

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

+ **O.M.P. (COMM) 318/2018 & I.A. No.9851/2018 (Stay)**

+ **O.M.P. (COMM) 319/2018 & I.A. No.9852/2018 (Stay)**

Reserved on: 20th August, 2018
Date of decision: 25th September, 2018

KAMAL KARMAKAR Petitioner
WALLDORF INTEGRATION SOLUTIONS LIMITED
(FORMERLY KNOWN AS CITIXSYS TECHNOLOGIES
LIMITED) Petitioner

Through Mr.Rajiv Nayar, Sr. Adv. with
Mr.Nikhil Singhvi, Mr.Kanak
Bose and Ms.Nikita Pandey, Advs.

versus

S CHAND AND COMPANY LIMITED & ORS.Respondents
Through Ms.Ranjana Roy Gawai,
Mr.Krishna Keshav and
Ms.Monica Saini, Advs. for R-1.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 28.03.2018 passed by the Arbitral Tribunal consisting of three Arbitrators. The Arbitral Tribunal, by its Impugned Award has held that Walldorf Integration Solutions Limited (formerly known as Citixsys Technologies Limited), the petitioner in OMP (COMM) 319/2018 (hereinafter referred to as the 'Company') had

committed breach of the terms of the Debenture Conversion Agreement dated 03.03.2009 (hereinafter referred to as 'DCA') in not redeeming the Optionally Convertible/ Redeemable Preference Shares (OCPS) issued in favour of the respondent no.1. The Arbitral Tribunal has further held that the respondent no.1/claimant in the arbitration proceedings, though was entitled to Specific Performance of the DCA, since the company would not be able to redeem the OCPS on account of inadequacy of the distributable profits as on 31.03.2016, would be entitled to damages equivalent to the redemption amount along with interest. The Arbitral Tribunal has awarded in favour of the respondent no.1 a sum of Rs.6,40,62,500/-, the redemption amount as per Clause 4 (III) of the DCA, as damages along with interest @ 8% p.a. from 03.07.2011, being the date on which the OCPS became due for redemption as per redemption notice issued by the respondent no.1, till 10.01.2015, being the date of notice invoking the arbitration, and *pendent lite* and future interest at the same rate.

2. Before advertng to the submissions made by the learned senior counsels for the petitioners, a few facts leading to the arbitration proceedings need to be noticed.

3. The petitioners and the respondent no.1 had entered into a Debenture Subscription Agreement (DSA) dated 14.07.2007, in terms whereof, the respondent no.1 invested a sum of Rs.4.1 crores in Optionally Convertible/Redeemable Debentures of the face value of Rs.1 lac each in the petitioner company.

4. The parties, that is, the company and Mr.Kamal Karmakar (petitioner in OMP (COMM) 318/2018), as the Principal Shareholder of

the Company, entered into the DCA on 03.03.2009 with the respondent no.1 by which the debentures were to be converted into 5,12,500 OCPS at conversion price of Rs.80/- with face value of Rs.10/- each on a premium of Rs.70/-per share. Some of the relevant terms of DCA are quoted hereinbelow:

“2. Terms & conditions of the Conversion:

- 1) ***Conversion Price:*** *The parties hereto have agreed to covert the optionally convertible redeemable Debenture subscribed at Rs. 1,00,000/- (Rupees One Lakh only) per Debenture by the Investor at a conversion price of Rs. 80/- (Rupees Eighty only) per Optionally Convertible or Redeemable Preference shares with face value of Rs. 10/- each and a premium of Rs. 70/- per share. Accordingly, the Company shall issue total 5,12,500 (Five Lac Twelve Thousand Five Hundred Only) numbers of Optionally Convertible or Redeemable Preference shares to the Investor.*

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4. Post Conversion Rights of Investors

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- II. *Following the conversion of present Debentures in to Preference shares in pursuance of this agreement, the Investor will have the option to convert the such Optionally Convertible or Redeemable Preference shares into Equity Shares of the company, on or after completion of 27 months from the closing dated-*

(a) *at a minimum conversion price of Rs. 80/- (Rupees Eighty only) per equity share, or;*

(b) *at such higher rate (i.e. higher than Rs. 80/- (Rupees Eighty) per equity share) as arrived pursuant to the valuation of Company carried out by a*

respectable audit firm appointed with mutual consent, at the behest of Company, or;

(c) if any other person, entity, firm or body Corporate brings in the company an Investment for an amount being greater than Rs. 7.50 Crore (Rupees Seven Crore Fifty Lac only), in the form of Equity Shares at a rate higher than the conversion price mentioned in the sub clause (a) above, then the optionally convertible or redeemable preference shares held by Investor shall be converted at such higher rate at which such investment is made by the other person, entity, firm or body Corporate;

(d) If simultaneous to or after signing of this agreement, any other person, entity, firm or body Corporate are allotted equity shares in the company at a rate less than the conversion price, i.e. Rs. 80/- per share, then the Principal Shareholder shall transfer the proportionate additional shares to the Investor, representing the deficient face value of the Rs. 80/- invested by the Investor.

III. Redemption of the Preference shares: *The Investor will also have the option to redeem such Preference shares, on or after completion of 27 months from the Closing date at a premium of Rs. 45 per share (i.e. Redemption at Rs. 125 per Share). The Company may pay the Investor, during the time it holds such Preference shares, dividend calculated at the rate not exceeding 9% per annum on its entire shareholding, if the same is declared by the Company. In case the company pays any dividend during these 27 months; the premium calculated above would be reduced by the dividend paid during the period up to the date of conversion.*

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14. TERMINATION

14.1 Upon sale of Preference shares by the Investor or the company going public or on conversion of Preference shares or on redemption of Preference shares, this agreement shall cease to be operative in its entirety.

14.2 The Parties have agreed that:

- I. If any party to this Agreement commits any breach of this Agreement or any terms contained herein, the other party shall become entitled to terminate this Agreement, provided the party committing breach fails to cure such breach to the satisfaction of the other party within a 30 days cure period. The failure to cure the breach committed by Company shall make it liable to redeem the entire preference shares held by the Investor and pay out the redemption amount as per the terms of the present Agreement.*
- II. Without prejudice to any other legal or equitable right that the Investor may have, it is agreed that in the event of termination of this Agreement, the Investor shall have the right to immediately demand redemption of the Preference shares at price as agreed hereof.*
- III. Termination of this Agreement for any cause whatsoever shall not relieve either Party hereto of any liability, which at the time of termination has already accrued to the other Party hereto, or which may, thereafter, accrue in respect of any act or omission prior to such termination.*
- IV. In the event that the Investor exercises option to redeem the preference shares held by it in terms of the present Agreement or an occasion for redemption arises owing to the Termination of the present Agreement and the Company fails to honour its obligation to redeem the redeemable preference*

shares, such failure will amount to clear breach of the terms of this Agreement rendering the Company and the Principal shareholder, both liable to pay damages to the Investor for such breach.”

5. The DCA also contains an Arbitration Agreement between the parties in form of Clause 15 thereof.

6. In terms of the DCA, the respondent no.1 vide notice dated 10.05.2011 opted for redemption of the Preference Shares with effect from 03.07.2011, being the date of expiry of 27 months. The petitioners, however, vide their letter dated 28.06.2011 refuted the request of the respondent no.1 for redemption and stated that the understanding between the parties all along was that the respondent no.1 would convert these shares into equity. Thereafter, the parties entered into a series of correspondence, where different modes of settlement were discussed. No settlement being arrived at, the respondent no.1 invoked the Arbitration Agreement on 10.01.2015.

7. The learned senior counsel for the petitioners, relying upon the abovementioned email dated 28.06.2011 contends that the cause of action for invoking the arbitration would accrue on this date when the petitioners had clearly refuted its liability under the DCA. Relying upon Article 54 of the Schedule to the Limitation Act, 1963, it is submitted that on the date of the invocation of the arbitration by the respondent no.1, that is 10.01.2015, its claim for Specific Performance was clearly barred by limitation. He places reliance on the judgment of the Supreme Court in *Ahmadsahab Abdul Mulla (2) vs. Bibijan & Ors.*, (2009) 5 SCC 462.

8. The Arbitral Tribunal has rejected the above contention of the petitioner relying upon Section 18 of the Limitation Act and observing as under:

“While the Tribunal agrees with the respondents that money due on preference shares is not a debt and that a preference shareholder is not a creditor to the company yet, it also notes that the Claimant also has also stated that it has not claimed redemption amount as a debt nor has claimed the same as a creditor. In terms of Section 18 of the Limitation Act, admission of not only a debt but also a liability in respect of any right or property would extend the period of limitation. Learned counsel for the respondent has attempted to draw a fine distinction between admittance of liability in the Balance Sheet and the admittance of liability under the DCA and has argued that statutorily, till the OCPS is either converted or redeemed, the same has to be reflected as a part of capital in the Balance Sheet and since the Claimant seeks specific performance of the obligation under DCA, there should be some independent acknowledgement of the obligation in relation to the DCA . The Tribunal does not wish to deliberate on this issue as to whether the acknowledgment of liability in the Balance Sheet would extend the period of limitation in this case, as, the Tribunal finds that there has been an acknowledgement in relation to DCA as discussed in the succeeding paras.

The second ground advanced by the Claimant has two limbs: One is that there had been an acknowledgment in relation to DCA in terms of Section 18 of the Limitation Act and the other is that there had been series of correspondence between the Claimant and R2 by means of e-mails to resolve the disputes. While, the respondents admit the e-mails, it is their contention that not even in a single e-mail, the company had agreed to redeem the shares and as such there was never an acknowledgement

by the company of its liability/obligation to redeem the OCPS.

We note that all the e-mails relied on by the Claimant had been disclosed only by the respondents 1 & 3 in their joint SoD. Some of the relevant e-mails which were exchanged after the notice of refusal dated 28th June 2011 are:

E mail dated 14th April 2012 from Saurabh Mittal, CFO of Claimant (Pg 171 of SoD) to R-2

Sub: Conversion of Preference into Debt: Conveying that the Board of Claimant had agreed to convert the preference shares into debt and requesting for commencing the process.

Reminder Email from Mittal to R-2 on 20th April 2012 (Page 171 of SoD)

Response E Mail dated 20th April 2012 from R-2 to Mittal: "Sorry for missing this.

Rajeev/Ritesh : Can you have this evaluated by Lawyer" (Page 170 of SoD)

E mail dated 23rd June 2012 from R-2 to Mittal stating that the OCPS cannot be converted into debt and must be converted into common shares. (page 169 of SoD)

E mail dated 25th June 2012 from Saurabh Mittal to R-2 (Page 153 of SoD) Sub: Conversion of Preference shares into Debt- Reminder 2

I would speak to the Board and revert to you. What was written in the Agreement is clear that there was an option of conversion. The process of conversion to debt has also been shared with you.

Email dated 24 Sep, 2013 from Saurabh Mittal, CFO of S.Chand to R-2 (Page 157 of SoD)

Please refer to discussion earlier today. Mr Samir Khurana who is a consultant, would visit you tomorrow at 4 pm to discuss your business plan and Financials with you and your team so that he can report back for the Board to take a decision of conversion of the preference shares to equity shares.

Within an hour of receiving the above mail, R-2 sent an e mail to Mr Samir confirming the time of 4 pm the next day.

E mail dated Oct 24, 2013 from R-2 to Himanshu Gupta of Claimant (Page 155 of SoD)

Sub: Shares

It was good seeing you. As discussed, please send me a letter from S. Chand to convert the preference shares to regular shares. I will have it done at an earliest.

From the above e-mails, it is evident that the OCPS had been a subject matter discussions in these e-mails. However, according to the respondents since in none of the emails, the company had agreed to redeem the shares, there is no acknowledgement in terms of section 18 of the Limitation Act.

The Explanation to Section 18 of the Limitation Act, which is widely worded, does not require that for a writing to be an acknowledgment, the liability or obligation should have been admitted. As per the Explanation, even refusal to perform is an acknowledgment. Both the sides have referred to certain judgments which have dealt with the expression "acknowledgement".

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The jural relationship between the Claimant and the company is that of an investor and investee and the liability of the company is to either redeem or convert the OCPS at the option of the Claimant. The e-mails sent by

the respondents as referred to above deal only with OCPS. The e-mail sent by R2 on 24th October 2013 wherein he had said "It was good seeing you. As discussed, please send me a letter from S. Chand to convert the preference shares to regular shares. I will have it done at an earliest" clearly establishes that R2 had admitted the existence of jural relationship. Hence, the e-mails can definitely be termed as "acknowledgement" as contemplated in Section 18 of Limitation Act.

*In addition, the e-mails do reflect that the parties were attempting to resolve the disputes relating to OCPS, initially by way of conversion into debt and later by converting them into equity shares, but neither materialised, resulting in the invocation of arbitration. From some of the e-mails, like the one dated 24th October 2013 from R-2 and the other one dated 24.9.2013 sent by the Claimant to R-2 it is seen that there had been personal interaction also between the Claimant and R2. In **Hari Shankar Singhania (supra)**, after noting that there were correspondences evidencing that there were efforts made to amicably settle the disputes, the Supreme Court held in para 38 of the judgment that, the right to invoke Arbitration would accrue only from the date of the last correspondence between the parties and the period of limitation commences from the date of last communication between the parties. This judgment has been referred with approval in **Shree Ram Mills Ltd v. Utility Premises P Ltd (supra)**. In the present claim, the last date of communication from R-2 was on 25.10.2013 and hence the period of limitation would commence from that date only.*

Therefore, the notice invoking arbitration dated 10.1.2015 has to be held to be within limitation period commencing from 25.10.2013, not only in view of the acknowledgement in terms of section 18 of the Limitation Act, but also in view of the attempt of the parties to

resolve the disputes in relation to OCPS as reflected by the series of emails.”

9. The above being a matter of appreciation of evidence led before the Arbitral Tribunal and inference drawn by the Arbitral Tribunal therefrom, this Court cannot sit in appeal to re-appreciate the same. The Supreme Court in **Associate Builders v. DDA** (2015) 3 SCC 49, while considering the powers of this Court under Section 34 of the Act has held as under:-

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award.”

10. In **M/s Sudarsan Trading Co. vs. Government of Kerala & Anr.** (1989) 2 SCC 38, Supreme Court while holding the Arbitrator to be the sole judge of the evidence led before it, has held as under:

“Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisal of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of the evidence. The arbitrator is the sole Judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.”

11. The Supreme Court further held that:-

“An award may be set aside on the ground of error on the face of the award, but an award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.”

12. In ***Sutlej Construction Limited v. Union Territory of Chandigarh*** (2018) 1 SCC 718, the Supreme Court reiterated the above in the following words:-

“11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be “justice”. (Associate Builders v. DDA), (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204.

12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of reappreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38: (1989) 1 SCR 665; Harish Chandra & Co. v. State of U.P., (2016) 9 SCC 478: (2016) 4 SCC (Civ) 526: AIR 2016 SC 4257 and Swan Gold Mining Ltd. v. Hindustan Copper Ltd. (2015) 5 SCC 739: (2015) 3 SCC (Civ) 27: (2014) 4 Arb LR 1)”

13. Apart from the e-mails referred to by the Arbitral Tribunal, note can also be taken of e-mail dated 04.07.2011, which is after the letter

dated 28.06.2011. This e-mail is addressed by Kamal Karmarkar, petitioner in OMP(COMM) 318/2018 and the Principal Shareholder of the Company, and reads as under:

“I have received the redemption notice from S.Chand. I was surprised that you want to redeem and not convert your preferential shares into equity. We had discussed earlier that company will allocate you shares at one third of value agreed and signed if you agree to convert into equity. While Dinesh Ji’s family has converted into shares at the discount; it is unfair that S.Chand is now asking for redemption after shares were allocated to group Investors at a discount. I will request you to relook at the situation and convert your preferential shares into equity. If you still want to redeem, we should talk and find a method. Attached please find the formal reply.” (Emphasis supplied)

14. A reading of the above e-mail would show that the petitioners were still willing to redeem the OCPS. The parties thereafter explored other ways of settlement, including that of conversion of the OCPS into equity and then selling the same to third party investor, or to convert the investment of the respondent no.1 into debt. It cannot therefore, be said that the claim of the respondent no.1 was barred by limitation.

15. The petitioners have also filed on record additional documents, including Annual Report for the year 2012, which includes the following ‘Notes on Financial Statements’:-

“The Company had issued preference shares in the previous years to its existing Share Holders and the same were due to redemption in the financial year 2011-2012 but a decision is pending at the end of the Board of Directors for due consideration.” (Emphasis supplied)

16. The acknowledgment of liability is also contained in the Notes appended to the Balances Sheet for the year ending 31.03.2015, which is quoted hereinbelow:

“(iii) Rights, preference and restrictions attached to preference shares:

The redemption of preference shares shall be made on or after completion of 27 months from the date of allotment of shares at ₹ 125 per share. The company may pay the dividend calculated at the rate not exceeding 9% per annum on its entire shareholding, if the same is declared by the company. The said shares shall have also an option for conversion into equity shares of ₹ 10 each at a minimum conversion price of Rs.80 per equity share or at such higher price as arrived pursuant to the valuation of Company.”

17. I therefore, find no merit in the submissions made by the learned senior counsel for the petitioners on the claim of respondent no.1 being barred by the law of limitation as on the date of invocation of arbitration.

18. In the present case, the respondent no.1 had originally filed its Statement of Claim only seeking Specific Performance of the DCA. It was only on 11.05.2017, when the final arguments were being addressed before the Arbitral Tribunal, that the respondent no.1 filed an application seeking amendment of the Statement of Claim relying upon Section 21(2) and 21(5) of the Specific Relief Act, 1963, claiming damages as an alternate relief to the prayer of specific performance. The application seeking amendment was filed with the averment that it was only at the far end of the proceedings on 22.04.2017, that the petitioner filed the Balance Sheet of the company for the year 2015-16 disclosing that the company had incurred a loss of about Rs.3.30 crores. With the company

incurring this loss, redemption of the preference shares would no longer be permissible due to proviso being added to Section 123 of the Companies Act, 2013 by way of Companies (Amendment) Act, 2015 and therefore, amendment in the Statement of Claim to include the claim of Damages as an alternate relief was sought.

19. The above amendment application has been allowed by the Arbitral Tribunal and by way of the Impugned Award the Arbitral Tribunal has further awarded damages in favour of the respondent no.1. The learned senior counsel for the petitioners challenges the same on the following grounds:

- (a) The application seeking amendment of the Statement of Claim could not have been allowed by the Arbitral Tribunal as claim for damages was available to the respondent no.1 even at the stage of filing of the Statement of Claim itself and therefore, the relief of damages was barred by the Law of Limitation. In this regard he places reliance on the judgment of the Supreme Court in *Jagdish Singh v. Natthu Singh*, (1992) 1 SCC 647;
- (b) That even if the amendment application is held to have been rightly allowed by the Arbitral Tribunal, the Arbitral Tribunal could not have proceeded to award damages in favour of the respondent no.1 without calling upon the petitioners to file their Statement of Defence to such amendment and without calling upon the respondent no.1 to lead evidence in support of such amended claim. He submits that the award of Damages in favour of the respondent no.1 without any evidence being led by the respondent

no.1 in proof of such damages being suffered by it, cannot be sustained.

20. I have considered the submissions made by the learned senior counsel for the petitioners, however, I find no merit in the same. Section 21 of the Specific Relief Act, 1963 is reproduced hereinbelow:

“21. Power to award compensation in certain cases.—

(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint

on such terms as may be just, for including a claim for such compensation.

Explanation.—The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.”

21. In ***Jagdish Singh*** (Supra), the Supreme Court has held that where the contract for no fault of the plaintiff, becomes impossible of performance, Section 21 enables the award of compensation in lieu of and in substitution of specific performance. The Court further held that even assuming that the respondent therein had not specifically sought damages in lieu of specific performance, the same was a mere formality to be completed, and permitted the amendment so that “complete justice is done”.

22. In ***Urmila Devi and Ors v. Deity, Mandir Shree Chamunda Devi***, (2018) 2 SCC 284, the Supreme Court upheld the award of compensation in lieu of decree of Specific Performance where during the pendency of the second appeal in the High Court, notification under Section 4 of the Land Acquisition Act, 1894 was issued for acquisition of the suit land. In fact, the claim of the plaintiff therein for compensation was enhanced by the Supreme Court.

23. In ***Babu Lal v. Hazari Lal Kishori Lal and Ors.***, (1982) 1 SCC 525, the Supreme Court, albeit in context of Section 22 of the Specific Relief Act, 1963 which also uses the expression “at any stage of the proceeding” as is used in the Proviso to Section 21(5) of the Specific

Relief Act, 1963, held that the same includes execution proceedings as well.

24. In **Ram Mohan v. Anil Kumar**, 2017 SCC OnLine Del 10922, this Court, relying upon the judgment of the Supreme Court in **Babu Lal** (Supra) has held as under:

“9. While Section 21 is concerned with claim for compensation for breach, either in addition to or in substitution of the relief of specific performance, Section 22 is concerned inter-alia with any other relief to which the plaintiff may be entitled to, including the refund of any earnest money or deposit made by the plaintiff in case his claim for specific performance is refused. The words “any other relief to which he may be entitled” are of wide amplitude and would take within their ambit a claim also for compensation for breach of agreement either in addition or in substitution of the relief of specific performance. Thus, a plaintiff in a suit for specific performance of an agreement of sale can, under Section 22, claim the relief of compensation for breach either in addition or in substitution of specific performance and if the plaintiff has not claimed such relief he can amend the plaint under the proviso to sub-section (2) of Section 22. Sub-section (3) of Section 22 makes the power of the Court to grant relief thereunder, “without prejudice” to the powers to award compensation under Section 21 and which is again indicative of it being possible for the respondent/plaintiff in the present case, to claim the relief as was sought by way of amendment, under proviso to Section 22(2) as well.

10. However, even if it were to be held that a claim for compensation for breach in addition to or in substitution of the claim for specific performance having been specifically dealt with under Section 21, is not within the ambit of Section 22 and the claim thereunder is confined to other reliefs including of refund of earnest money or deposit paid

or made by the plaintiff, I still see no reason as to why the interpretation of the proviso to sub-section (2) of Section 22 should not also apply to the interpretation of the proviso to sub-section (5) of Section 21. What prevailed in Ex-Service Enterprises (P) Ltd. and in Babu Lal supra for holding amendment provided under proviso to sub-section (2) of Section 22 to be possible even at the stage of execution was the use of words “at any stage of the proceeding”; the term “proceeding” was held to be comprehensive term meaning a prescribed course of action for enforcing a legal right. It was held that the word “proceeding” includes execution proceedings also which is a stage in the legal proceedings or a stage in the judicial process and/or a stage in litigation. It was thus held that the legislature has given ample power to the Court to allow amendment of the plaint at any stage including the execution proceeding. There is nothing in the language of Section 21 which would make inapplicable the aforesaid interpretation of the words “at any stage of the proceeding” used in the proviso to sub-section (5) of Section 21 also.

11. Supreme Court in Jagdish Singh v. Natthu Singh (1992) 1 SCC 647 held that where the plaintiff, by his option has made specific performance impossible, Section 21 does not entitle him to seek damages. However where the contract, for no fault of the plaintiff, becomes impossible of performance, Section 21 enables award of compensation in lieu and substitution of specific performance. It was further held that if the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance, the Court will allow the amendment at any stage of proceeding. However different and less liberal standards apply if what is sought by amendment is the conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract Act is invoked. The latter amendment was held to be under the discipline of

Rule 17 of Order VI of the CPC. It was clarified that the fact that sub-section (4) of Section 21 invokes Section 73 of the Contract Act for the principles of quantification and assessment of compensation, does not obliterate this distinction. Finding that the plaintiff in that case had not sought amendment of plaint for compensation in lieu of specific performance, the amendment of the plaint at the stage before the Supreme Court was permitted.

12. The Specific Relief Act having permitted amendment of plaint to seek the reliefs as mentioned above at any stage of the proceeding, the contention of the counsel for the petitioner that proviso to Order VI Rule 17 has to apply is clearly erroneous and misconceived. The Rules contained in First Schedule of the CPC, as Order VI is, provide the law relating to procedure of Courts of Civil Judicature; but where any statute codifying the law relating to any right which may be claimed in Civil Court provides otherwise, such statute being a special law, in comparison to general law contained in CPC, has to prevail or the two have to be harmoniously construed.”

25. In the present case, the Arbitral Tribunal has recorded that it was an admitted fact that the petitioners produced the financial statement of the company for the year 2015-16 only on 22.04.2017, when the proceedings were at an advance stage and that to, at the instance of the Arbitral Tribunal itself, even though the same was signed on 05.09.2016. It has been further held by the Arbitral Tribunal that the claimant could not have filed the amendment application without the knowledge of such financials for the year 2015-16 and that the amendment application was filed within three weeks of gaining such knowledge. It has been further held that the claim for specific performance was originally maintainable

and the amendment is based on a subsequent event not known or in existence at the time of filing of the claim. The amendment application had been filed, not in abandonment of the relief of specific performance, since, according to the claimant/respondent no.1 herein, performance had become impossible without any fault on its part, due to change in law subsequent to the date of the filing of the claim.

26. I am in full agreement with the finding of the Arbitral Tribunal.

27. Though, an attempt was made by the learned senior counsel for the petitioners to contend that even on 10.05.2011, when the respondent no.1 had made a request for redemption of the OCPS, the OCPS could not have been redeemed under Section 205(1) of the Companies Act, 1956, on a specific query being raised by this Court, it was admitted that such plea had not been urged before the Arbitral Tribunal. On the contrary, the Arbitral Tribunal has recorded in the Award that the petitioner in OMP(COMM) 318/2018, Kamal Karmakar, had himself stated that the redemption of the preference shares had not been rejected by the company “citing non-profitability of business”. In fact, the balance sheets for the relevant years were not even filed by the petitioners before the Arbitral Tribunal. The applicability of Section 205(1) of the Companies Act, 1956 to the facts of the present case, being a mixed question of fact and law, cannot be agitated for the first time before this Court under Section 34 of the Act.

28. As far as the contention with respect to the award of damages without granting an opportunity to the petitioners to file an amended Statement of Defence and/or in absence of any evidence being led in

support thereof by the respondent no.1 is concerned, the same is again without any merit.

29. The Arbitral Tribunal in its Record of Proceedings dated 14.05.2017 has recorded the statement of the counsel appearing for the petitioners in the following words “learned counsel maintains that the application should be disposed of along with the claim petition and with the pronouncement of Award”.

30. In any case, the Arbitral Tribunal while awarding damages in favour of the respondent no.1, has placed reliance on Clause 14.2 (IV) of DCA as also Illustration (n) to Section 73 of the Contract Act and has held as under:

“Under the DCA, if the Claimant opts for redemption, the respondents have to pay the redemption amount to the Claimant. In other words, it is an agreement to pay money. In terms of section 21 (4) of Specific Relief Act, in determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act. Illustration (n) to Section 73 of the Contract Act deals with breach of a contract to pay money. It says “A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving money on that day, unable to pay his debts and is totally ruined. A is not liable to make good anything except the principal sum he contracted to pay together with interest up to the day of payment.” This illustration makes it clear that in case of an agreement to pay money, even if a party suffers due to non payment of money, he can only seek payment of the money due along with interest and nothing more and nothing less. In other words, he does not have to prove any loss or damages

due to default in paying the money as per the contract and even if he proves loss or damages, he is entitled to only the money due with interest. Therefore, in line with this illustration, the Claimant does not have to quantify any loss or damages due to non redemption of the OCPS and it is entitled to the redemption amount as damages along with interest on account of the failure of the company to redeem the OCPS. At this juncture, it may be relevant to refer to the argument of the learned counsel for the respondents as recorded earlier as a part of his argument "If at all, there is a remedy, it could be only for damages under section 73 of Contract Act, which also would be inadmissible because of limitation. Further, the Claimant has also not invoked section 73 of the Contract Act". This amendment application has been filed under proviso to section 21 (5) of Specific Relief Act and as per sub section (4), the Court has to be guided by Section 73 of the Contract Act. Hence, there is no need to separately invoke section 73 of the Contract Act. Regarding limitation, the Tribunal has already held that the application is within time. Further, the Tribunal also notes that the respondents have taken a stand as recorded earlier that "Clause 14. 2(IV) provides a clear remedy of seeking for damages in case of non-redemption of the preference shares by the Respondent Company resulting in the Breach of the DCA. Hence, when remedy for breach has been provided in the DCA itself, the claim for specific performance is not maintainable." This would show that the respondents themselves admit that the Claimants can seek damages as provided in Clause 14.2(IV). In the amendment application, the Claimant has sought damages only under this Clause."

31. In the present case as the DCA itself, in Clause 4 (III) thereof, provides the premium on each share that is to be redeemed. This, therefore, was the most reasonable and fair measure of damages suffered

by the respondent no.1 due to breach of the DCA by the petitioner. As the relief of specific performance could not be granted to the respondent no.1 for no fault of respondent no.1, the quantification of the damages by the Arbitral Tribunal cannot be held to be perverse or unreasonable.

32. In **Babu Lal** (Supra), the Supreme Court has held that procedure is made to advance the cause of justice and not to retard it. The insistence of the petitioners for opportunity to file Statement of Defence to the amended Statement of Claim and to lead evidence, is only an insistence on completion of a formality. In the present case, no further evidence was filed in support of claim for damages, but the terms of the DCA itself were sufficient for proving the damages suffered by the respondent no.1 due to breach of the terms thereof and therefore, the insistence of first filing the Statement of Defence to the amendment and then calling upon the respondent no.1 to lead evidence, would have been a mere formality. Further, as recorded above, it was the statement of the learned counsel for the petitioners itself that the Arbitral Tribunal should dispose of the amendment application alongwith the final Award. Petitioners cannot now be heard to complain against the Award merely because it has gone against the petitioners.

33. Learned senior counsel for Kamal Karmakar has further argued that in any case, Mr.Karmakar was neither a necessary nor proper party in the arbitration proceedings, therefore, the claim of specific performance sought for by the respondent no.1 could not have been maintained against Mr.Karmakar. He further submits that the Arbitral

Tribunal has erred in making Mr.Karmakar jointly and severally liable in the Impugned Award.

34. I have considered the submissions made by the learned counsel, however, find no merit in the same.

35. The Arbitral Tribunal has rejected the application filed by Mr.Karmakar under Section 16 of the Act *inter alia* observing as under:

“Further, even though it is true that it is the company which has to redeem the preference shares yet the very fact that in Clause 14.2. (IV) of DCA, R-2 had agreed to be made liable for damages in case of default by the company to redeem the preference shares, shows that he had undertaken to ensure that the company redeems the preference shares. The Tribunal notes a very important aspect that all the correspondences relating to redemption had been between the Claimant and R-2. From the correspondences it is not clear whether, R-2 had sent the e-mails in his capacity as the MD representing the company or in his capacity as the Principal shareholder. When the optionally convertible preference shares had been issued to the Claimant under the authority of the Board and the shareholders, the rejection of the request of the Claimant for redemption should have been approved by the Board. The letter of refusal does not indicate that the decision to refuse was that of the Board. Even in the pleadings there is no averment that the Board of the company had taken the decision to refuse redemption. It is only R-2 who can answer these issues. Therefore, he is not only a proper party, being a signatory to the DCA, he is also a necessary party without whose presence, the claim cannot be adjudicated.

Regarding the jurisdiction of the Tribunal to determine any claim against R-2, the Tribunal has already given a finding that the amendment application, the Claimant has sought the relief of passing an award directing the Respondents jointly and severally to pay the damages in terms of Clause 14.2. (IV) of DCA. It is important to note that in the DCA, only in case of default to

redeem, R-2 has been made liable for damages and not in case of any other default. Therefore, R 2 seems to have consciously undertaken the obligation to ensure that the company redeems the OCPS if sought for by the Claimant.

This being the case, the Tribunal does have jurisdiction to determine the claim against R-2. Accordingly, the application filed by R-2 under section 16 of C&A Act is dismissed.”

36. I am in full agreement with the finding of the Arbitral Tribunal. Mr.Karmakar was not only the principle shareholder of the company but was also a signatory to the DCA. Clause 14.2 (IV) of the DCA makes the principle shareholder liable to pay damages to the investor/respondent no.1 for breach of the Agreement. The respondent no.1 had filed its Statement of Claim alleging such breach and, therefore, Mr.Karmakar was rightly made a party to the arbitration proceedings. As far as the Award making Mr.Karmakar jointly and severally liable for payment of damages to the respondent no.1 is concerned, the same is also in terms of clause 14.2 (IV) of the DCA and therefore, cannot be faulted.

37. It is further contended by the learned senior counsel for the petitioners that the Arbitral Tribunal has erred in directing the OCPS to be returned to the Company. It is submitted that without there being a buyback, the OCPS cannot be transferred to the company. It is further contended that, in case, the Company was to issue the said shares to any individual, it would be bound to redeem those shares in the future making additional payment for the same liability causing unjustified damages to the Company.

38. I do not find any merit in the submissions. The Arbitral Tribunal, having awarded damages to the respondent no.1, has rightly directed the respondent no.1 to hand over the preference share certificates along with the signed transfer forms to the petitioners. With this direction, the shares are not transferred back to the Company. In any case, what the petitioners would do with such share certificates and transfer forms, cannot have any effect on the claim of damages awarded to the respondent no.1 and the challenge to the Impugned Award on this ground cannot be sustained.

39. The last submission made by the counsels for the petitioners is that the Arbitral Tribunal has erred in directing the petitioners to pay interest from 03.07.2011, being the date on which the OCPS became due for redemption. It is submitted that no direction for payment of interest could have been granted before the date of the Award as it is only with the Impugned Award that the Arbitral Tribunal allowed the application of the respondent no.1 seeking amendment to its Statement of Claim now claiming damages in lieu of specific performance.

40. On the other hand, counsel for the respondent no.1 submits that the Arbitral Tribunal has rightly granted interest in favour of the respondent no.1 from 03.07.2011 as the OCPS had become due for redemption on that date.

41. I have considered the submissions made by the counsels for the parties.

42. In the present case, the respondent no. 1 had sought redemption of the OCPS with effect from 03.07.2011 vide its letter dated 10.05.2011. This was in terms of the DCA. The petitioners were in breach of the terms of the DCA when they failed to redeem the OCPS on the due date. Therefore, no fault can be found in the directions of the Arbitral Tribunal directing the petitioners to pay interest with effect from 03.07.2011.

43. Under Section 31(7)(a) of the Act, the Arbitral Tribunal has been empowered to award interest at such rate as it deems reasonable for the whole or any part of the period between the date on which the cause of action arose and the date on which the Award is made. In the present case, the Arbitral Tribunal was, therefore, within its jurisdiction to award interest in favour of the respondent no. 1 with effect from 03.07.2011 and no ground within the limited scope of interference with the Arbitral Award permissible under Section 34 of the Act has been made out by the petitioners.

44. In view of the above, I find no merit in the present petitions and the same are dismissed, with no order as to costs.

NAVIN CHAWLA, J

SEPTEMBER 25 , 2018/Arya/RN