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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 30th January, 2020
Pronounced on: 07th February, 2020**

+ O.M.P. (COMM) 316/2017

SPORTY SOLUTIONZ PVT. LTD. THROUGH ITS CHIEF
EXECUTIVE OFFICER MR. ASHISH CHADHA Petitioner
Through : Mr.Sanjeev Anand and Mr.Suresh
Khadav, Mr.Varun K.Bala,
Advocates.

versus

BADMINTON ASSOCIATION OF INDIA
THROUGH ITS PRESIDENT & ANR. Respondents
Through : Mr.Nalin Kohli, Ms.Vishakha
Ahuja and Ms.Nimisha Menon,
Advocates for respondents No.1
and 2.

+ O.M.P.(I) (COMM.) 362/2017

SPORTY SOLUTIONZ PVT. LTD. Petitioner
Through : Mr.Sanjeev Anand and Mr.Suresh
Khadav, Mr.Varun K.Bala,
Advocates.

versus

BADMINTON ASSOCIATION OF INDIA
AND ANOTHER Respondents
Through : Mr.Nalin Kohli, Ms.Vishakha
Ahuja and Ms.Nimisha Menon,
Advocates for respondents No.1
and 2.

**CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA**

YOGESH KHANNA, J.

O.M.P. (COMM) 316/2017

1. This petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as '*the Act*') challenging the award dated 08.05.2017 passed by the sole arbitrator.

2. The brief facts as alleged by the petitioner are:-

a) Respondent no.2 approached the petitioner for itself and on behalf of respondent no.1 to associate the petitioner in holding annual badminton tournaments in the country on a modest scale. The petitioner offered to respondent no.2 and respondent no.1 through respondent no.2 the Indian Badminton League (IBL) format, agreed to develop an organized Indian Badminton League (IBL) with all commercial rights with the petitioner against payment of rights fee to the respondent No.1 and respondent no.2 with a condition the intellectual property rights of the Indian Badminton League (IBL) shall vest exclusively in the petitioner for perpetuity, to which respondent no.1 and respondent no.2 agreed;

b) On 22.10.2012 a memorandum of understanding (MOU) was signed between the Petitioner and the respondents No.1 & 2 on the lines of the approved draft and the agreement arrived at between them, with regard to the initiation, development and organizing of the Indian Badminton League. On 10.11.2012 a formal tripartite agreement was executed between the petitioner and respondents No.1 & 2 assigning role and obligation of the parties. On 09.11.2012, 04.12.2012 & 20.07.2013 the petitioner applied for registration of trademark and logos "Indian Badminton League" and "IBL" in its name.

c) On 16.07.2013 new agreement was entered into between the petitioner and the respondents. Under this agreement, *interalia*:-

- (i) the petitioner was granted rights to (a) develop and organize IBL;*
- (b) concept, format and structure of IBL.*
- (ii) during the subsistence of the agreement, all (following) commercial rights in or in relation to IBL shall vest in the petitioner.*
- (iii) in terms of Clauses 4 & 5 of the agreement Rights fee was to be paid by the petitioner to the respondents.*

(iv) under clause 9.3 the respondents have undertaken that no other professional/amateur tournament/ sports event similar to or competing with IBL shall be initiated, started, entertained or sanctioned by the respondents.

(v) under clause 9.4 the respondents have undertaken to fully protect and promote the rights and interest of the petitioner and IBL without exception and not to take any steps or actions that could dilute or detract from the value, exclusively or goodwill attaching to IBL.

(vi) under clause 11.2 the respondents could terminate the agreement only by giving 90 days advance notice in writing to the petitioner and also if the petitioner has committed any breach of any of the terms of the agreement and the said breach has not been remedied within 30 days of the receipt by the petitioner of written notice given by the respondents requiring it to do so.

(vii) Under Clause 12, after the period of 10 years, the respondents were obligated to first offer renewal of the agreement for a term of ten years to the petitioner on the terms to be agreed between the parties and only if the parties failed to agree on the terms of renewal the respondents were free to contract with the third parties;

d) The first IBL was held between 14.08.2013 to 31.08.2013. It emerged as the greatest badminton tournament in the history of the sport across the globe. The Petitioner earned its goodwill with the name "Indian Badminton League" and the same became synonymous in the sport of badminton as IBL with the petitioner's efforts. The BAI announced the IBL 'Season 2' would be held between 30.09.2014 to 15.10.2014.

e) On 22.04.2014 the respondent No.1 cancelled IBL altogether in the year 2014 (30.09.2014 to 15.10.2014 - The dates fixed for the IBL) and the next tentative dates fixed were January-February, 2015 without any prior notice or consultation with the Petitioner.

f) On 24.04.2014 the petitioner protested to the aforesaid change of dates and requested the respondent no.1 to stick to the dates earlier announced and also requested for convening a meeting of the Governing Council at the earliest. The Petitioner also pointed out currently IBL was still a loss - making exercise for the company as profits could be expected only after a gestation period of three years.

g) The respondent no.1 vide in its e-mail dated 26.04.2014 replied to the petitioner's above e-mail dated 24.04.2014 and stated that it had no time till 2nd June and was busy in World Badminton event and general election to be held in the country. Merely, for the reason the petitioner had made a statement earlier that it had made a loss in IBL-1 and were

also foreseeing loss in 2nd & 3rd IBL, without any complaint or any allegation whatsoever against the petitioner, asked the petitioner to give a Bank Guarantee of ₹50 crores.

h) Governing Council meeting was held which is alleged to have resolved to amend Clause 8 of the Agreement dated 16th July, 2013 by invoking Clause 27 of the said agreement, providing for petitioner to give Bank Guarantee of ₹50 crores or *lesser* amount to the satisfaction of respondent No.1. It is claimed by the respondents that it was resolved at the said meeting that the petitioner shall furnish bank guarantee of ₹ 50 crores within 15 days of the said meeting. The petitioner submits no such resolution was tabled in the meeting and there was no voting on any such resolution to furnish bank guarantee at the meeting of Governing Council dated 20.09.2014.

i) On 31.01.2015 the petitioner issued a letter to the Respondent No.1 i.e. BAI requesting them to announce dates of IBL season 2 by 10.02.2015, else they will be forced to take legal recourse. The respondent No.1 responded, vide e-mail dated 01.02.2015 stating therein the Petitioner would have to deposit a bank guarantee of ₹50 crores, else the agreement dated 16.7.2013 would be terminated. It was alleged in the said letter the alleged "Governing Council" in its meeting dated 20.09.2014 had approved of the demand for the bank guarantee from the petitioner.

j) The petitioner vide email dated on 10.03.2015 agreed to furnish bank guarantee of Rs.15.00 Crores with request to convene the Governing Council meeting to approve the petitioner's proposed payment schedule for bank guarantee in the following manner as under:

- (a) six crores within three weeks of the acceptance of the proposal; and
- (b) nine crores for the players contact fee, two weeks prior to the IBL players auction.

k) on 21.04.2015 instead of responding to the petitioner's aforesaid email dated 11.03.2015 and convening a Governing Council meeting, on 21.04.2015, the Respondent no. 1 sent a formal letter terminating the contract dated 16.07.2013 in complete violation of natural justice and committed breach of contract by illegally terminating the contract.

l) On 29.05.2015 petitioner filed a petition being OMP No.285/2015 under Section 9 of the Act for interim measures challenging the termination letter dated 21.04.2015 and prayed for the respondents to announce the IBL Season-2 dates and for restraining the respondents from entering into contracts with any other party for conducting IBL Season-2. This Court vide order 29.05.2015, in view of the statement made by the Counsel for the respondent no.1 that the original schedule for Season-2 had lapsed and fresh schedule, was yet to be announced, was of the view that no interim relief could be granted at that stage to the petitioner and accordingly dismissed the petition with liberty to the petitioner to agitate the issue before the appropriate forum. On 30.09.2015 respondent no.1 announced the conducting of IBL Season-2 from January 2 to 17 of 2016 and auction of the six franchisee teams were scheduled for 20.09.2015.

m) On 30.10.2015 petitioner filed an application under Section 9 of the Act in this Court for restraining the respondents from conducting the same. As, simultaneously, arbitration agreement had been invoked by the petitioner and the respondent no.1 had appointed Mr. Justice V.N. Khare, Former Chief Justice of India as the sole arbitrator to adjudicate the dispute between the parties, pursuant to the orders passed by this Court, the said Section 9 petition was treated as application under Section 17 of the Act to be heard by the said Arbitral Tribunal.

n) On 03.12.2015 all of a sudden in breach of the Agreement dated 16.07.2013, the respondent no .1 issued press statements that it had decided to "rechristen the Indian Badminton League (IBL) as Premier Badminton League (PBL), which will be held from January 2 to 17, 2016. As per the said press release the Premier Badminton league (PBL) was to commence on 02.01.2016 in Mumbai. The Learned Arbitral Tribunal vide order dated 28.12.2015 decided the said application but refused to grant the injunction prayed for. The said order of the Learned Arbitral Tribunal was confined/ limited to, as to whether the respondents should be enjoined from conducting the IBL Season-2 during 02.01.2016 to 17.01.2016. The sole basis of the Learned Arbitral Tribunal passing this order dated 28.12.2015 as recorded in it, was that enormous money has already been spent for organizing the tournament which is to start from 02.01.2016. Respondent no.1 proceeded to organize and hold badminton tournaments under the name Premier

Badminton League (PBL) during January 2 to January 17, 2016 and irreparable loss and damage was caused to the Petitioner.

o) On 08.01.2016 the petitioner filed its Statement of Claim on 08.01.2016 in the arbitration proceedings seeking declaration qua the termination of the Agreement dated 16th July, 2013 by the Respondents as null and void. The petitioner claimed specific performance of the said agreement and order of restraining the respondents from holding any badminton tournament under the name of 'Premier Badminton League' or 'PBL' or any other name. The petitioner claimed Rs.21,26,57,871/- towards the expenses incurred by it during the financial year 2012-13, 2013-14 & 2014-15 and interest thereon @ 24% per annum and Rs.18,335 lacs towards loss of profit which the petitioner would have earned during 10 years contractual period. On 01.05.2016 the respondents filed their reply to the statement of claim along with counter claim.

p) The petitioner came across a news item published on <http://www.televisionpost.com/news/bai-awards-longterm-rights-of-premier-badminton-league-tosportzlive/> dated 16.09.2016 announcing that the respondent no.1 has awarded long term rights of its franchise based Indian Badminton League (IBL) which was rechristened as Premier Badminton League (PBL) for year 2017. The petitioner immediately filed an application under Section 17 of the Act on 24.10.2016 and prayed for interim measures. Vide order dated 14.11.2016 the learned Arbitrator rejected the petitioner's said application under Section 17. The petitioner filed an appeal ARB.A.(COMM.) 43/2016 challenging the same. This Court vide its order dated 23.03.2017 held there is no occasion at this stage for the Court to observe anything or pass any orders in that regard as pointed out by the respondent that the next PBL would be held by the end of this year and outer limit for passing arbitral award is 13.05.2017.

q) On 08.05.2017 the learned Arbitral Tribunal made the Award wherein it is held the termination of the Agreement dated 16.07.2013 the respondents vide notice dated 21.04.2015 although, not in terms of Clause 11 of the 2013 agreement, subject to the Respondent No.1 paying compensation of Rs.2.5 crores to the Petitioner within a period of three months from the date of delivery of the award. It is alleged vide the said Award, the learned Arbitral Tribunal wrongly held the 2013 agreement

was no longer subsisting between the parties and had rejected all other reliefs/claims sought by the petitioner in the statement of claim. Vide the said award the learned Arbitrator has also rejected the counter claims filed by respondent no.1, hence this petition.

3. The learned counsel for the petitioner has referred to the tripartite agreement dated 16.07.2013 executed between the petitioner and the respondents No.1 & 2 wherein all the rights qua the events were given to the petitioner for holding events for ten years and to commercially exploit the events by earning revenue in every possible way through banners, media, advertisements etc and in turn they were bound to pay fees which was, initially, for the first year at Rs.1.00 Crores and later was subject to increase.

4. A few relevant clauses of the contract run as under:-

"1. Definitions and Interpretation

"Commercial Rights" means the right to access, control, exploit, market, promote, advertise, transfer, acquire and sub-license including without limitation all public exhibition rights to property for a period of 10 years commencing from 2013 and ending the year 2022.

"IBL" shall mean the annual domestic badminton tournament, organized in various Indian Cities, under the name of Indian Badminton League.

"Governing Council" means the supreme committee of the Indian Badminton League established by BAI to establish and oversee the operations of the league. The Governing Council shall consist of 11 members, out of which 6 members shall be of BAI including the President, BAI, who shall be the Chairman of the Governing Council and out of the remaining members 3 would be from SSPL and 2 will be of MBA.

"Term" means the period of 10 years commencing from 2013 and expiring at the end of the year 2022.

"Territory" means the entire world.

In this Agreement, unless otherwise specified:

a. the list of contents and headings are for ease of reference only and shall not be taken into account in construing this Agreement;

2. Grant of Rights

2.1 In consideration of the payment of Rights Fee, BAI and MBA hereby grants to SSPL during the TERM the following rights, throughout the TERRITORY.

2.1.1. Develop and Organize IBL

SSPL shall have the sole and overall right to conceptualize, develop and organize IBL.

2.1.2. Concept, format and structure of IBL SSPL shall have the sole right to determine the concept, format and structure of IBL. SSPL shall have right to modify, amend or alter the format and structure of IBL from time to time, as SSPL may deem fit, subject to Clause 7.1.

2.1.3 Franchise and Teams

2.1.7 Boarding, Lodging and Transportation

2.1.8 Commercial Rights

During the subsistence of this Agreement, all commercial rights in or in relation to IBL shall vest in SSPL.

SSPL shall have the following rights:-

a. Rights to earn revenues and fees in the process of recruitment of players, appointment of franchises, issue of entry tickets to match venues and any all earning opportunities arising from on in relation to the organization and holding of IBL matches

b. Broad-casting, Television, Radio, Mobile, Internet and Web Rights in relation to images, photos, audio, video, audio-video, cinematograph content in relation to IBL or in relation to any match comprised in IBL or in relation to another event or element that relates to IBL or to the matches conducted under. IBL or in relation to the name and likeness of any Franchise, Team and Player.

2.1.9 Intellectual Property Rights

During the subsistence of this Agreement, SSPL shall own following:-

a) SSPL shall solely decide and determine other names, marks, logos, slogans, brands etc. to be associated with IBL.

b) SSPL shall solely decide and determine the names, marks, logos, slogans, brands etc. to be associated with each annual tournament and/or each match and/or each even of IBL.

c) SSPL shall solely decide and determine the names, marks, logos, slogans, brands etc. to be associated with each Franchise.

d) SSPL shall be entitled to enter into co-branding arrangements with sponsors, suppliers, Franchises etc.

e) SSPL shall exclusively be entitled to register the names, marks, logos, slogans, brands etc. to be associated with IBL, any tournament, matches or events of IBL

f) SSPL shall own exclusive copyright an all footage and feed, including still images, video, audio-visual, text of the matches and event in the IBL.

4. RIGHTS FEE AND PAYMENT SCHEDULE

4.1. In consideration of grant of the exclusive rights SSPL shall pay the Rights Fee, in the Designated Account of BAI MBA equally in accordance with the below payment schedule specified in Clause 5.

5. PAYMENT SCHEDULE

5.1 It is agreed between the parties that SSPL shall pay rights fee on yearly basis. Out of the 100% of the rights fee as detailed below, the SSPL shall pay 50% of the agree amount before 30 days of the start of first match of IBL and remaining amount of 50% of the rights fee within 60 days of the completion of the annual league season.

<i>Date</i>	<i>Amount in lacs to be paid to BAI:</i>
2013	100
2014	150
2015	150
2016	200
2017	200
2018	200
2019	300
2020	500 or 50% of the profit as determined by the Governing Council whichever is higher.
2021	750 or 50% of the profit as determined by the Governing Council whichever is higher.
2022	1000 or 50% profit as determined by the Governing Council whichever is higher.

8. SSPL'S GENERAL OBLIGATIONS

8.1 SSPL shall make timely payment to BAI.

8.2 SSPL shall be responsible for the management of the event.

8.3 SSPL shall endeavour to find out franchisees for the purpose of this agreement however, the selection of the Franchisees shall be subject to approval of the Governing Council.

8.4 Licensing of Media and other rights in relation to IBL, its tournament, matches, events etc. shall be done solely by SSPL.

8.5 SSPL shall endeavour to get all possible sponsorships.

8.6 SSPL undertakes to plan tournament scheduling and re-scheduling in consultation with the Governing Council.

8.7 SSPL shall make all necessary arrangement for players boarding and lodging.

8.8 All events related press conferences will be arranged and organized by SSPL.

8.9 All sale and distribution or tickets shall be done exclusively by SSPL.

8.10 All disciplinary action if any against the Franchise shall be done by SSPL provided that where it involves an issue relating to rules and regulations of the BAI, the disciplinary action shall be taken in consultation with the Governing Council. Further all disciplinary action if any against the players etc shall be done by BAI/MBA, as the case may be.

9. BAI AND MBA'S GENERAL OBLIGATIONS

9.3. BAI and MBA undertake that no other professional/ amateur tournament/sports event similar to or competing with IBL shall be initiated, started, entertained, permitted or sanctioned by BAI and/or MBA.

9.4 BAI and MBA undertake to fully protect and promote the rights and interest of SSPL and IBL without exception and to take any steps or actions that could dilute or detract from the value, exclusivity or goodwill attaching to IBL.

11. TERMINATION

11.2 BAI and MBA may at any time by giving 90 days advance notice in writing to SSPL, terminate this Agreement in any of the following events:

- a. if SSPL commits any breach of any of the terms, conditions and warranties contained herein and such default or breach is not remedied within 30 days of receipt by SSPL of written notice requiring it to do so; or
- b. xxxx.

26. Governing Law

26.1 This Agreement shall be governed by and construed in accordance with the laws of India.

26.2 Before resorting to arbitration under clause 26.3, parties shall attempt in good faith to amicably resolve any dispute arising out of relating to this Agreement promptly by good faith negotiations for a period of ten (10) days from date of issuance of written notice that a dispute has arisen by any party to the other parties.

26.3 All disputes and differences of whatsoever nature, whether existing or which shall at any time, arise between the parties hereto touching or concerning the agreement, meaning operation or effect thereof or to the rights and liabilities of the parties or arising out or in relation thereto whether during or after completion of the contract or whether before after determination, foreclosure, termination or breach of the agreement (other than those in respect of which the decision of any is by the contract, expressed to be final and binding) shall be referred to arbitration by a sole arbitrator to be appointed by the President, BAI and proceedings will be in accordance with the Arbitration and Conciliation Act, 1996 as amended from time to time. The place of arbitration shall be New Delhi, India. The language of arbitration shall be English.

26.4 In relation to matters within jurisdiction of courts consistent with the Arbitration and Conciliation Act, 1996 parties shall submit to the exclusive jurisdiction of the courts at New Delhi.

27. EMERGENCY POWER OF THE GOVERNING COUNCIL OF IBL:

Notwithstanding anything contained in this Agreement the Governing Council of IBL shall have unfettered and unrestricted right, power/ authority to alter/modify any of the clause of this agreement, which shall be binding on the parties. Further, in case of any dispute or difference between the parties as to the interpretation of any Clause of this Agreement, decision/opinion of the President, BAI shall be final and binding on the parties."

5. It is alleged by the learned counsel for the petitioner the first event of IBL was held from 14.08.2013 to 31.08.2013 and it was a grand success. However, later though the dates for the second IBL were

announced by the respondent No.1 from 30.09.2014 to 15.10.2014, but were cancelled and further dates in January 2015 and February 2015 were given, despite it was to be held on annual basis yet again the said dates were cancelled. The petitioner protested claiming *interalia* it had entered into various agreements with dealers, advertisers, broadcasters, vendors etc. so if it not to be made an annual event it would suffer losses and sent an email dated 24.04.2014 to the respondents in this regard. The relevant portion of said email is:-

“e) Yonex - Sir, as you are aware, the league was a loss making exercise for us in year One. In year two and three too, we do not foresee the league making money. We would consider the league a success even if we are able to break even with our operational costs. We are ready to sit with Yonex under your guidance and iron out any issues amicably. Our only request is that the relationship should not question the commercial viability of the league and should not be one way.”

6. The respondent No.1 replied vide its email dated 26.04.2014 and it noted:-

“Further, in response to the other contentions of your email under reply we have to say that we are shocked and deeply bothered and concerned over your statement that you have made loss in IBL 1st and you are foreseeing the loss in IBL 2nd and IBL 3rd as well, and in this regard the following points are relevant:-”

7. The learned counsel for the petitioner argued it was never a term of contract which may authorise the respondents No.1 & 2 requiring petitioner to pay a sum of Rs.50.00 Crores and it put a great financial burden upon it. The learned counsel for the petitioner referred to annexure P-30 (page No.548) written by the respondent No.1 to the President of the Badminton World Federation wherein the respondent No.1 rather stated as under:-

“.....Badminton World Federation should look into this event with a lenient and different view granting discounts in Financial consideration and extend their whole hearted support Because this is

the first experiment of its kind in World Badminton wherein a lots of commercial interest and financial risks are at stake. The prospective sponsors still have reservations to entirely look at Badminton as "Potential Sport of Commercial interest".

And another email dated 25.12.2015 sent by respondent No.2 to respondent No.1 note:-

"Thereupon we decided to approach the professional event Management companies and explored the possibility of commercial success of this proposed IBL. The companies approached were Total Sports Asia, Mumbai, Percept, Mumbai one sports logistics company from Delhi and Sporty Solutionz, Mumbai/Delhi/Singapore. Though no one has come forward on their own except Sporty Solutionz. Considering all the above facts and luke warm response received, we decided to go ahead with Sporty Solutionz who, we found to be quite competitive to deliver."

8. It is argued by the learned counsel for the petitioner firstly the respondent No.1 changed the date of the event unilaterally and secondly asked the petitioner to furnish a bank guarantee for a sum of Rs.50.00 Crores, per minutes of an alleged meeting of the Governing Council on 20.09.2014. It is argued the minutes of the said meeting are forged and fabricated; the petitioner neither attended the said meeting nor signed its minutes. In the said minutes the respondents No.1 & 2 amended initial agreement dated 16.07.2013 and rather added clause No.8.1.1. The minutes dated 20.09.2014 note:-

*"The Governing Council in order to protect and safeguard the interest of players, officials, franchisees, BAI and other stake holders of IBL and also to save the existence of brand IBL resolved to invoke its emergency powers as envisaged under Clause 27 of the agreement dated 16.07.2013 and to alter / modify the existing Clause 8 of the agreement dated 16.07.2013, which stipulates the SSPL's general obligations/ to the following effect: -
"8.11 SSPL shall furnish to BAI a bank Guarantee of Rs.50,00,00,000/- (Rupees Fifty Crores Only) or of any lesser amount to the satisfactions of BAI duly issued by only nationalized bank."*

9. It was argued the said minutes are nothing but a sham document.

10. The learned counsel for the petitioner argued the resolution dated 20.09.2014 (Annexure P-12) is a forged document though stated to have passed in the presence of six people, including Mr.Ashish Chadha, CEO of the petitioner. However, it was argued though Mr.Chadha was present in the meeting, but the proposal of payment of Rs.50.00 Crore or its equivalent bank guarantee was never passed in his presence and neither there was any emergency to invoke powers under clause No.27 of the agreement dated 16.07.2013. It is alleged a decision *qua non-furnishing of bank guarantee of Rs.50.00 Crores within 15 days from 20.09.2014 would be construed as a serious breach of the terms and conditions of the agreement dated 16.07.2013*, was never taken.

11. The learned counsel for the petitioner also pointed to Annexure P-11, an email dated 26.04.2014 sent by Dr.Vijay Sinha to the petitioner wherein he demanded of his own an amount of Rs.50 Crores and it rather noted such decision was taken on 26.04.2014 and not on 20.09.2014 - on which date the resolution is stated to have been allegedly passed. Reference was made to Annexure P-26 a letter dated 08.10.2014 wherein the respondent had asked the petitioner to furnish Bank Guarantee of Rs.50.00 Crore within 15 days *per* decision dated 20.09.2014. However, vide Annexure P-17 *viz* letter dated 01.02.2015 (email) the demand was brought down to Rs.15.00 Crore, payable within 15 days. The said letter *inter alia* notes :-

“In view of your repeated requests and persistent deliberations to reconsider the matter, the BAI, in the larger interest of the game of badminton and also to save the IBL, reconsidered the matter, granted relaxation in the amount of the bank guarantee and agreed to your offer that the SSPL shall furnish a bank guarantee of INR 15 Crores issued by some nationalised bank on the format of the bank guarantees

as provided by the BAI. Thereafter, a format of bank guarantee was emailed to you by the undersigned. However, instead of furnishing the bank guarantee you have again started making highly unwarranted communications to anyhow run away from your responsibility."

However, it was argued the petitioner never agreed to it voluntarily and alleged *when* a decision to reduce the guarantee to Rs.15.00 Crore was taken and by *whom* was never mentioned in the letter. However, admittedly, a letter dated 10.03.2018 (Annexure P-18) was sent by the petitioner wherein it agreed to pay Rs.15.00 Crores in two trenches i.e. Rs.6.00 Crores and Rs.9.00 Crores. The learned counsel also referred to the email (Annexure P-16) sent on behalf of the petitioner to the respondent No.2 on 31.01.2015 which *inter alia* note:-

I still remained optimistic that good sense will prevail. I shared all my feelings with you. Your moral support to my logical and Justified approach gave me confidence, I did try and negotiate with Dr Akhilesh Das Gupta on possibilities of allowing the IBL Season 2 to happen. I again convinced myself to yet again quietly surrender to another unwarranted and unlawful demand for saving the league that I have created and cared for like the baby. I was prepared to bear anything possible and walk any length possible to save my baby. This emotional connect forced me to accept Dr Akhilesh Das Gupta'S revised demand for INR 90,000,000 (rupees nine crore) guarantee money for ensuring timely payment to players. I felt all hurdles are cleared and it's time to work smoothly for the second season of IBL on yet again revised dates of April 5 to 22, 2015."

12. Hence, it was argued the guarantee was imposed upon the petitioner without any resolution being tabled in the meeting or without any voting on it. Qua the emergency power per Clause No.27 (supra), the learned counsel for the petitioner argued one needs to exercise such powers only in an *emergent* situation, but here it was none. It was argued right from filing of the statement of claim the petitioner has been agitating the resolution is a forged one, but no decision has been given by the learned Arbitrator on it and award was passed presuming the resolution is valid. It is argued since there was no meeting of minds on OMP(COMM) 316/2017 and OMP(COMM) (I)362/2017

payment of Rs.50.00 Crores and since there was no discussion and since in its pleadings the petitioner has denied such resolution dated 20.09.2014, so also in its admission-denial; the learned Arbitrator ought not to have relied upon the same; more so when though the resolution was exhibited as Ex.RW1/N, but the respondent did not produce its original till the end despite order dated 06.02.2017 of the learned Arbitrator for its production.

13. The learned senior counsel for the petitioner also referred to letter Ex.P27 dated 08.10.2014 to say it contains various other decisions, allegedly, taken in the meeting dated 20.09.2014, but such decisions were never included in annexure P-12, hence is forged.

14. Let us see as to how the learned arbitrator has dealt with this argument in impugned award viz:-

“8.30 Lastly, Mr.Anand argues that the minutes of the GC meeting dated 20th September, 2014, whereby sub - clause 11 was incorporated in Clause 8 of the 2013 Agreement, are fabricated and false. To substantiate the said argument, Mr. Anand relies upon the letter dated 08th October, 2014 written by SAL to the Claimant. The relevant part of said letter is reproduced as under:-

"In this regard, it is to remind the issues regarding representatives of SSPL in the Governing Council has already been discussed in length in the meeting of Governing Council dated 20.09/2014 at the instance of Mr.Ashish Chadha when he produced a copy of the resolution passed in the meeting dated 18.08.2014 if the Board of Directors of Sporty SoLutionz Pvt Ltd appointing Mohammad Azharuddin and Mr.Pradeep Kumar as representatives of SSPL along with Mr. Ashish Chadha and it was resolved that only those persons can represent the SSPL in the governing Council who are directors or stake holders at SSPL:"

It is argued that the said discussion and' resolution, which took place in the meeting dated 20th September, 2014, and are acknowledged by the Respondents themselves find no mention at all in the minutes of meeting produced by the Respondents before the Tribunal. It is also argued that despite the Tribunal's directions the Respondents have been unable to produce the Original Copy of the minutes of meeting dated 20th September, 2014. Mr.Anand has also relied upon the cross

examination of the witnesses of SAI as well as MBA, to highlight the inconsistencies with respect to the attendance of the Claimant's representatives in the meeting, and whether unanimous resolutions were passed, if at all. Further, Mr. Anand submits that Mr. T. P.S Puri - BAI's witness, is not the general secretary of the Governing Council and as such cannot have personal knowledge as to the preparation and safe keeping of the minutes. In such circumstances, Mr. Anand submits that these minutes cannot be relied upon, as they do not portray what actually transpired at the meeting. Being a fabricated document, these minutes do not obligate the Claimant to produce the Bank Guarantee, due to the non furnishing of which, the 2013 Agreement has been terminated.

8.31 Mr. Mittal in reply to the Claimant's contention as to fabrication of minutes, states that the copy of these minutes have been relied upon by the witness for Respondent No.1, Mr. T.P.S.Puri and have been exhibited as Ex.RW1/N. The relevant paragraph from the Affidavit of Evidence of Mr. T.P.S.Puri is being reproduced as under:-

26. I further state that the Minutes of the Meeting dated 20.09.2014 were circulated by hand by Dr. Vijay Sinha Member Secretary, IBL Governing Council immediately after the meeting and the same were also passed by all the members of the Governing Council present in the meeting without any objection. The Minutes of the said Meeting are being exhibited as Ex.RW1/N.'

Mr. Mittal further draws the attention of the Tribunal to the Examination in Chief of the said witness by way of which the said Minutes, according to Mr. Mittal have been proved. The relevant paragraph from the Examination in Chief of the witness Mr. T.P.S Puri is reproduced as under:-

"Document referred to in Paragraph 26 of my affidavit is in my knowledge and I am acquainted with this document. It is marked as Exhibit RW1/N.'

8.32 Mr. Mittal submits that an objection to the admissibility of a document is of two kinds: first, an objection that the document itself is inadmissible in evidence, and second, when the objection is not towards admissibility, but to the mode of proof. Mr. Mittal states that the Claimant's objection to these minutes is towards the mode of proof. Although in case of the former, an objection as to admissibility of a document can be taken at a later stage, in the case of a latter, if a document is tendered and marked as an exhibit, the objection as to mode of proof cannot be taken subsequently. It amounts to waiver of objection, Mr. Mittal places reliance on the case of R.V.E. Venkatachala Gounder v. Arulmigu Viswesarasami & V. P. Temple, (2003) 8 SCC 752. The relevant paragraph is reproduced as under:

20. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not (dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit" an objection as to its admissibility is not excluded and is available to be raised

even at a later stage or even in appeal or revision. In the latter case, the Objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit.'

8.33 *Mr. Mittal further submits that the Claimant is estopped from raising any challenge to the minutes of meeting dated 20.09.2014, as the same have been referred to and relied upon by BAI in numerous communications exchanged with the Claimant. However, the Claimant has only disputed these minutes for the very first time before this Hon'ble Tribunal. Mr. Mittal also relies upon Q 161 of the Cross examination of Mr. T.P.S Puri. The said Question and its answer is reproduced as under:-*

Q - 161 - I put it to you that Shri Ashish Chadha did not agree to the furnishing of the bank guarantee by SSPL and opposed the same.

A. That is not Correct. As far as my knowledge is concerned he did not oppose to the said resolution passed in the said meeting.

Mr. Mittal submits that the very question suggests that the Claimant admit that Mr.Ashish Chadha was present in the meeting dated 20th September, 2014.

8.34 *Mr. Mittal further submits that due to an impending dispute between BAI and its Secretary, the original records have not been produced. The Authorised Representative for BAI has made a statement before this Tribunal that the Secretary, who has the entire records is presently behind bars.*

8.35 xxx xxx

8.36 xxx xxx

8.37 *This letter also makes specific reference to the minutes, and to the fact that the CEO of the Claimant, Mr.Ashish Chadha was present in the said meeting. It is pertinent to mention that this document has been produced by the Claimant itself. Further, in the letter dated 10th March, 2015 in which the claimant seeks to respond to this letter on the aspect of the bank guarantee of Rs.15 Crores, the minutes referred to in the aforesaid letter are not disputed by the Claimant. It is the same position in the termination letter dated 21.04.2015. The Tribunal finds that there is no communication by the Claimant disputing the validity of the said minutes, prior to such objection having been taken before this Tribunal. Accordingly, the Tribunal holds that the objection now raised by the Claimant for the first time as to the fabrication of the minutes is a clear after-thought, and deserve to be rejected.*

8.38 *In addition, the Tribunal finds force in the argument of Mr. Mittal, as to the waiver of the objection to mode of proof, which is*

fortified by the case of *R.V.E. Venkatachala Gounder (Supra)*. The Tribunal finds that the Claimant's objection as to the mode of proof was not taken at the relevant and proper time, that is, during the admission of the said document. Hence, the Claimant cannot be allowed to raise such an objection at any stage subsequent to the marking of the document as an exhibit. Keeping in view the entirety of the facts and circumstances in this regard, the Tribunal holds that the challenge to the minutes of meeting dated 20th September, 2014 fails and is rejected.

8.39 For the reasons aforesaid, the Tribunal holds that the incorporation of sub-clause 11 in Clause 8 of the 2013 Agreement is legal and valid, and that the said demand of the Bank Guarantee made upon the Claimant is enforceable.

8.40 Having held that the introduction of sub - clause 11 in Clause 8 of the 2013 Agreement as legal and valid, the Tribunal shall now consider the facts of the case to decide whether the Claimant is in breach of the 2013 Agreement.

Issues 3(b) and 3(c)

8.41 Addressing the issue of breach, Mr.Anand relied upon the various communications exchanged between the parties in this regard:-

- 26.04.2014 – The letter vide which the first demand was made by BAI for a Bank Guarantee for the amount Of Rs. 50 crores. According to Mr.Anand, the said letter does not constitute a notice within the meaning of Clause 11 of the 2013 Agreement as the Governing Council had only incorporated the Sub- Clause 11 to Clause 8 of the 2013 Agreement on 20.09.2014.
- 29.09.2014 – The Governing Council in its meeting passed the resolution and made a demand to the Claimant for the Bank Guarantee of Rs.50 Crores within 15 days thereof.
- 08.10.2014 – Notice by BAI to Claimant stating that the Claimant must furnish BG worth Rs.50 Crores within 15 days of the receipt of that notice.
- 01.02.2015 - By way of this letter, BAI reduced the demand from 50 crores to Rs. 15 crores. Mr, Anand submits that this constitutes a fresh demand and in such circumstances, the letter dated 8.10.2014 becomes irrelevant, and the demand for Rs.50 crores becomes non-existent. Mr.Anand also submits that this demand of Rs. 15 crores is unilateral, and that there is no agreement between the parties to arrive at such an amount further by way of this letter, the Claimant cannot be held to be in breach as the entire issue of Rs.50 crores became non-est and has been waived by the Respondents.
- 10.03.2015- By way of this letter, the claimant agreed to pay to the Respondents Rs.15 crores in two tranches subject to approval by Governing Council. As per Mr.Anand, no response has been received to this counter-offer and thus there has been no agreement between the parties as to bind the claimant to furnish the Bank Guarantee of Rs.15 crores.
- 21.04.2015- The termination letter from BAI to the claimant Mr.Anand submits that even though the 2013 Agreement provided for a

90 day notice. BAI by its termination letter terminated the agreement forthwith, directing the claimant to withdraw with immediate effect, and cancelling all rights and privileges of the claimant with respect to the 2013 agreement.

8.42 Mr. Anand submitted that in addition to his challenge as to the illegality of Clause 8.11, it is clear from the facts of the case that the Respondents waived their demand of the bank guarantee, thus not requiring the claimant to furnish the same. Mr. Anand submits that BAI by its own subsequent demand of Rs.15 crores vide its letter dated 1st February, 2015, nullified the earlier demand of Rs.50 crores. Further, he submits that the reduced demand of Rs.15 crores had been made unilaterally, inasmuch as there was no agreement between the parties to this effect. Further, the counter-offer of the Claimant was not accepted by the Respondents, and hence there was no binding agreement between the parties obligating the Claimant to furnish the said Bank Guarantee."

15. Now the main challenge to the impugned award is on three counts, **a)** resolution being forged; **b)** agreement was never amended; and **c)** the document Ex.RW1/N ought not to have been exhibited.

16. The learned counsel for the petitioner submitted that not only the resolution is forged but there was no occasion for exercise of such emergency power and it could have been exercised only for amending the agreement and not for requiring the petitioner to deposit bank guarantee of Rs.50.00 crores or Rs.15.00 Crores. The learned Arbitrator ignored the source of power for asking of the bank guarantee i.e. the agreement and as there was no amendment to the agreement, the respondent could not have asked for the bank guarantee and the correspondences between the parties show clause No.8.11 which was inserted in the minutes of the meeting dated 20.09.2014 by the respondents later, as is evident from letters dated 08.10.2014 and 01.02.2015, as in both such letters the respondent had insisted the petitioner to provide for the bank guarantee, but never mentioned addition of clause No.8.11 in the tripartite agreement and it was only for this reason the learned Arbitrator vide its

order dated 06.02.2017 had directed the respondent to make available all the original minutes of the meeting, which were never provided.

17. It was argued the letters dated 08.10.2014 and 01.02.2015 of the respondent only speak about the approval of the governing council for asking the petitioner to provide for the bank guarantee which the Governing Council could have only asked if there was an amendment. Hence, the respondents forged the minutes to insert clause No.8.11 in minutes dated 20.09.2014 but then again did not provide for its originals to the Arbitrator.

18. Secondly, it was argued per clause No.11.2(a) of the agreement *if the petitioner had committed any breach of the terms, the respondent ought to have given 30 days notice to remedy such breach.* It is submitted vide letter dated 01.02.2015 the respondents were asked to deposit the bank guarantee of Rs.15.00 Crores by 16.02.2015 and on default the petitioner was to give 30 days' notice per clause No.11.2(a) to remedy such breach and only thereafter the respondents could have given termination notice of 90 days. No such notice was ever given hence the termination is bad.

19. The learned counsel for the petitioner also referred to the cross-examination of respondent no.1 witness Mr.T.P.S. Puri, Vice President (Administration) of respondent no.1:

"Q.34 Is it correct that the Governing Council of IBL also had its meetings?"

Yes.

Q.36 Were the Minutes of Meetings of these Governing Council of IBL maintained?"

A. I will check and come back to the Tribunal.

Q.37 Can you tell who were the representatives of MBA on the Governing Council of IBL?

A. I will verify and come back to the Tribunal.

Q.39 Is it correct that the record of the meetings of the General Body of BAI and of the meetings of the Governing Council of IBL was differently maintained?

A. I will verify and come back to the Tribunal. The witness undertakes to produce the record of relevant years also.

Q. 70 Please see questions No. 34, 35, 36, 37, 38 and 39, 40, 42, 43, and their answer in your deposition dated 15th December, 2016. Can you now give answers the questions No.35, 36, 37, 38, 39, 40, 42, 43?

A. I will check and come back to the Tribunal after a week when I will be able to get the record.

Q. 115 Can you tell now how many meetings of Governing Council of IBL were held during the period 2013-14?

A. We had only one formal meeting held on 20th September, 2014. Besides that we had informal meetings for which there is no record.

Q. 174 Please see para 23 of your affidavit. Is it correct that in this para you are referring to only one meeting of the Governing Council dated 20th September, 2014?

A. Only one formal meeting was held and I am referring only to that.

Q. 175 I put it to you that no minutes of the meeting dated 20th September, 2014 were either prepared or circulated on 20th September, 2014 at the venue as claimed by you.

A. I deny.

Q. 195 I put it to you that you are deposing falsely.

xxxx Mr. Sanjeev Anand before closing the cross-examination stated that the Respondent have filed Photostat copy of the Minutes of Meeting dated 20th September, 2014 and as much as not admissible in evidence.

Counsel for Respondent submits that the said document has already been exhibited as Exhibit RW-1/N at the time of Examination-in-Chief dated 15.12.2016 and no objection as to mode or manner of proof or any other objection qua this document was taken by the Claimant at that stage, therefore, the said objection as to mode and manner of proof cannot be raised at this stage, especially since also the stage for inspection of documents is already over.

Per Tribunal

Under similar circumstances and similar objection taken this Tribunal passed an order on 15.10.2016 whereby the parties were directed to make available the originals at the time of hearing of the arbitration proceedings in view of the fact that the Evidence Act, is not applicable in the arbitration proceedings and to be fair to both the parties I direct that the Respondent shall make available originals of the Minutes of Meeting dated 20th September, 2014 at the time of hearing of this matter."

20. The learned counsel for the petitioner argued the proceedings need to be *fair* to each of the parties *per* Section 18 of Arbitration and Conciliation Act, 1996 and could not have ignored original minutes dated

20.09.2014 and could not have said since those were lying with a jailed employee, were not required to be seen.

21. He referred to various paragraphs of his statement of claims and how the arbitrator dealt with such objections in its award, more specifically, in paras 8.53 to 8.77 as under:

“8.70 The most fundamental question that arises for consideration before the Tribunal, is that where the breach of the 2013 Agreement by the Claimant has been established but in the notice of termination of the 2013 Agreement there is no advance notice of 90 days, what happens to such termination of the 2013 Agreement. On other issues, this Tribunal has inter-alia, recorded a finding that the Claimant is not entitled to the relief of specific performance in view of the fact that it has not averred in the statement of claim and proved, that it was, arid still continues to be, ready and willing to perform its part of the contract that the Claimant has no financial capacity to furnish bank guarantee of Rs.15 crores and that the Claimant has committed breach for not furnishing the bank guarantee within the time provided to it by BAI. Further, the Claimant's Counsel Mr.Anand has stated that the Claimant has not sought any relief for damages in lieu of relief of specific performance having been refused to him. The Claimant's counsel himself admitted that for additional damages under Claim no.6, there is no standard by which the claim can be quantified in terms of money.

8.71 The Tribunal finds that none of the decisions cited by the parties deal with the present situation, where the breach is established, but the notice for termination is not in terms of class 11 of the 2013 Agreement, inasmuch as it fails to provide 90 day advance notice to the Claimant. However in view of the facts and circumstances of the case as noted in paragraph above, in the Tribunal's view, the decision in the case of Indian Oil Corpn. Ltd. v. Amritsar Gas Service, (1991) 1 SCC 533, may be usefully. referred to In Indian Oil Corpn (Supra), the corporation could upon the happening of certain events, terminate forthwith, the contract with Amritsar Gas Service as per clause 27 of the Agreement. In addition the parties mutually could terminate the contract by giving one month's notice as per clause 28 of the Agreement. The Appellant corporation exercised its right to terminate the agreement forthwith under Clause 27, as in its opinion, certain events had taken place to justify the said decision. The dispute as to termination was referred to an Arbitration. The award declared the termination as invalid, as according to the Tribunal, no event had taken place to justify the termination forthwith under clause 27. In addition, the Tribunal awarded specific performance of the Agreement to Amritsar Gas Service. In Appeal, the Supreme Court first held that the Agreement, being determinable, could not be specifically enforced Secondly the Court held that in a case where either party could mutually terminate the agreement by giving 30 days notice under

clause 28, Amritsar Gas Service would only be entitled to loss of earnings for 30 days.

8.72 Applying the ratio of Indian Oil Corpn (Supra) to the present matter, it is seen that the 2013 Agreement is determinable under Clause 11, which provides that either party can terminate the 2013 Agreement by giving advance notice of 90 days upon the other- party committing breach of the terms of the 2013 ,Agreement. The Tribunal has already held that the Claimant was in breach. Since such breach entitled the BAI to terminate the Agreement by giving a 90 day advance notice the Tribunal is of the opinion that the Claimant would be entitled to compensation only for the 90 day period that it was otherwise entitled to as notice period under the 2013 Agreement.

8.73 The next question that arises for consideration is the quantum of compensation the Claimant is entitled to for the notice period of 90 days. Tile Tribunal finds that there is no way to ascertain or compute the compensation in the facts of the present case for such period of 90 days. Admittedly, IBL is a loss making proposition for the first three four years. Further, in such period of 90 days, there is no other event taking place from where the Claimant may be able to earn any profit. The Tribunal is aware, that BAI is an authority to promote the game of badminton in India. However the Tribunal is surprised to find how BAI overlooked the requirement of law of giving advance notice of 90 days while terminating the 2013 Agreement. For that reason, they must be made to suffer by way of compensating the Claimant. With this end in view, the Tribunal deems it appropriate to refer to Claim No. 6 of the Claimant in the Statement of Claim under the said Claim, the Claimant has prayed for grant of loss of profits, that it would have earned if the 2013 Agreement was performed by tile parties for its entire tenure, i.e., 10 years, although it is not a correct way to ascertain the compensation in the present case.

8.76 Accordingly, the Tribunal awards the Claimant compensation for the notice period of 90 days to the tune of Rs.2.5 crores (Rs. Two crores fifty lakhs only) to be paid by Respondent No.1 within a period of three months from the date of the award. Further, being mindful of the decision rendered in Indian Oil Corp (Supra), the Tribunal 11holds that the 2013 Agreement is not subsisting between the parties. ”

22. The learned counsel for the petitioner then referred to *Oil and Natural Gas Corporation Ltd. vs. Western Geco International ltd.* (2014) 9 SCC 263 in which the Court held:

“34. xxxxx What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar case*¹⁰ it is required to be held that the award could be set aside if it is patently illegal. The result would be-award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

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

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

23. The above judgment was followed in *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49. The learned counsel for the petitioner also referred to *K.P. Poulose vs. State of Kerala and Another* (1975) 2 SCC 236 to show if the relevant documents are not considered by the arbitrator it would amount to misconduct.

24. In *Gopal Krishnahi Ketkar vs. Mohamed Haji Latif and Ors.* (1968) 3 SCR 862, the Court held:

"Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our

opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.”

25. Similarly in *Pradip Buragohain vs. Pranati Phukan* (2010) 11 SCC 108, the Court held:

“28. Non-production of the documents admittedly available with the appellant that would lend credence to the version set up by the appellant that the incident of corrupt practice was reported to him and/or to his election agent would give rise to an adverse inference against the appellant that either such complaints were never made or if the same were made they did not contain any charge regarding the commission of corrupt practices by the respondent in the manner and on the dates and the places alleged in the petition.

29. We may in this regard refer to illustration (g) to Section 114 of the Evidence Act which permits the Court to draw an adverse presumption against the party in default to the effect that evidence which could be but is not produced would, if produced, have been unfavourable to the person who withholds it. The rule is contained in the well-known maxim: omnia praesumuntur contra spoliatores. If a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted.”

26. Further, in *R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P.Temple & Anr.* (2003) 8 SCC 752, the Court held:

“5. xxxxx The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. xxxxx”

27. In *Narbada Devi Gupta vs. Birendra Kumar Jaiswal & Anr.* (2003) 8 SCC 745, the Court said the mere production and marking of a document as exhibit is not enough and its execution has also to be proved by admissible evidence. But however where the documents produced are admitted by the signatories and then marked as exhibits, held no further burden to lead additional evidence to prove the writing and its execution survives.

28. Then in *Life Insurance Corporation of India & Anr. vs. Ram Pal Singh Bisen* (2010) 4 SCC 491, the Court held:

"28.It is also worthwhile to mention here that one of the complainant Rattan Lal who was examined as witness during the departmental Inquiry was not cross-examined by respondent as he was not afforded proper opportunity in this regard."

29. Reference was also made to *Union of India vs. M/s. Mehta Teja Singh and Co., New Delhi* AIR 1983 Delhi 297 wherein the Court held:

"8. We find ourselves in full agreement with the learned single judge. The whole claim of the Union of India rested on the technical examiner's report. The report was thus a vital document without looking at which no award could be made. The action of the arbitrator in making an award without himself looking into the said document and without allowing the contractor inspection thereof clearly amounted to misconduct of the arbitration proceedings."

30. Further it was argued per clause No.27 (supra) the power was only to alter/modify any of the clauses of the contract, but nowhere had it provided addition of any clause, viz 8.11 (supra). In *National Fertilizers vs Puran Chand Nagia* (2000) 8 SCC 343 the Supreme Court noted:-

"23.We may also state that under the general law of Contracts, once the contract is entered into, any clause giving absolute power to one party to override or modify the terms of the contract at his sweet will or to cancel the contract -even if the opposite party is not in breach, - will amount to interfering with the integrity of the contract...."

31. Lastly it was argued mere acceptance of Rs.2.50 Crore towards the termination period, would not waive of the right of the petitioner to challenge other breaches, as set out in the petition itself.

32. Heard.

33. Admittedly, the petitioner earlier filed OMP(C) No.293/2017 challenging the impugned award. However, on 16.11.2017 the petitioner made a statement before this Court to withdraw the said petition and accepted release of Rs.2.50 Crores as awarded by the learned Arbitrator qua waiving of three month's notice period by the respondent for termination of the contract. The petitioner accepted the compensation awarded by the learned Arbitrator *unconditionally* without prejudice to its rights to claim interest upon such amount as per law. Since the petitioner had accepted damages qua waiver of the notice period, hence is now *estopped* to challenge the award or claim interest.

34. Award can be challenged, primarily, on grounds *viz* being patently illegal; or opposed to public policy; or in violation of fundamental policy of Indian law. Section 34(2) (b) (ii) with explanation 2 and 2A of the Act are:-

“34 Application for setting aside arbitral award. —

(1) xxx.

(2) An arbitral award may be set aside by the Court only if—

(a) xxx

(b) the Court finds that—

(i) xxx

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 2. — For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

2A An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the

Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

28 Rules applicable to substance of dispute. –

(1) and (2) xxx

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.”

A bare perusal of the above provisions would show the petitioner cannot claim a review on merit and neither the erroneous application of law nor re-appreciation of evidence can be a ground of appeal. Per Section 28(3) of the Act the Arbitrator *shall take into account the terms of the contract*. This is at variance with the earlier law viz Section 28(3) of the Act, prior to amendment, wherein the arbitrator was to decide the dispute in accordance with the terms of the contract and hence the interpretation of the contract is within the domain of the Arbitrator alone.

35. Thus the law as it stands today is examining the terms of the contract is exclusively within the jurisdiction of the learned Arbitrator. The Arbitrator alone has the power to interpret the terms of the contract and to examine the dispute purely in accordance with such terms. Now, if two views are possible on such terms, the view the learned Arbitrator has taken, ought to be followed until and unless there is patent illegality in it. This Court cannot sit in appeal under Section 34 of the Act to impose its own views if the view taken by the arbitrator is correct but even second view is possible. In *Ssangyong Engineering and Construction Company Limited vs National Highways Authority of India* 2019 SCC OnLine SC 677 it was held:-

“26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

36. Admittedly, contract dated 16.07.2013 was entered into between the parties and it superseded the earlier contract. Now, clause No.8.11 was added to this contract dated 16.07.2013 by the Board's resolution dated 20.09.2014, which meeting and addition of such clause 8.11 is now being disputed by the petitioner. Another important clause is No.11 of the contract and it says 90 days advance notice in writing need to be given to either party to terminate the agreement *lest* damages need to be paid. Admittedly, learned arbitrator has awarded damages of Rs.2.50 Crore to the petitioner herein which he has readily accepted, as noted in the order dated 16.11.2017 passed in OMP (C) No.293/2017. Clause No.22 of the agreement dated 16.07.2013 notes it is the final agreement superseding the earlier agreement. The emergency powers are given in clause No.27 of the agreement dated 16.07.2013 as under:-

27. EMERGENCY POWER OF THE GOVERNING COUNCIL OF IBL:

Notwithstanding anything contained in this Agreement the Governing Council of IBL shall have unfettered and unrestricted right, power/ authority to alter/modify any of the clause of this agreement, which shall be binding on the parties. Further, in case of any dispute or difference between the parties as to the interpretation of any Clause of this Agreement, decision/opinion of the President, BAI shall be final and binding on the parties.”

37. It was only per clause No.27 above Rs.50.00 Crore bank guarantee was demanded from the petitioner herein which he himself requested it to bring to Rs.15.00 Crores. The confusion was triggered only due to the email dated 24.04.2014 sent by the petitioner wherein it showed its concern in delay of event to June 2015 instead of September, 2014 and hence alleged losses. The email notes:-

"e) Yonex-Sir, as you are aware, the league was a loss making exercise for us in year one. In year two and three too, we do not foresee the league making money. We would consider the league a success even if we are able to break even with our operational costs. We are ready to sit with Yonex under your guidance and iron out any issues amicably. Our only request is that the relationship should not question the commercial viability of the league and should not be one way."

This email caused confusion/panic and hence on 26.04.2014 the respondent replied showing its concern qua its brand name and it may not be put to loss and debts etc. The email dated 26.04.2014 noted:-

"e) However, it is clarified that although this matter would be discussed in the Governing Council but the final decision in this regard will only be taken by the BAI.

Further, in response to the other contentions of your email under reply we have to say that we are shocked and deeply bothered and concerned over your statement that you have made loss in IBL 1st and your are foreseeing the loss in IBL2nd and IBL 3rd as well, and in this regard the following points are relevant:-

(i) You, Sporty Solutionz (P) Ltd is a Private Limited Company (Business House) whereas BAI is a charitable organisation and therefore, BAI assigned you the responsibility to develop, organize and market the IBL. The commercial rights in relation to the IBL were also given to you by the BAI so that you can access, market, promote and develop the event of IBL in the best possible manner.

(ii) xxx

(iii) The BAI even helped you in getting the sponsors and franchisees from the market.

38. Because of these developments a meeting of Governing Council was convened. Admittedly, notice of the meeting to be held on 20.09.2014 was sent to various stake-holders, including the petitioner herein and hence the petitioner had a fair warning and due to knowledge

of reasons for addition of clause No.8.11 in the Joint Venture Agreement dated 16.07.2013.

39. Qua the validity of clause No.8.11 of the agreement, an email dated 26.04.2014 of the respondent show the agenda for the discussions to be held by the Governing Council in a meeting was sent. The aforesaid email categorically noted:-

“Further, due to above and in order to secure and guarantee the following, the BAI is constrained to require the Sporty Solutionz (P) Ltd. to furnish a Bank Guarantee of Rs.50,00,00,000/- (Rupees Fifty Crores Only) from a nationalised bank before the meeting of Governing Council is convened to take a decision regarding the dates and schedule of IBL and other relevant issues:-

A. To secure and guarantee the Prize Money to the respective players, within time.

B. To secure and guarantee the payments to the players by the respective franchisees (at the moment 6 franchises) within time.

C. To secure and guarantee the payments of expenditures of the venues etc.

40. Such meeting of the Governing Council of IBL was held at Hotel Le Meridian, New Delhi and minutes dated 20.09.2014 noted the member representatives of all the three parties, BAI, MBA and SSPL were present in such meeting, the agenda of which was circulated in advance to all the members of the Governing Council. The minutes noted the member representatives of the BAI had expressed deep concern qua serious complaints being received from various quarters relating to mismanagement in organising IBL. Taking note of all these developments, the members of the Governing Council expressed their deep concern about the *success and representation* of the IBL and about frivolous and vexatious contentions raised by the petitioner *viz* the league was a *loss making exercise* in year one and would be so in year two and year three also and the petitioner *does not foresee* the league making

money in near future, hence the Governing Council demanded bank guarantee of Rs.50.00 Crore from the petitioner herein to which the petitioner never responded and alleged it need to refer the matter to the Board of Directors and only then such amount could be promised. The minutes of the meeting recorded:-

“g. WHEREAS, the BAI consistently with and in furtherance of its objects and constitution as well as the agreement dated 16.07.2013 and the larger good of the game of badminton, has justified Rs.50,00,00,000/- as the amount of Bank Guarantee”

41. One may here refer to an email dated 31.01.2015 of the petitioner wherein the petitioner duly acknowledged the demand of Rs.50.00 Crores as *resolved* in the Governing Council meeting. After negotiations, vide email dated 10.03.2015 the petitioner agreed to the revised demand for Rs.15.00 Crores - bank guarantee for ensuring timely payments to the players, per concern of the respondent noted in its email dated 01.02.2015 stating *interalia* the bank guarantee is necessarily required to secure the timely payments to national and international players per their auction price money and against costs/expenses/charges of venues/stadium/ reservations etc and hence the petitioner was required to furnish bank guarantee of Rs.15.00 Crores within 15 days from the date of the receipt of the letter, lest Agreement dated 16.07.2013 would be terminated.

42. On 10.03.2015, the petitioner rather sent an email in a positive frame of mind to pledge bank guarantee of Rs.15.00 Crores as warranted *viz* Rs.06.00 Crores not later than three weeks from the acceptance of this proposal. However, it did not happen and then vide notice dated

21.04.2015 on failure of the petitioner to furnish the bank guarantee, the contract dated 16.07.2013 was terminated.

43. The petitioner took all the pleas before the learned Arbitrator but those were brushed aside by the reasoned award and I need not repeat the contents of the award yet again. Admittedly, there is a limited scope for interference of this Court under section 34 (2) of the Act. In *J.G. Engineers Private Limited vs. Union of India and Another* (2011) 5 SCC 758 it was observed an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court, as then it would be opposed to public policy. The Court held that only when award can shocks the conscience of the Court, it can be treated as patently illegal. In *Associate Builders vs DDA* (2015) 3 SCC 49 the Court even went a step ahead to say the illegality must go to the root of the matter and cannot be of trivial nature. It was further held:-

“An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.”

44. *Patent illegality* has been clarified by the Arbitration and Conciliation (Amendment) Act, 2015 by the proviso to sub-section 2A of Section 34 of the Act as stated above. Further explanation 2 to Section 34 of the Act says the test is if there exists a contravention of the fundamental policy of Indian policy. It shall not entail the review on merits of the dispute.

45. In *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India* 2019 SCC OnLine SC 677 while interpreting the amended Section 34, the court held as follows:-

26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award.

.....

29. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator’s view is not even a possible view to take.”

46. In *Steel Authority of India Ltd. vs. Gupta Brother Steel Tubes Ltd.* (2009) 10 SCC 63, the court held as follows:-

“18. ... Suffice it to say that the legal position that emerges from the decisions of this Court can be summarized thus:

(i) xxx

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.”

(iv) to (v)

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.”

47. In *Swan Gold Mining Limited vs Hindustan Copper Limited* (2015) 5 SCC 739, the Court held:-

“12. It is equally well settled that the arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

19. ... the interpretation of the contract is matter of the arbitrator, who is a Judge chosen by the parties to determine and decide the dispute. The Court is precluded from reappreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.”

48. In *State Trading Corporation of India Limited v. Toepfer International Asia PTE Limited* 2014 7 HCC (Del) 504, this Court held:-

“18. If we were to start analysing the contract between the parties and interpreting the terms and conditions thereof and which will necessarily have to be in the light of the contemporaneous conduct of the parties, it will be nothing else than sitting in appeal over the arbitral award and which is not permissible.”

49. In *HRD Corporation vs GAIL (India) Limited* (2018) 12 SCC 471 the court noted *making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.*

50. Proving or disproving the validity of an allegedly forged document requires leading of detailed evidence and therefore once it has been duly considered and rejected by the learned Arbitrator, the same cannot be re-agitated in a proceeding with limited scope of enquiry such as the present petition under section 34 of the Act.

51. In view of the law discussed above, the present petition is not maintainable, more specifically in the light of order dated 16.11.2017 in OMP (C) No.293/2017 wherein the petitioner without any reservations accepted Rs.2.50 Crores, hence is now, even otherwise, *estopped* from OMP(COMM) 316/2017 and OMP(COMM) (I)362/2017

challenging the award. A person who accepts cost payable under the award or any other benefit under the award *dehors* the claim on merits cannot repudiate part award detrimental to him because the order is to take effect in its entirety. See *Sri Tushar Kanti Roy v. The Eighth Industrial Tribunal, Kolkata and Ors.* 2013 (2) CLJ (CAL) 620; *Cauvery Coffee Traders vs Honor Resources* (2011) 10 SCC 420 and *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.*, (2013) 5 SCC 470.

52. Qua the challenge to the validity of the minutes of the meeting dated 20.09.2014 viz those being forged, has been dealt with by the learned Arbitrator and such argument of petitioner having been rejected as afterthought. The minutes were referred to in various communication exchanged between the parties and the petitioner never disputed such minutes in its correspondences and had challenged it for the first time before the learned Arbitrator. The petitioner did not dispute such minutes and rather acquiesced to the validity of such minutes by expressly acknowledging those in its subsequent communications and even agreed to furnish bank guarantee of Rs.15.00 Crores on 10.03.2015. It is settled law that burden lies on a person who makes specific allegations and/or averments and such allegations must be supported by material particulars, per *Royal Palms (India) Pvt. Ltd., Mumbai v. Neeta Jignesh Parikh* 2016 (6) Mh L J 214. Rather in *Shin-etsu Chemical Co. Ltd. v. Aksh Optifiber Ltd. and Anr.* (2005) 7 SCC 234, the Court went ahead to say if such defences were to be allowed, it would necessarily require full fledged trial (oral evidence) at pre reference stage.

53. The petitioner had due knowledge as to why such meeting dated 20.09.2014 was convened and the reasons for addition of clause No.8.11 to clause No.8 of the Joint Venture Agreement dated 16.07.2013. It was only after the meeting, clause 8.11 was added to the aforesaid agreement *per* decision of the Governing Council vide its resolution dated 20.09.2014. After the Governing Council meeting, as observed earlier, the petitioner itself had acknowledged vide its email dated 31.01.2015 the demand of bank guarantee of Rs.50.00 Crores by respondent as resolved in the said Governing Council meeting and after negotiations vide its email dated 10.03.2015, the petitioner itself had committed to submit the bank guarantee for a reduced amount of Rs.15.00 Crores. Thus, the argument of the petitioner challenging the validity of clause No.8.11 of the agreement is contrary to its conduct and not substantiated by any *cogent* evidence. The learned Arbitrator has aptly dealt with the validity of clause No.8.11 adopted by the Governing Council in exercise of its emergency power under clause No.27 and had rightly rejected the challenge of petitioner to the minutes of meeting dated 20.09.2014. Even the award includes a detailed discussion on validity of the emergency clause No.27 and insertion of clause No.8.11 at pages No.42 to 57 of the award and I need not to repeat it again.

54. The essence of the contract was timely payment to be made by the petitioner to BAI and such obligations were outlined in the agreement and hence, any breach thereof would entail the termination of the Joint Venture Agreement and was completely justified.

55. In the circumstances, there is no patent illegality in the findings of the learned Arbitrator. The petition is bereft of any merits and accordingly is dismissed. Pending applications, if any, also dismissed. Parties to bear their own costs.

O.M.P.(I) (COMM.) 362/2017

56. In view of above order, this petition also stands disposed of. Needless to say the petitioner is at liberty to seek execution of the award in his favour. Pending applications are also disposed of.

YOGESH KHANNA, J.

FEBRUARY 07, 2020

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