinitely delay the closing of the transaction, contemplated under the SPA to resile from the SPA in mala fide manner.

44. xxx Petitioners state that subject matter of the transaction is majority shares of an unlisted company, which is a unique asset by

itself and are not otherwise available in open market. Hence, the interim reliefs as prayed for deserves to be granted in facts of this case."

23. It is argued the contract like the one is not a *terminable contract* and even if the Court holds it to be a *terminable* then also an injunction be granted under Section 42 of the *Specific Relief Act* as damages are not an adequate remedy in the present case. The learned senior counsel for the petitioner referred to clauses 10.1 and 10.2 as also clause 3.3(f) of the SPA to say 10.2(a) is generic and whereas 3.3(f) is its species. The learned senior counsel for the petitioner also relied upon *Upma Khanna & Anr. V. Tarun Sawhney & Ors.* FAO(OS) No.366/2011 decided on 10th May, 2012, which held:

"8. The two agreements had identically verdicted clauses in Clause No.17 in one and Clause No.20 in the other. They read as under:-

" If this agreement is not implemented within the twelve calendar months from the date hereof this agreement shall stand terminated and extinguished automatically without any further act of parties and vendors shall be at liberty to sell the said property to any other person after refund of earnest money, as also other lawful charges hereinafter mentioned if paid by the vendee on behalf of the vendor; the intention of the parties is that they all be resorted to the same position as at the date hereof and as if this agreement had not been executed."

xxx

11. And needless to state the case of the appellants was that as per Clause 17 in one agreement and 20 in the other, both of which were identical in language, if the agreement was not implemented within 12 calendar months from the date of the agreement, it shall stand terminated; and thus as per Section 14(1)(c) of the Specific Relief Act, 1963 the agreement could not be specifically enforced. Per contra, the plaintiff pleaded that said clause would apply when the contract in question envisaged it being determinable at the option of both or either party and not where time was fixed for performance of a contract requiring in the interregnum the seller to take steps and obtain permissions so as to be in a position to execute the sale deed and the seller being in default.

xxxxx

18. But, the argument overlooks the concept of a fault liability and a fault effect and a no fault liability and a no fault effect. It overlooks the point that one should not rush to conclusions. Clause (c) uses the expression „in its nature determinable" and does not throw any light whether the determination contemplated embraces a fault effect determination.

19. If a defence by a contracting party that the sufferance of the default and hence the determination of the contract is to be accepted, it would amount to allowing the party committing the wrong to take advance of its own neglect and this would ex-facie not be acceptable to a court of equity.”

24. And in *Ascot Hotels and Resorts Pvt. Ltd. & Anr. V. Connaught Plaza Restaurants Pvt. Ltd.* Arb.A.(Comm) No.12/2017 decided on 20th March, 2018, wherein it was held:

“26. Reliance of the petitioner on the judgment of the Supreme Court in Indian Oil Corporation Ltd (Supra) and of this Court in Planet M Retail Ltd. (Supra) also cannot be accepted. In both Indian Oil Corporation Ltd and Planet M Retail Ltd. the contract provided for a right in the parties to terminate the agreement on giving a notice without cause. As noted above, in view of Clause 22.4 of the agreement, in the present case such a right cannot be said to be vested in the appellant.”

25. It was argued the clause(s) of automatic termination are always subject to *default* clause. Reference was then made to clause 14.10 of the SPA which notes:

*“14.10 Remedies. This Agreement shall be specifically enforceable at the instance of any Party (including the Purchaser 1 Confirming Party). The Parties and the Purchaser 1 Confirming Party agree that a Non-Breaching Party will suffer immediate, material, immeasurable, continuing and irreparable damage and harm in the event of any **material breach of this Agreement** and the remedies at law in respect of such breach will be inadequate and that such Non-Breaching Party shall **be entitled to seek specific performance against the Breaching Party for performance of its obligations under this Agreement in addition to and without prejudice to its rights to claim damages and compensation and any other rights available to it under this Agreement or under the process of applicable Law or any equitable remedies available to it.**”*

26. The learned senior counsel for the petitioner argued though the agreement; the Article of Association of respondent No.1 says respondent No.3's consent is essential for transaction but such consent was unnecessarily withheld and despite the respondent No.3 made the petitioner believe it was granting such consent, (per its email dated

06.06.2017 at 10.42 AM) but yet withheld it without any cogent reason. It is argued that all these issues need to be looked into by the Arbitrators.

27. The learned senior counsel for the petitioner argued if tomorrow the petitioner can show there was a breach on the part of the respondents then the consequences of breach shall follow and the arbitrator would decide who was at breach and may hold the parties cannot wriggle out of its obligations as set out in the SPA and hence at the present moment the rights of the petitioner need to be safeguarded since there are serious contentious issues.

28. It is argued a one liner reply of the respondent No.3 *they have not given its consent* would solve no purpose since why it has refused is a serious question having repercussions, the petitioner needs to know the reasons for such refusal and require such correspondence. It is argued no person can profit from its own wrong and as time is not an essence of this contract, as has been extended once thus if it is held the contract could not be enforced then negative covenant be enforced (per Section 42 supra) as was held in *Gujarat Bottling Co. Ltd. and Others vs. Coca Cola Co. and Others* (1995) 5 SCC 545:

“42. In the matter of grant of injunction, the practice in England is that where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction and injunction is normally granted as a matter of course, even though the remedy is equitable and thus in principle a discretionary one and a defendant cannot resist an injunction simply on the ground that observance of the contract is burdensome to him and its breach would cause little or no prejudice to the plaintiff and that breach of an express negative stipulation can be restrained even though the plaintiff cannot show that the breach will cause him any loss. See : Chitty on Contracts, 27th. Edn., Vol. I, General Principles, para 27-040 at p. 1310 : Halsbury's Laws of England, 4th Edn. Vol. 24, para 992. in India Section 42 of the Specific Relief Act, 1963 prescribes that notwithstanding anything contained in Clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance

that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. This is subject to the proviso that the plaintiff has not failed to perform the contract so far as it is binding on him. The Court is, however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer.”

29. It is argued even if the contract is *determinable by nature*, the specific performance can still be granted keeping in view the *uniqueness* of the transaction/underlying asset and the *inadequacy of damages* as was held in *M/s Madhusoodhanan & Anr. vs. Kerala Kaumudi (P) Ltd. & Ors.* (2004) 9 SCC 204; *Atlas Interactive (India) Pvt. Ltd. vs. BSNL* 126 (2006) DLT 504; *Frankfinn Aviation Services Pvt. Ltd. vs. BC Gupta* Manu/DE/8609/2007; *KSL & Industries Ltd. vs. National Textiles Corporation* Manu/DE/3872/2012 and *UP State Electricity Board vs. Ram Barai Prasad* Manu/UP/0173/1985.

30. Hence the crux of the argument of the petitioner is per various clauses of SPA, more specially clause 14.10 (*supra*), there exist a clear obligation upon the parties to act *fairly* and in *good faith* and to *refrain from rendering the contract frustrated* and as the respondents are reluctant to share their correspondence *a)* an adverse inference be drawn against them; *b)* the subject property be safeguarded; through the arbitrator may *modify* such directions, if need be.

31. The learned senior counsel for the respondents No.1 & 2 on the other hand submit the contract entered into between the parties is a *determinable* contract and is not specifically enforceable. It is alleged a terminable contract if terminated even without reasons, cannot be restored. The only recourse then is the award of damages, if any.

32. Section 14 (1) (a) (c) and 41 (e) of the Specific Relief Act, 1963, is relevant and it read:-

“14. Contracts not specifically enforceable.—

(1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) xxx xxx;

(c) a contract which is in its nature determinable;

(d) xxx xxx.

41. Injunction when refused.—An injunction cannot be granted—

(a) to (d) xxx xxx

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(f) to (j) xxx xxx.”

33. In *Indian Oil Corporation Limited vs Amritsar Gas Services and Others* (1991) 1 SCC 533, the Court observed:-

“xxx xxx The finding in the award being that the Distributorship Agreement was revocable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinate'. In the present case, it is not necessary to refer to the other clauses of Sub-section (1) of Section 14, which also may be attracted in the present case since Clause (c) clearly applies on the finding read with the reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained.

13.

xxx xxx

14.In such a situation, the Agreement being revocable by either party in accordance with Clause 28 by giving thirty days' notice, the only relief which could be granted was the award of compensation for the period of notice, that is, 30 days. The plaintiff-respondent No. 1 is, therefore, entitled to compensation being the loss of earnings for the notice period of thirty days instead of restoration of the distributorship.”

34. Further in *Bharat Catering Corporation vs IRCTC & Another* 164 (2009) DLT 530 this Court noted:-

“xxx xxx

“ordinarily relief to be granted to a plaintiff in such a matter is awarding of damages and interim injunction of a mandatory nature is not to be granted.”

35. In *Lindsay International Pvt. Ltd. & Ors. vs. Laxmi Niwas Mittal & Ors.* (2017) SCC Online Cal 270 the Court held:

“79. xxx.

There is no presumption of permanence of duration in any type of contract, and the question whether the contract is determinable depends upon the proper construction of the contract in every case and a commercial contract is determinable.”

36. Further in *IL&FS Engineering and Construction Company Limited vs. Pashimanchal Vidyut Vitaran Nigam Limited* 2018 SCC Online Del 6448 the Court held:

“ 22. xxx....the contract if is determinable, a direction to specifically enforce it cannot be granted, much less under Section 9 of the Arbitration and Conciliation Act. xxx”

37. Thus the law discussed above do show the commercial contracts are *terminable* contracts. The principle of fault liability as discussed in *Upma Khanna* (supra) was applied in the cited case since DDA was the one whose consent was relevant and hence the conduct of the defendant viz. he/she has performed his part of the obligation was found relevant. The DDA, being a State under Article 12 of the Constitution was then directed to re-examine its consent. This clearly is not the case here, the respondent no.3 being a private organisation has no tapping of State hence it can be directed to reconsider its consent.

38. Another moot question is if the Long Stop Date is over, can the arrangement be re-ignitioned. The petitioner in a petition under Section 9 of the Act is asking this Court to direct continuation of an agreement which admittedly has come to an end. Clause No.3.3(f) is relevant and it notes:-

“3.3 Conditions Precedent Confirmation:

(f) At the earlier of the occurrence of:

(i) Purchaser 1 exercises its right under Clause 3.3(d)(i); or (ii) the Seller Company exercises its right under Clause 3.3(e)(i), then, the Long Stop Date shall stand extended by 6 (six) Business Days. Notwithstanding anything contained in this Clause 3.3(f), there shall be only one instance of the extension of the Long Stop Date pursuant to the provisions of this Clause 3.3(f), and in the event that the Seller Company, the Company and/or the Purchasers, as the case may be, are unable to satisfy their respective relevant condition precedent, then the transactions hereunder shall stand abandoned and the Agreement shall terminate automatically at the expiry of the extended Long Stop Date.”

39. Further, clause No.10.1 of SPA (qua termination) is without prejudice to clause No.10.2 and it says that *this agreement shall stand automatically terminated and the transactions contemplated herein shall be abandoned in terms of sub clauses (a) to (c).*

40. Admittedly, Long Stop Date was over on 08.01.2018, but vide a Supplemental Agreement dated 11.01.2015 was extended. Now per clause No.3.3(f) of SPA with six business days the contract ended on 31.03.2018 and in all events by 09.04.2018.

41. The next question is did the parties, acted *per* its obligations under the contract(s)? The obligations of respondents No.1 & 2 are enumerated in a chart, at page No.161 of its reply. Qua seeking of approval IRDAI the respondents no.1 and 2 did file an application on 26.04.2017 with the IRDAI and then several letters were exchanged between respondents and IRDAI on the subject and meetings were held. The request to respondent No.3 for its consent was also made promptly, but the respondent no.3 admittedly, did not give such consent. The postal ballot notice dated 11.05.2017 and correspondence has been exchanged with IFC/ respondent no.3, but to no avail. On the other hand obligations of the

petitioners, are enumerated at page No.164 of reply, were all pending till closure except it had obtained FIPB approval.

42. Now clause No.3.1(y) (*supra*) makes it obligatory for the seller company to receive a written consent / no objection of IFC/respondent no.3 for the transaction. Even Article 164 of the Article of Association of respondent No.1 notes:-

*“164. As long as IFC holds at least twenty five percent (25%) of the IFC Securities and at least one percent (1%) of the outstanding issued and paid-up capital of the Company on a Fully Diluted Basis, the Company shall not and shall ensure that its Key Subsidiaries and Key Affiliates shall not take the following decisions or actions **without the prior written consent** of IFC:*

(a) authorize or undertake any arrangement for the disposal of: (i) twenty five percent (25%) or more of the assets of the Company or any Key Subsidiary or any Key Affiliate, whether in one or a series of transactions; or (ii) any shares of any Subsidiary that results in the Company owning (directly or indirectly) less than fifty one percent (51%) of any Key Subsidiary; or (iii) any shares of any Affiliate that results in the Company owning (directly or indirectly) less than twenty six percent (26%) of any Key Affiliate (unless such arrangement is undertaken to meet the requirements of the Applicable law, provided that the Company issues a written notice to IFC providing information as IFC may require in respect of such arrangement. Provided further that IFC's prior written consent under Article 164(a) shall not be required in respect of the (A) proposed sale of forty nine percent (49%) of the equity share capital each of RAMCL and RTCL by RSL to Invesco; (B) transfer of RSL's shareholding in RAMCL and RTCL pursuant to the exercise of a call option by Invesco; and (C) transfer of RSL's shareholding in RAMCL and RTCL upon the exercise of the shoot-out mechanism by Invesco, as specified under the joint venture arrangements between Invesco, RTCL, RAMCL and RSL;

xxxxx

The provisions of Article 164 shall have effect notwithstanding anything contained in the Articles J (other than Article 166 and Article 168).”

43. Admittedly, the structure of the respondent No.2's share holding as on date of the grant of registration was - Religare Enterprises was holding 90% of the shares; Union Bank of India and Corporation Bank were holding 5% each; IFC had 7.19% shares in the holdings of the respondent No.1. Since its share was more than 1%, so the consent of

respondent no.3 was *mandatorily* required for this transaction to go through.

44. A letter dated 10.10.2007 annexed to reply of the respondent No.3, is a letter sent by the said respondent to the Consortium Investors led by True North Managers stating inter alia *it had not yet given its written consent for the purchase of the shares by the petitioner*. Identical letters were sent by respondent no.3 to other purchasers and lastly on 06.04.2018 it had *refused* to consent. Though, it is alleged by the petitioner the respondents No.1 & 2 did not make any attempt to obtain consent of respondent no.3, but admittedly vide supplemental agreement dated 11.01.2018 the parties waived off its earlier breaches. Moreover letter dated 05.06.2017 of respondent no.3 written to respondent No.1 reveal the respondent No.1 had made efforts to obtain its consent and the respondent no.3 recognised such effort of respondent no.1 but on 06.04.2018 had refused to consent.

45. The petitioner's argument viz *a Board Resolution passed on 23.06.2017 by the general body of the respondent No.1 consisting of all the share holders - including the respondent No.3 had consented to the transaction so it cannot be said respondent no.3 never consented to the transaction*, is misconceived as such resolution can't be read ahead of reply of respondent No.3 wherein it had categorically alleged *at no stage it had ever represented to the petitioners or any other person that it had granted its consent to the proposed transaction*. Admittedly respondent no.3 never exercised its vote in response to the postal ballot notice dated 11.05.2017 when respondent No.1 had invited its share holders to vote in

favour of a special resolution qua the proposed transaction. In any event, the special resolution dated 23.06.2017 itself notes it was *subject to the necessary consensus and approvals*, hence the consent of respondent no.3 cannot be implied vide such resolution.

46. The respondent No.3 *admittedly* is an arm of the World Bank and is not an institution which may collude with anyone. Since respondent No.3 is a substantial shareholder in the respondent No.2 so by virtue of shareholder's special rights its consent to the transaction was most essential. Now since respondent No.3 had denied its consent for the transaction can it be asked to *reconsider* it. Admittedly respondent No.3 had a veto right to sale, per article 164 of the Article of Association. The shareholders rights are recognised by law. *The Freedom of Voting by Palmer's Company Law* notes *a members vote is a piece of property which may be exercised as he or she pleases. This is so even if the shareholder votes against a resolution which the Court has ordered the company to effect.*

47. The SPA entered into between the parties, *admittedly*, was contingent upon obtaining consent of the respondent No.3, which stood denied and hence the contract stood abandoned. The resolutions, so relied upon by the petitioner were subject to certain approvals and one of it was the consent of respondent No.3. Though respondent No.3 appointed a nominee director, but his appointment was with a covenant viz., he/she shall not give consent on behalf of respondent No.3 and shall not act as a representative of respondent No.3. Now even if the respondent No.3 had stated in its correspondence about a *positive move*, it would not mean it

had given its consent or would definitely give its consent. It does not lead to a contract and cannot be used as a promissory estoppel against respondent No.3.

48. Lastly the negative covenants could only be enforced during *existence* of the agreement and not after its termination. Clause 14.10 (*supra*) at best can operate only against respondents No.1 & 2 and not against respondent No.3 and hence such a negative covenant, even otherwise, cannot be enforced against respondent No.3.

49. For enforcing a negative covenant, *per Section 42*, there has to be an agreement *not to do any act*. The petitioner here refers to clause 4(b) and clause 7 viz. the *interim period* and *restricted period*, but, admittedly the contract being terminated, for, whatsoever reasons, such clauses would cease to operate.

50. In *Percept D'Mark (India) (P) (Ltd.) vs. Zaheer Khan and Another* (2006) 4 SCC 227 the Court held:

“61. xxxxx... So long as Clause 31(b) is read as being operative during the term of the agreement, i.e. during the period from 29.7.2003 till 29.10.2003, it may be valid and enforceable. However, the moment it is sought to be enforced beyond the term and expiry of the agreement, it becomes *prima facie* void, as rightly held by the Division Bench.

62. If the negative covenant or obligation under Clause 31(b) is sought to be enforced beyond the term, i.e. if it is enforced as against a contract entered into on 20.11.2003 which came into effect on 1.12.2003, then it constitutes an unlawful restriction on respondent No.1's freedom to enter into fiduciary relationships with persons of his choice, and a compulsion on him to forcibly enter into a fresh contract with the appellant even though he has fully performed the previous contract, and is, therefore, a restraint of trade which is void under Section 27 of the Indian Contract Act.”

51. Again in *IRCTC Limited vs Cox and Kings India Limited & Another* 186 (2012) DLT 552 it was noted:-

“25. Based on the facts projected above, we come back to the main issue, namely, whether direction in the nature given, which are in the nature of mandatory injunction amounting to specific performance or directing continuation of the arrangement even when the agreement had been terminated could be given or not. Once the Joint Venture Agreement is terminated, prima facie we feel that even in the main arbitration proceedings, it would be difficult for M/s C&K to seek the final relief of specific performance and for restoration of the agreement. There is a huge possibility that in such a situation, normally M/s C&K would be entitled to damages even if it is held that Joint Venture Agreement was illegally terminated. After all, Joint Venture Agreement was a contract between the parties. It was only in the realm of contractual arrangement with no statutory flavour and no element of public law. While dealing with the contractual obligations under the realm of contract in a private field without any insignia of public element, it may be somewhat difficult for M/s C&K to maintain the relief of specific performance. The agreement was in commercial field to be governed by contract law, as between two private parties”

52. The prayer in the petition is styled in a manner as if the agreement had not come to an end; but factually it stands terminated since the *closing* has not occurred on the *closing date* due to refusal to consent by respondent no.3. The petitioner did not plead *material breach* of the agreement qua *representations, warranties or covenants* by the respondents, as are defined in clauses 4, 7.1 and 7.2 of the SPA, hence cannot plead for enforcement of negative covenant.

53. Thus where respondent No.3, a share holder, has refused its consent; the majority share holders cannot ask respondent no.3 to rethink its decision as it would be contrary to the Article 164 of the Articles of Association.

54. In the circumstances the relief as prayed for in the petition cannot be granted. The petition though is dismissed but with a direction to respondents to file on record the correspondence inter se on seeking/refusal of consent of respondent No.3 in a sealed cover within

two weeks from today and may be dealt with, per directions of the arbitral tribunal. Pending application is also disposed of.

55. No order as to costs.

YOGESH KHANNA, J

MAY 28, 2018

DU/VLD

