

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 17.09.2021

+ **O.M.P. (COMM) 207/2021 & I.A. 9037/2021**

VINOD AGARWAL & ANR.

..... Petitioners

versus

**M/S FROST INTERNATIONAL LTD.
& ANR**

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Ashim Vachher, Advocate with
Mr Pawash Piyush, Advocate.

For the Respondents : Mr Anil Aggarwala, Advocate for R-1
Ms Neha Sharma, Advocate for R-2.

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

JUDGMENT

VIBHU BAKHRU, J.

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an Arbitral Award dated 27.11.2018 (hereafter the 'impugned award') delivered by an Arbitral Tribunal comprising of a Sole Arbitrator.

2. The controversy in the present petition is limited to examining whether the impugned award for a sum of ₹82,73,709/- (Rupees Eighty Two Lacs, Seventy-Three Thousand, Seven Hundred and Nine only) rendered by the Arbitral Tribunal in favour of respondent no.1, M/s Frost International Ltd. (hereafter 'Frost') is patently illegal. The Arbitral Tribunal held that the petitioners were liable to pay the said amount against their obligation to indemnify Frost for any loss caused on account of breach of their representations and warranties in terms of the Share Purchase Agreement dated 07.08.2013 (hereafter the 'SPA'). The Arbitral Tribunal found that contrary to the representations made by the petitioners, respondent no.2 company, M/s Agros Impex (I) Pvt. Ltd. (hereafter 'Agros') was liable to pay Income Tax and penalty for the Assessment Years 2006-07 to 2010-11, which were not disclosed or recognized in the Books of Accounts of Agros. The Arbitral Tribunal had also found that Frost had paid the said liability and thus, in terms of Clause 7.1 of the SPA, the petitioners were liable to make good the loss suffered by Frost.

3. Mr Vachher, learned counsel appearing for the petitioners, confined his submissions within a narrow compass. He, readily, conceded that the findings of the Arbitral Tribunal to the effect that Agros had incurred liabilities in respect of the taxes and penalty for the Assessment Years 2006-07 to 2010-11 to the extent of ₹82,73,709/-, which were not disclosed in the Books of Accounts, could not be interfered with, in these proceedings. He confined his submissions to assailing the findings of the Arbitral Tribunal to the effect that Frost had

established that it had paid the said liability and/or had incurred a loss to the aforesaid extent. He submitted that the evidence on record did not establish that Frost had paid a sum of ₹82,73,709/- towards Income Tax and penalty. He submitted that this was also contrary to its pleadings as in the Statement of Claims, Frost had asserted that it had paid a sum of ₹20,39,580/- (Rupees Twenty Lacs, Thirty-Nine Thousand, Five Hundred and Eighty only) being a major shareholder of Agros. Although, Frost claimed that Agros had incurred a liability towards Income Tax to the extent of ₹82,73,709/-, it did not assert that the aforesaid sum was discharged by Frost or was directly paid by it to the Income Tax Authorities. He submitted that in any event, there was no evidence on record to establish that Frost had discharged the aforesaid liability by making payments to the Income Tax Authorities.

4. Next, he submitted that even if it is accepted that Agros had incurred a liability towards Income Tax and penalty amounting to ₹82,73,709/- as asserted by Frost, the same could not possibly lead to the conclusion that Frost had incurred a corresponding loss to that extent. He stated that the additional tax was a liability of Agros; not of Frost. Therefore, Frost had not incurred any loss on account of additional Income Tax assessed as payable by Agros. He submitted that theoretically, it was possible for Frost to have incurred a loss on account of diminution in the value of the shares sold by the petitioners to Frost in terms of the SPA. But, Frost had not founded its claim on the said assertion. Frost had claimed the amount as a direct loss incurred by it, which it had failed to establish. He emphasized that in terms of the SPA,

the petitioners had sold 33.54% of the issued equity shares of Agros to Frost and thus, in any event, Frost could not claim that it had incurred a loss equivalent to the entire additional liability of Agros on account of Income Tax or penalty.

5. Before proceeding to address the aforesaid controversy, it is relevant to briefly note the context in which it arises.

6. The petitioners were promoters of Agros. They were also Directors of the said company and held 100% of its outstanding issued equity capital. The Government of India formulated a Policy for installing High Security Registration Plates (hereafter 'HSRP') on vehicles sold in India. In terms of the said policy, the Government of India notified the Motor Vehicles (New High Security Registration Plates) Order, 2001 on 22.08.2001. The said order was subsequently amended by a notification dated 16.09.2011. It is stated that the Governments of various States in India issued Notices Inviting Tenders for manufacturing and affixing HSRP on vehicles. Agros had participated in one such bidding process but was unsuccessful.

7. Thereafter, on 05.08.2011, a Joint Venture Agreement was entered into between Agros, the petitioners (who at that material time held the entire share capital of Agros); Frost; M/s Trinity Engineering and Mechanical Services Pvt Ltd; and M/s Trinity Engineering Services LLC. At the material time, it was represented that Agros and the petitioners had acquired essential tangible and intangible assets including government approvals, licenses, land and building for

carrying on business in the National Capital Territory of Delhi. Agros had acquired knowledge in regard to the availability and access to advanced technology and specialized raw material required to meet the norms as specified by the Government of India under Rule 50 of the Central Motor Vehicle Rules, 1989. The petitioners represented that they had incurred huge expenses to acquire the said assets and the same were of immense value for entering into the business of HSRP. The said parties were desirous of participating in the said business and the purpose of the Joint Venture Agreement was to use Agros as a vehicle for bidding for businesses as a consortium. The said parties also entered into a Share Subscription Agreement simultaneously. In terms of the Share Subscription Agreement, Frost and Trinity Engineering & Mechanical Services Pvt Ltd (Trinity India) agreed to subscribe Class-B Equity Shares, which would constitute 40% of the total issued equity capital post issuance of such equity.

8. Frost has pleaded that the petitioners continued to be in effective control and management of Agros even after their equity holding in Agros was diluted by fresh issue of shares pursuant to the said Share Subscription Agreement.

9. Frost claims that the petitioners and it had close relations with Mr Jagdish Shah, Chairman of Trinity Engineering Services LLC (incorporated in Dubai). It is averred that the petitioners had sought financial assistance for bidding as well as for manufacturing of HSRPs, from him. But, since Trinity Engineering Services LLC (Dubai) could not provide the necessary financial assistance to participate in the

bidding process including for the reason that it was a foreign entity, Mr Jagdish Shah had introduced the petitioners to Frost.

10. Frost states that it invested ₹2,22,00,000/- (Rupees Two Crores and Twenty-Two Lacs) in Agros after it was converted into a Joint Venture Company pursuant to the Joint Venture Agreement and dilution of the share capital in terms of the Shares Subscription Agreement dated 05.08.2011.

11. On 18.04.2012, the Government of Uttar Pradesh issued a Notice Inviting Tenders for manufacturing, supervision, sale and affixation of HSRPs in the State of Uttar Pradesh. Agros (which at the material time was a Joint Venture Company) submitted its bid along with a security deposit of ₹50,00,000/- (Rupees Fifty Lacs) and the requisite documents. Frost claims that it had paid the aforesaid security deposit of ₹50,00,000/-. The bids were open on 30.05.2012 and Agros was declared a successful bidder. It is averred that thereafter, the Transport Department of the State Government of Uttar Pradesh required Agros to file its Income Tax Returns for the previous two years (that is, for the Assessment Years 2009-10 and 2010-11). Frost states that on 31.05.2012, Agros filed the same with the Transport Department, State of Uttar Pradesh.

12. Frost claims that it had invested substantial funds in Agros including for setting up the manufacturing unit of HSRP, apart from furnishing the security deposit and earnest money for the bids submitted by it. On 07.08.2013, the petitioners entered into the SPA with Frost,

Trinity Engineering Services LLC and Trinity Engineering and Mechanical Services Pvt Ltd, Agros, one Mr Ankush Wadhera and Mr Saral Verma.

13. The recital of the SPA indicates that subsequent to entering into the Share Subscription Agreement on 05.08.2011, Agros issued equity shares, which were subscribed by Frost, Trinity Engineering Services LLC as well as Mr Ankush Wadhera and Mr Saral Verma. As on the date of the SPA, the petitioners held 5,32,520 Equity Shares of ₹10/- each of Agros, which constituted 33.54% of the total equity capital in the said company. In terms of the SPA, the petitioners agreed to sell the said shares to Frost for a consideration of ₹10,00,00,000/- (Rupees Ten Crores only). The petitioner acknowledged the receipt of a sum of ₹6,50,00,000/- (Rupees Six Crores and Fifty Lacs only) as part of the purchase consideration and agreed to pay the balance consideration of ₹3,50,00,000/- (Rupees Three Crores and Fifty Lacs only) on the closing date.

14. Disputes arose between the parties, essentially, in connection with the representations made and warranties held out by the petitioners under the SPA. The relevant terms of the SPA are set out below:

“Clause 3.3 Financial Statements:

3.3.1 All the financial statements of the Company have been prepared in accordance with Applicable Laws and are consistent with the Company’s Books and Records (which, in turn, are accurate and complete), fairly presents the Company’s financial condition

and results of operations, changes in shareholders' equity and cash flow as of the times and for the periods referred to therein and have been prepared in accordance with Applicable Laws.

Clause 3.4 Liabilities:

As on the Closing Date, the Company has no Liabilities outstanding for the period up to the Cut-off date.

(Emphasis supplied)

Clause 3.7 Taxes:

3.7.1 The Company has filed all Tax Returns that are required to be filed under Applicable Laws for all transactions, activities and periods ending on or prior to the Cut-off Date. All such Tax Returns are true, accurate, correct and complete in all respects. The Company has paid all Taxes that are due to, or claimed, assessed or assessed by any Government authority for the periods covered by the Tax Returns filed by the Company.

Clause 3.7.3 There are no existing circumstances (apart from the possibility of normal audit selection) which reasonably may be expected to result in the assertion of any claim for Taxes against the Company by any Government Authority with respect to any period up to the Cut-off date for which Tax Returns are required to have been filed or

Tax is required to have been paid. The Company has not received a written ruling from a Government Authority relating to any Tax that could have a continuing effect with respect to any taxable period up to the Cut-off date for which the Company has not filed a Tax Return. The Company has not received any written or oral notices from any Governmental Authority with respect to Taxes of the Company in any prior examination which, by application of the same or similar principles, could reasonably be expected to result in a proposed deficiency for any other taxable transaction, activity or period. The Company has not received any written or oral notice of an audit or review for any transaction, activity or period not yet closed by the applicable statute of limitation.

(Emphasis supplied)

Clause 4.3 No Violation to Result

The execution, delivery and performance by the Sellers of this Agreement and the consummation of the Transaction by the Sellers does not and will not directly or indirectly (with or without notice or lapse of time); (i) violate, breach, conflict with, constitute or default under, (a) any of the terms of the certificate of incorporation, constitutional documents of the Company or any resolution adopted by the board of directors or shareholders of the Company, or (b) any note, debt instrument, security agreement, mortgage or any other financing document to which the Company is a party

or by which it is bound, or (c) any law, judgment, decree, order, rule, regulation, permit, license or other legal requirement of any Government Authority applicable to the Company, (ii) give any Person the right to exercise any remedy under any contract or cancel, terminate or modify any contract; (iii) give any Governmental Authority the right to revoke, withdraw, suspend, cancel, terminate or modify any permit or license that is held by the Company or that otherwise relates to the Company's business or to any of the assets owned or used by the Company, (iv) result in the creation or imposition of any Encumbrance in favour of any Person upon the Sale Shares or any of the properties or assets of the Company, (v) cause the Buyer or the Company to become subject to, or become liable for the payment of, any Tax: (vi) give any Governmental Authority or other Person the right to challenge the Transaction, or (vii) result in a violation under any Applicable Law.

(Emphasis supplied)

Clause 4.7 The Sellers hereby represent and warrant to the Buyer that for the Period between the Cut-off Date and the Execution Date, they have not done or caused or allowed to be done any act or things, which would have a Material Adverse Effect.

Clause 4.8 The Sellers hereby represent and warrant to the Buyer that they have complied with the terms and condition of the JVA and have not undertaken any action or omitted to do

anything, which would constitute an event of default under which would be in breach of the JVA.

Clause 4.9 The Sellers hereby represent and warrant to the Buyer that, except with the prior written consent of the Buyer, for the period between Cut-Off date and the Execution Date, the Seller have not signed any document or done any act (Whether as a shareholder, director, employee or agent of the Company) which has subjected or would subject the Company to any Liability.

7. INDEMNITY

7.1 Seller Indemnification

Subject to the other terms and conditions of this Clause 7, each Seller ("Seller Indemnifying Party") shall, jointly and severally indemnify and defend the Company and the Buyer and their respective officers, directors, employees, successors and assigns (collectively, the "Buyer Indemnified Party") against and shall hold them harmless from, against and in respect of all Liability suffered, sustained, incurred or paid by any Buyer Indemnified Party resulting from, arising out of or relating to:

- (i) the breach of any representation or warranty of a Seller set forth in this Agreement, Annexures hereto or any certificate or document delivered by any Seller in connection with the transactions contemplated hereby; or
- (ii) the breach of any covenant or agreement of such Seller set forth in this Agreement, Annexure hereto or any certificate or document delivered by any Seller in connection with the transaction

contemplated hereby; or

- (iii) any failure of the Sellers, at the Closing Date, to transfer good, valid and marketable title to the Sale Shares, to the Buyer, free and clear of all Encumbrances; or
- (iv) any failure of the Company to comply with Applicable Laws, including the Companies Act and the rules and regulations made thereunder, prior to the Cut-off Date; or
- (v) any business undertaken by the Company other than the HSRP Business till the Closing Date; or
- (vi) any business undertaken by the Company (including the HSRP Business) prior to the Cut-off Date; or
- (vii) any act, omission, operation, management or conduct of the Sellers (whether as a shareholder, director, employee or agent of the Company) in relation to the Company (including the HSRP Business) after the Cut-off Date including without limitation any Liability relating to filing of any document with the Office of the Transport Commissioner, Government of Uttar Pradesh, provided that the indemnity obligation of the Sellers under this sub-clause (vii) shall be that of Vinod Agarwal only.”

15. Once the shares held by the petitioners in Agros were sold, as per the terms of the SPA, the petitioners exited as shareholders and demitted office as Directors from the said company. Frost alleges that the new management discovered that the Commissioner of Transport, Government of Uttar Pradesh, had issued a letter dated 20/21.06.2013 to Agros seeking certain clarifications with regard to its Income Tax

Returns for the Assessment Year 2010-11. The said letter also indicated that the Transport Department had received information from the Director General of Income Tax (Intelligence and Criminal Investigation), New Delhi, that the Association of Registration Plates Manufacturers of India had filed a complaint dated 15.12.2012 with the Income Tax Department alleging that Agros had forged its Income Tax Returns for the Assessment Years 2010-11.

16. Frost states that after issuance of a Show Cause Notice, the Commissioner of Transport, State of Uttar Pradesh, passed orders blacklisting Agros and debarring it from participating in any bids for a specified period. Further, Frost states that subsequent to acquiring the shares held by the petitioners in Agros, in terms of the SPA, the Income Tax Department re-assessed Agros and imposed substantial Income Tax liability including penalty for the Assessment Years 2006-07 to 2010-11. The Arbitral Tribunal found that additional Income Tax liability pertained to the period during which the petitioners were in full control of Agros.

17. Disputes between the parties were referred to arbitration under the aegis of the Delhi International Arbitration Center (DIAC). Before the Arbitral Tribunal, Frost filed a Statement of Claims, *inter alia*, claiming compensation of an amount of ₹ 3,00,00,000/- (Rupees Three Crores only) from the petitioners on account of loss of its goodwill and business. The Arbitral Tribunal rejected the contention of Frost on account of loss of goodwill and its business as there was no material on record to prove actual loss suffered by it. The Arbitral Tribunal further

held that since the Supreme Court had also stayed the tender issued by the State of Uttar Pradesh and as no fresh tender has been floated, no actual loss could have been suffered by Frost.

18. In its Statement of Claims, Frost also claimed a sum of ₹82,73,709/- in respect of the undisclosed Income Tax liability for the Assessment Years 2006-07 to 2010-11.

19. It is necessary to refer to certain paragraphs of the Statement of Claims, which would indicate the basis on which Frost had founded its claim for the aforesaid amount of ₹82,73,709/-. The said paragraphs are extracted below:

“49. That as the Respondent Nos. 1 & 2 failed to provide the relevant information and documents pertaining to the business conducted by them for the Assessment Year 2006-07, the Claimant Company in respect of the said Assessment Year 2006-07 has paid the following amount to the Income Tax Department:

Sl. No.	Particulars	Amount Paid	Date of Payment
1.	Tax assessed under the Income Tax Return filed for the A.Y. 2006-07	Rs.15,39,580/-	27/09/2013
2.	Towards demand of Rs.23,58,625/- for re-	Rs.5,00,000/-	25/06/2014

	assessment of A.Y. 2006-07		
	Total:	Rs.20,39,580/-	

50. The Income Tax Department vide its order dated 15/09/2014 imposed penalty upon M/s. Agros Impex (I) Pvt. Ltd. i.e. Respondent No.3 u/s 271(b) of the Income Tax Act to the tune of Rs.1,00,000/-.
51. M/s. Agros Impex (I) Pvt. Ltd. i.e. Respondent No. 3 which is now being managed and run by the Claimant Company received four notices dated 21/1/2014 from the Income Tax Department U/s. 143 (2) of the Income Tax Act with respect to the Income Tax Returns of M/s. Agros Impex (I) Pvt. Ltd. for the Assessment Years 2007-08, 2008-09, 2009-10 and 2010-11.
52. That on the receipt of the notices, the Claimant Company requested both the Respondent Nos. 1 & 2 to provide relevant information and documents called in by the Income Tax Department and also to cooperate with it and appear before the Income Tax Department and set the record straight. The Respondent Nos. 1 & 2 failed to cooperate and as a result whereof the Claimant Company was unable to comply with the notices dated 21/1/2014 issued by the Income Tax Department. The representative of the Claimant Company on several occasions appeared before the Income Tax Department and presented their case but in the absence of the required documents, the Claimant Company could not satisfy the Income Tax Department with respect to its queries.
53. That Income Tax Department vide its four separate orders all dated 13/3/2015 passed Assessment

Orders for the Assessment Years 2007-08, 2008-09, 2009-10 and 2010-11 assessing the liability of M/s. Agros Impex (I) Pvt. Ltd. i.e. Respondent No.3 which is as follows:

- a) Assessment year-2007-08: Rs.76,69,675/-
- b) Assessment Year-2008-09: Rs.55,31,522/-
- c) Assessment Year-2009-10: Rs.53,77,821
- d) Assessment Year-2010-11 Rs.56,79,223/-

Total: Rs.2,42,58,241/-

- 54. The Income Tax Department vide all Its four Assessment Orders dated 13/3/2015 imposed interest @5% U/s. 234A/B/C/D of the Income Tax Act and issued penalty notice U/s. 271(1)(c) of the Income Tax Act upon M/s. Agros Impex (I) Pvt. Ltd. i.e. Respondent no. 3.
- 55. M/s. Agros Impex (I) Pvt. Ltd. i.e. Respondent No. 3 (owned, controlled and run by Claimant Company) being highly aggrieved by the orders dated 15.09.2014 & 13.03.2015 passed by the Income Tax Department filed appeal against the said orders before the Commissioner of Income Tax.
- 56. The Commissioner of Income Tax vide its order dated 09.07.2015 dismissed the appeal of M/s. Agros Impex (I) Pvt. Ltd. i.e. Respondent No. 3 and confirmed the penalty of Rs.1,00,000/- (Rupees One Lac only) imposed U/s. 271B of the Income Tax Act, 1961 by the Assessing Officer for the Assessment Year 2006-07.

57. The Commissioner of Income Tax vide its four separate orders all dated 27.07.2015 dismissed the appeals filed by M/s. Agros Impex (I) Pvt. Ltd. i.e. Respondent No. 3 challenging the order of the Assessing Officer dated 13.03.2015 with respect to the Assessment Year 2007-08, 2008-09, 2009-10, 2010-11. The Commissioner of Income Tax however vide its order dated 27.07.2015 has reduced the rate of interest imposed by the Assessing Officer from 5% to 1.20%.
58. That after the assessments done by the Income Tax Department and the dismissal of the appeals filed by M/s. Agros Impex (I) Pvt. Ltd. i.e. Respondent No. 3, the Claimant Company is left with no other option but to pay the said amount. The Claimant Company being the major shareholder of Respondent No. 3 has till date paid Rs.20,39,580/- (Rupees Twenty Lacs Thirty Nine Thousand Five Hundred Eighty) and after the passing of the order dated 09/07/2015 and 27/07/2015 by the Commissioner of Income Tax whereby the interest rate has been reduced, the Claimant Company is liable to pay further sum of Rs.61,34,129/- for the Assessment Years 2007-08 to 2010-11. The said liabilities are entirely of the Respondent Nos. 1 & 2 and they are liable to pay the same to the Claimant Company. The liability of the Respondent Nos. 1 & 2 towards the Claimant Company in respect of the Income Tax for the Assessment Years from 2006-07 to 2010-11 is as follows:-

(a)	Amount on 27/9/2013 for the Assessment Year 2006-07	Rs.15,39,580/-
(b)	Amount paid on 25/6/2014 for the Re-Assessment of the Assessment Year 2006-07	Rs.5,00,000/-

	against liability of Rs.23,58,625/-	
(c)	Amount paid towards penalty imposed U/s 271B of the Income Tax Act for the Assessment Year 2006-07	Rs.1,00,000/-
(d)	Income Tax Liability for the Assessment year 2007-08 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax	Rs.19,40,550/-
(e)	Income Tax Liability for the Assessment year-2008-09 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax	Rs.15,13,765/-
(f)	Income Tax Liability for the Assessment year-2009-10 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax	Rs.13,58,237/-
(g)	Income Tax Liability for the Assessment year-2010-11 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax	Rs.13,21,577/-
	Total	Rs.82,73,709/-

59. That from the facts and circumstances narrated hereinabove it is crystal clear that the Respondent Nos.1 & 2 in connivance and conspiracy with each other have cheated the Chairman Company. The Respondent. Nos. 1 and 2 have given false

representations to the Claimant Company and due to the false representations and inducement by the Respondent Nos.1 & 2 the Claimant Company has suffered huge losses and continues to suffer the same. That as per the terms and conditions of the share purchase agreement dated 07.08.2013 entered between the Claimant Company and the Respondents, the entire responsibility & liability with respect to the business of M/s. Agros Impex (I) Pvt. Ltd. i.e. Respondent No.3 for the years prior to 07.08.2013 is of Respondent Nos.1 & 2. The Respondent nos.1 & 2 under the Share Purchase Agreement dated 07.08.2013 have undertaken and accepted the same and have further indemnified the Claimant Company with respect to any liability for the years prior to 07.08.2013. The claimant states and submits that the Claimants had paid a sum of Rs. 10,00,000,00/- (Rupees Ten Crores) to the respondents towards the share value only upon their assurances and representations as contained in the Share Purchase Agreement. The Respondents Nos. 1 & 2 under the Share Purchase Agreement dated 7/8/2013 had undertaken that any liability of M/s. Agros Impex (I) Pvt. Ltd. with respect to the date prior to the cut-off date i.e. 7/8/2013 would be their personal liability.”

20. A plain reading of paragraph 58 of the Statement of Claims indicates that Frost had asserted that after dismissal of the appeals filed by Agros, it was left with no option but to pay the amount of liability towards Income Tax and penalty, which the petitioner had quantified at ₹82,73,709/-. Frost asserted that till the date of filing of the Statement of Claims, it had paid ₹20,39,580/- and it was further liable to pay an amount of ₹61,34,129/- for the Assessment Years 2007-08 to 2010-11. Admittedly, the income tax liability and penalty were that of Agros and

not of Frost. It is not disputed that Frost was not liable to pay any amount to the Income Tax Department and had incurred no liability on that count. Frost had made a claim on the basis that it was a majority shareholder of Agros and was in control and management of the company.

21. The Arbitral Tribunal examined various clauses of the SPA (Clauses 3.3, 3.4, 3.7, 4.3 and 7.1) and found that the petitioners had represented and declared that all Income Tax Returns of Agros were duly filed and all taxes had been paid. The petitioners had also represented that the books and records of Agros were maintained in accordance with law and all statutory compliances were made. The said representations and warranties did not hold good and, the Arbitral Tribunal found the petitioners liable to indemnify Frost against the breach of the representations and warranties set forth in the SPA.

22. The petitioners contested the said claim on several grounds. First, they disputed the correspondence between the parties and claimed that their email account had been hacked. The Arbitral Tribunal found that they have failed to establish the same. Next, the petitioners contended that they had not extended any indemnity to Frost under the SPA. This contention was also rejected by the Arbitral Tribunal. This Court finds no reason to interfere with these findings. Mr Vachher has also not advanced any contentions to impugn the said findings. As noted at the outset, he had confined the challenge to the impugned award only on two fronts: Frost had not suffered any loss as the Income Tax liability and penalty was imposed on Agros (not on Frost) and there was no

evidence that Frost had made a payment to the Income Tax Department as the assessments were made in respect of Agros.

23. A plain reading of the impugned award indicates that the Arbitral Tribunal had not accepted the aforesaid contentions. It had referred to Clause 7.1 of the SPA and held as under:

“HH. It is clear from the above provision that the Seller i.e. the Respondent is liable to indemnify the Buyer i.e. Frost against the breach of any representation or warranty set forth in this agreement. The Claimant has proved the payment made by them after re-assessment. It is an admitted position that the Claimant had purchased the entire shareholding of Respondent No.1 and 2 by virtue of the said agreement and it is the Claimant who has suffered loss for the failure of Respondent to pay taxes / penalty for the AY 2006-07 to 2010-11. Respondent No.1 and 2 had agreed to indemnify the Buyer that is the Claimant Company from making good loss if any of the representations or warranties set forth in the agreement.

II. Accordingly, I deem it appropriate to award a sum of Rs.82,73,709/- in favour of the Claimant and against the Respondent Nos.1 and 2.”

24. It is clear from the above that the decision of the Arbitral Tribunal to enter an award of ₹82,73,709/- in favour of Frost and against the petitioners is premised on its finding that the petitioners had breached their representations and warranties set forth in the SPA and Frost had proved the payments made by them after re-assessment. The Arbitral Tribunal also proceeded on the basis that since Frost had purchased the

entire shareholding of the petitioners and taken over the management of Agros, by virtue of the SPA, it had suffered a loss on account of failure on the part of the petitioners to pay taxes and penalty for the Assessment Year 2006-07 to 2010-11.

25. Undeniably, the additional liability to pay income tax and penalty in question was that of Agros as Agros was the assessee and not Frost.

26. It is also important to note that in terms of Clause 7.1 of the SPA, the petitioners had not only indemnified Frost but also Agros, as they were collectively referred to as “Buyer Indemnified Party”.

27. The contention that Frost had not incurred any loss as the liability on Income Tax/penalty was that of Agros is, plainly, unmerited. Frost is a substantial shareholder of Agros. Thus, any additional liability on Agros would result in a direct loss to Frost as undisputedly, it would adversely affect the value of shares held by it in Agros.

28. Mr Vachher had contended that Frost had not structured its claim in the aforesaid manner and, therefore, no award on the said basis could be made in its favour. This Court is unable to accept the said contention as a careful reading of the Statement of Claims indicates that Frost had asserted that it had suffered a loss as well as incurred a liability on account of being a majority shareholder of Agros. It also asserted that it had directly paid part of the demand raised, that is, ₹20,39,580/- and, was liable to pay the balance.

29. The Arbitral Tribunal has also accepted the above claim. This is clearly discernable from the Arbitral Tribunal's finding that *"it is an admitted position that the Claimant [Frost] had purchased the entire shareholding of Respondent no.1 and 2 [the Petitioner] by virtue of the SPA and "it is the Claimant [Frost] who has suffered loss for the failure of Respondent to pay taxes / penalty for the AY 2006-07 to 2010-11"*.

30. Thus, in view of the Arbitral Tribunal's finding – which is not contested by Mr Vachher – that since the petitioners were in breach of their representations and warranties as set forth in the SPA, the petitioners would be liable to indemnify Agros against any loss on account of the additional liability that was not recognized or disclosed by the petitioners.

31. In the circumstances, the decision of the Arbitral Tribunal that the petitioners would be liable to make good the amount of income tax and penalty imposed pursuant to the re-assessment of Agros, cannot be faulted.

32. The only narrow area of dispute that remains to be addressed is whether the entire amount equivalent to the liability in question could be awarded in favour of Frost.

33. Undisputedly, Frost had not incurred any direct liability on account of Income Tax/penalty, as the liability was that of Agros. Frost is the majority shareholder of Agros and does not hold the entire share capital of Agros. As noted above, Frost had made a claim on its behalf as a separate entity and not on behalf of Agros. Frost had not instituted

the arbitral proceedings as a derivative action for the benefit of all shareholders.

34. Thus, any diminution in the disclosed net worth of Agros on account of any undisclosed liability would adversely affect the value of shares held by Frost; but, obviously, only to the proportionate extent of its shareholding in Agros.

35. Having stated the above, it is relevant to note that Frost had founded its claim not only on account of being the majority shareholder of Agros but also on the ground that it had paid the liability in question. In the Statement of Claims, it had stated that it had paid a sum of ₹20,39,580/- and, in addition, there was a further liability to pay the balance amount of ₹61,34,129/- for the Assessment Years 2007-08 to 2010-11. At the time when the Statement of Claims was filed, the said liability towards the Income Tax Department had not been discharged. However, it cannot be disputed that the liability was discharged thereafter. The concerned official from the Income Tax Department was examined and there is sufficient evidence to establish that the entire liability of ₹82,73,709/- was paid. A part of the said liability was paid directly by Frost while the remaining balance was paid from the bank accounts of Agros.

36. There is sufficient material on record to establish that Agros was funded by Frost. Frost had also claimed that since it was in control and management of Agros, it was required to take the necessary steps for discharge of the liability in question. It had also asserted that it had

funded Agros to the extent of ₹2,22,00,000/- (Rupees Two Crores, Twenty-Two Lacs only).

37. Frost has filed an affidavit that it had thereafter, increased its funding in Agros. However, since the said affidavit was not placed before the Arbitral Tribunal, the same cannot be considered. However, to the extent of ₹2,22,00,000/-, there is no doubt that there was material before the Arbitral Tribunal to arrive at the conclusion that Frost had funded Agros. The Tribunal had returned the specific finding that “*the claimant [Frost] has proved the payment made by them after re-assessment*”.

38. In the given facts, the manner in which Frost had funded the discharge of the liability assessed on Agros – whether by making direct payments to the Income Tax Department or by funding Agros to pay the same, is not material.

39. In terms of Clause 7.1 of the SPA, the petitioners had agreed to indemnify and defend the “buyer indemnified party” [Agros and Frost] against all liability that may be suffered, sustained, incurred or paid by any buyer indemnified party. Thus, in terms of Clause 7.1 of the SPA, the petitioners were required to hold the respondents harmless against any payment of any liability that was not disclosed in the books of Agros. Since it is established that the liability had been paid by the respondents, the petitioners were required to indemnify the respondents in respect of the same.

40. The Arbitral Tribunal's view that Frost had established that the liability in question had been paid by it, warrants no interference in these proceedings. The Supreme Court in a recent decision in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.: 2021 SCC OnLine SC 695*** has authoritatively held that the approach of the courts to evaluate and reappreciate evidence to determine whether an arbitral award is vitiated on the ground of patent illegality is impermissible.

41. In the present case, there is ample material on record to establish that Agros was being funded by Frost; Frost was in management and control of Agros; and the liability of ₹82,73,709/- was not disclosed in the accounts of Agros; Frost had paid the consideration of ₹10 crores for purchasing the shares of Agros as held by the petitioners on the basis of the representation that all liabilities were disclosed and accounted for in the books of Agros; and undisclosed liability towards the income tax and penalty quantified at ₹82,73,709/- was discharged. Any further inquiry as to how and in what manner Frost had provided funds for discharge of the said liability is neither necessary nor warranted in these proceedings.

42. In ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.: (2019) 20 SCC 1***, the Supreme Court had observed as under:

24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a

casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

[underlined for emphasis]

43. In the given circumstances, this Court is unable to accept that the impugned award is liable to be set aside as being vitiated by patent illegality on the face of the award or that it is in conflict with the public policy of India.

44. The petition is, accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

SEPTEMBER 17, 2021

nm/RK