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

Date of Decision: 23.11.2021

+ **FAO(OS) (COMM) 145/ 2021 & CM APPLs. 41497-99/2021**

VINOD AGARWAL & ANR. Appellants

Through: Mr. Ashim Vachher, Mr.
Pawash Piyush, Advs.

versus

FROST INTERNATIONAL LTD & ANR. Respondents

Through: Mr. Anil Agarwalla, Adv.
Ms. Neha Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

JASMEET SINGH, J (ORAL)

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13 of Commercial Court, Commercial Division and Commercial Appellate Division of High Court Act, 2015 challenging the judgment dated 17.09.2021 passed by the learned Single Judge in OMP (COMM) 207/2021 titled as *Vinod Agarwal & Anr. Vs. M/s Frost International Ltd. & Anr.*

2. We heard the arguments in detail and have already dismissed the appeal in question. The reasons were to follow, which we are giving in the present order. Briefly stating the facts giving rise to filing of the present appeal.

3. The Appellants were the promoter Directors of Respondent No.2

Company i.e., M/s Agros Impex India Pvt. Ltd. which were subsequently converted into a Joint Venture company (JV). Respondent No.1 is a company registered under the Companies Act, 1956 and is engaged in the business of import and export of various commodities as well as various other businesses. Respondent No.1 had filed a Claim Petition before the Ld. Sole Arbitrator, Mr. Sudhanshu Batra (Senior Advocate) stating that the Government of India had formulated a policy for installing High Security Registration Plates (HSRP) on vehicles which are sold in India. The Government of India, for that purpose, issued a notification dated 22.08.2001, which was subsequently amended vide notification dated 16.09.2011, termed as Motor Vehicle (HSRP) Order, 2011. Pursuant to the said notification, various State Governments in India floated tenders and invited bids for manufacturing and fixing of HSRP on vehicles.

4. One Mr. Jagdish Shah who was known to the Appellant introduced the Appellants to Respondent No.1, and various rounds of meetings were held between Respondent No.1 company, M/s Trinity Engineering Services Ltd. (whose chairman was Mr. Jagdish Shah), and the Appellant in May and June, 2011.

5. It was stated that Appellants represented to the Respondent No.1 company, and others that the Appellant had Type Approval Certificate (TAC) issued by the Vehicles Research and Development Establishment, Pune which is a prerequisite for bidding, and taking part in process of manufacturing and affixing HSRPs.

6. It was further stated in Claim Petition that based upon

representations, assurances and warranties given by the Appellants, a JV and Share-subscription Agreement was entered into on 05.08.2011 between the following:

- “a) The Respondent No. 1 Company i.e. M/s Frost International Ltd.*
- b) The APPELLANTS i.e. Mr. Vinod Agarwal & Mrs. Anshu Agarwal.*
- c) M/s Trinity Engineering Services LLC.*
- d) M/s Trinity Engineering Mechanical Services Pvt. Ltd.*
- e) M/s Agro Impex India Pvt. Ltd.”*

7. That subsequently Respondent No.2 i.e., M/s Agro Impex India Pvt. Ltd. was converted into a JV company. Upon execution of JV Agreement and Share-subscription Agreement, the JV company, filed its bids in various States for manufacturing and supply of HSRPs. The Security deposit and other finances to meet the expenses were provided by Respondent No.1 Company.

8. On 18.04.2010, the Government of State of Uttar Pradesh issued a Notice Inviting Tender (NIT) for manufacturing, distribution, sale and affixation of HSRPs in the State of Uttar Pradesh. The JV company submitted its bid along with the earnest money of Rs. 50 lakhs. On 30.05.2012, the bids were opened and the JV company was declared as successful bidder.

9. In terms of the bidding document of the Government of Uttar Pradesh, it was a prerequisite that the Bidder/ Applicant was required to provide its Income Tax Return (ITR) for the last two years. Since the JV

company was incorporated only on is 05.08.2011, it had not filed any Income Tax Return for the period for which ITRs were sought by the State Government of Uttar Pradesh. As per the bidding documents, the ITRs were required to be submitted for the Assessment Year 2009-10 and 2010-11.

10. It was further stated by the Respondent No.1 Company /claimants that since for the period 2009-10 and 2010-11, the Respondent No.2 company was controlled and operated by the Appellants, the Appellants were required to file the requisite Income Tax Returns. It was claimed that the Appellant vide their letter dated 31.05.2012 filed ITRs for the year 2010-11 of the Respondent No.2 for the assessment year 2010-2011.

11. Upon execution of a Share Purchase Agreement dated 07.08.2013, the Appellant sold their entire shareholding in the JV Company to the Respondent No.1 for a total consideration of Rs. 10 crores. On the sale of their entire shareholding, the Appellants moved out to the Respondent No.2 company.

12. After execution of the Share Purchase Agreement dated 07.08.2013, it came to the notice of the new management that the Commissioner of Transport, Government of Uttar Pradesh had issued a letter dated 20th / 21st June, 2013 to the Joint Venture company whereby the Transport Commissioner had asked for clarification with respect to the Income Tax Return for the Assessment Year 2010-11 submitted by it with the Transport Commissioner. The Transport Commissioner had alleged in the letter of 20th / 21st June, 2013 that there was a letter dated 15.12.2012, issued by the Association of Registration Plates Manufacturers of India alleging that

Respondent No.2 had forged its Income Tax Returns for the Assessment Year 2010-11.

13. Even though, Respondent No.1 immediately on discovering such letter issued by the Transport Commissioner, called upon the Appellants to provide the information and clarification, however, the same was not forthcoming. In terms of Clause 7.1 (vii) of the Share Purchase Agreement dated 07.08.2013 the entire responsibility with regard to the ITRs for the Assessment Year 2010-11 was of the Appellant and in case of any loss to Respondent No.1, the Appellants were liable for the same.

14. Another notice dated 19.11.2013 was received by Respondent No.2 from the Transport Commissioner, State of Uttar Pradesh whereby it was informed that the Transport Commissioner had received confirmation from the Income Tax Department that Income Tax Returns for the Assessment Year 2010-2011 were not genuine.

15. It is stated in Claim Petition that on 05.08.2014, the State of Uttar Pradesh revoked the tender allotted to the Respondent No.2 company and Respondent No.2 was blacklisted and debarred from taking part in any bidding process in the State of Uttar Pradesh for a period of two years. Such decision was conveyed to Respondent No.2 vide letter dated 26.08.2014. The said blacklisting and debarring order was challenged, and on 28.08.2015, the order /decision of the State of Uttar Pradesh was quashed and set aside by the Lucknow bench of the High Court of Allahabad

16. On 10.09.2015, the Transport Commissioner issued a Show Cause Notice calling upon Respondent No.2 to show cause as to why action

should not be taken against Respondent No.2 under Clause 2.27.1 of the Tender document to blacklist and debar Respondent No.2.

17. In the above factual background, Respondent No.1 made a claim towards damages to the tune of Rs. 3 crores on account of investment made, loss of goodwill and reputation, loss of business and legal expenses due to the wrongful, illegal, and criminal acts of the Appellant in filing the forged ITR. The second part of the claim made by the Respondent No.1 before the learned sole Arbitrator pertained to Income Tax liability for the Assessment Year 2006-07 to 2010-2011 imposed by the Income Tax authorities on Respondent No.2.

18. It was stated that under the share purchase agreement dated 07.08.2013, the Appellants had indemnified the Respondent No.1 for any alleged acts or omissions pertaining to the management or conduct with regard to business of the Respondent No.2 during the period it was under their control. The Appellants were liable to make good any such loss to Respondent No.1.

19. It is further stated that Respondent No.1 had to pay the following amounts to Income Tax Department: -

<i>Sl. No.</i>	<i>Particular</i>	<i>Amount Paid</i>	<i>Date of Payment</i>
<i>1</i>	<i>Tax Assessed under the Income Tax Return filed for the Assessment Year 2006-2007.</i>	<i>Rs. 15,39,580/-</i>	<i>27.09.2013</i>
<i>2</i>	<i>Towards demand of Rs. 23,58,625/- for re-</i>	<i>Rs. 5,00,000/-</i>	<i>25.06.2014</i>

	<i>assessment of Assessment Year 2006-2007</i>		
	Total	Rs. 20,39,580/-	

20. It was stated that Respondent No.1 company paid a sum of Rs. 20,39,580/-. In addition, there were four separate assessment orders for the Assessment Years 2007-08, 2008-09, 2009-10 and 2010-11 by the Income tax authorities amounting to Rs.2,42,58,241/-. Respondent No.1 company challenged the same and after disposal of various appeals, Respondent No.1 Company was liable to pay a sum of Rs. 61,34,129/-.

21. It was stated that the liability of the Appellants towards Respondent No.1 in respect of ITRs for the Assessment Year 2006-07 to 2010-11 is a follow:-

a.	<i>Amount paid on 27.09.2013 for the Assessment Year 2006-2007</i>	<i>Rs. 15,39,580/-</i>
b.	<i>Amount paid on 25.06.2014 for the Re-Assessment of the Assessment Year 2006-2007 against liability of Rs. 23,58,625/-</i>	<i>Rs. 5,00,000/-</i>
c.	<i>Amount Paid towards penalty imposed U/s 271 B of the Income Tax Act for the Assessment Year 2006-2007</i>	<i>Rs. 1,00,000/-</i>
d.	<i>Income Tax liability for the Assessment year 2007-2008 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax.</i>	<i>Rs. 19,40,550/-</i>
e.	<i>Income Tax Liability for the Assessment year 2008-2009 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax</i>	<i>Rs. 15,13,765/-</i>
f.	<i>Income Tax liability for the Assessment year 2009-2010 in view of the order dated</i>	<i>Rs. 13,58,237/-</i>

	<i>27.07.2015 passed by the Commissioner of Income Tax</i>	
g.	<i>Income Tax Liability for the Assessment year 2010-2011 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax</i>	<i>Rs. 13,21,577/-</i>
	Total	Rs. 82,73,709/-

22. As already noted above, two claims were filed by the Respondent No.1 company before the learned Sole Arbitrator. Claim – A of Rs. 3 crores, is not relevant for the purpose of this adjudication and need not detain us, as the same has been rejected by the sole arbitrator and not challenged by the Respondents.

23. We are only concerned with claim No. B being the liability of the Income Tax Department for the Assessment Years as detailed below:

B. Claim with respect to the liability of the Income Tax Department for the Assessment Years:

<i>2006-2007</i>	<i>Rs. 21,39,580/-</i>
<i>2007-2008</i>	<i>Rs. 19,40,550/-</i>
<i>2008-2009</i>	<i>Rs. 15,13,765/-</i>
<i>2009-2010</i>	<i>Rs. 13,58,237 /-</i>
<i>2010-2011</i>	<i>Rs. 13,21,577/-</i>
Total	<i>Rs. 82,73,709/-</i>

24. As per the appellant, the learned Arbitrator and the learned Single Judge failed to appreciate that no loss had been caused to Respondent No.1

as the entire proceedings were initiated by the Income Tax Department for the Assessment Years 2006-07 to 2010-11 against the JV company i.e. Respondent No.2.

25. As per the documents filed by Respondent No.1 before the Arbitrator, only a sum of Rs. 20,39,580/- was paid by Respondent No.2 and not by Respondent No.1. It was further the case of the Appellants before the Ld. Sole Arbitrator, that the Respondent No. I admittedly carried out due diligence with respect to the Respondent No.2 Company prior to entering into the Share Purchase Agreement through M/s Shardul Amarchand Mangaldas, and were well aware of all the Income Tax Returns which were filed by the Appellants with respect to the Respondent No.2. Thus, the case of the Appellants before the Ld. Sole Arbitrator was that under Section 19 of Indian Contract Act the Respondent No. I Company was not entitled to claim any damages from the Appellants since Section 19 clearly contemplates that a party to a contract whose consent was caused by fraud or misrepresentation will not be entitled to recover any money if such party had means to know about such misrepresentation by ordinary diligence. Prior to entering into the Share Purchase Agreement dated 07.10.2013, the Respondent No.1 carried out thorough due diligence through M/s Shardul Amarchand Mangaldas and, in any case, the Respondent No. I had already received the Notice dated 20/21st June, 2013 issued by the Transport Commissioner. Hence, the Respondent No. 1 was well aware of the allegations of forged income Tax Return being filed before the Ld. Transport Commissioner, Government of Uttar Pradesh. Thus, the

Respondent No. 1 was not entitled to claim any damages against the Appellants.

26. The main grounds of challenge before us were that:

- a) Learned Single Judge failed to appreciate that the impugned award dated 27.11.2018 was an award passed without evidence. It was argued that the learned Single Judge failed to appreciate that the Sole Arbitrator had ignored the basic principle of law that Respondent Nos.1 and 2 are separate legal entities, and merely because Respondent No.1 holds certain share of Respondent No.2, will not entitle Respondent No.1 to maintain any claim on behalf of loss/damage suffered by Respondent No.2.
- b) The learned Single Judge failed to appreciate that in the affidavit filed by Respondent No.1 before the learned Single Judge, the Respondent No.1 had taken a new stand as regards proof of payment which was never pleaded or proved before the learned Sole Arbitrator.
- c) The learned Single Judge as well as the Sole Arbitrator failed to appreciate that the entire proceedings were initiated by Income Tax authorities against Respondent No.2, who was alleged to have made a payment of Rs. 20,39,580/-.
- d) The Ld. Single Judge failed to appreciate that the Ld. Sole Arbitrator while passing the impugned award, failed to appreciate that prior to entering into the Share purchase agreement dated 07.08.2013

proper due diligence was carried out by the Respondent No.1 through M/s Shardul Amarchand Mangaldas. Hence, the Respondent No.1/ Claimant was well aware of the fact that tax returns had been filed by the appellants prior to cut off date for Respondent No.2. Section 19 of the Contract Act clearly stipulates that the contract is not voidable if the parties whose consent was so caused by misrepresentation or silence, had the means to discover the truth with ordinary diligence. In the facts of the present case extensive due diligence was carried out by M/s Shardul Amarchand Mangaldas who was engaged by the Respondent No. 1. Hence, the Respondent No. 1/ Claimant was fully aware of the state of affairs of the Respondent No.2, as well as the entire tax returns filed by the Respondent No.2. Despite that the Respondent No. 1/ Claimant entered into the Share Purchase Agreement. Hence, the Respondent No. 1 could not have claimed any damages on account of bar under Section 19 of the Contract Act. On this ground alone the impugned Judgment dated 17.09.2021 & the impugned Award dated 27.11.2018 is liable to be set aside.

27. The grounds for rejecting the contentions of the Appellant are as under: -

28. In the statement of claim filed by Respondent No.1, it has clearly been stated as under: -

"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.	Particular	Amount Paid	Date of Payment
1	Tax assessed under the Income Tax Return filed for the A. Y. 2006-2007.	Rs. 15,39,580/-	27/09/2013
2	Towards demand of Rs. 23,58,625/- for re-assessment of A.Y.2006-2007	Rs. 5,00,000/-	25.06.2014
	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 Lac 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:-*

<i>a.</i>	<i>Amount on 27.09.2013 for the Assessment Year 2006-2007</i>	<i>Rs. 15,39,580/-</i>
<i>b.</i>	<i>Amount paid on 25.06.2014 for the Re-Assessment of the Assessment Year 2006-2007 against liability of Rs. 23,58,625/-</i>	<i>Rs. 5,00,000/-</i>
<i>c.</i>	<i>Amount Paid towards penalty imposed U/s 271 B of the Income Tax Act for the Assessment Year 2006-2007</i>	<i>Rs. 1,00,000/-</i>
<i>d.</i>	<i>Income Tax liability for the Assessment year 2007-2008 in</i>	<i>Rs. 19,40,550/-</i>

	<i>view of the order dated 27.07.2015 passed by the Commissioner of Income Tax.</i>	
<i>e.</i>	<i>Income Tax Liability for the Assessment year 2008-2009 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax</i>	<i>Rs. 15,13,765/-</i>
<i>f.</i>	<i>Income Tax liability for the Assessment year 2009-2010 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax</i>	<i>Rs. 13,58,237/-</i>
<i>g.</i>	<i>Income Tax Liability for the Assessment year 2010-2011 in view of the order dated 27.07.2015 passed by the Commissioner of Income Tax</i>	<i>Rs. 13,21,577/-</i>
	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."

29. It is clearly stated in the Claim Petition that Respondent No.1, till the date of filing of the statement of claim, had paid Rs. 20,39,580/-, and was further liable to pay an amount of Rs. 61,34,129/-.

30. The Income Tax liability and penalty was that of Respondent No.2, and not of Respondent No.1. Respondent No. 1 had made a claim on the basis that it was a majority shareholder of Respondent No.2, and was in control and management of the company.

31. In our view, the learned Arbitrator has correctly appreciated the indemnity provisions which read as under: -

"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 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."

(emphasis supplied)

32. The Arbitrator has correctly held that: -

"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 A Y 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."

33. The impugned order of the learned Single Judge correctly holds that the finding against the Appellant is premised on the foundation that the Appellants had breached their representations and warranties set forth in the SPA, and Respondent No.1 had proved that payments have been made by them after re-assessment. The contention that Respondent No.1 had not incurred any loss as the liability to pay Income Tax is also unmerited. Respondent No.1 is substantial shareholder of Respondent No.2. If any additional liability is saddled on Respondent No.2, the same would result in a direct loss to Respondent No.1 which would adversely affect the value of shares held by Respondent No.1 in Respondent No.2. The Id. Single judge has, thus, correctly held in the impugned order dated 17.09.2021, that:

"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 Rs. 20,39,580/- and, in addition, there was a further liability to pay the balance amount of Rs. 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 Rs. 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 Rs. 2,22,00,000/- (Rupees Two Crores, Twenty-Two Lacs only)

34. From the above, it is clear that the Respondent No.1 Company i.e., Frost had paid the entire liability of Rs. 82,73,709/- for and on behalf of Respondent No.2 i.e., Agros. It is not in dispute that the Respondent No.1 Company purchased the entire shares of the Appellant under the terms of

the Share Purchase Agreement. The Agreement particularly the indemnity condition, obligated the Appellant to indemnify the Respondent No.1 Company Frost, in the event of a breach of any representation or warranty made in the agreement. The appellant committed a fraud by producing forged and fabricated documents. Thus reliance placed on Section 19 of the Contract Act was misplaced. Thus, it is clear that vide this undertaking given in the form of the indemnity condition, the Appellant had committed to hold the Buyer i.e., the Respondent No.1 Company, harmless in the event that any of the agreement's representations or warranties were breached or found incorrect/untrue. The Appellant now cannot shirk its responsibility set forth in the Indemnity Clause and hide behind its own wrongdoings/fraud of producing forged and fabricated documents relating to the Income Tax Returns.

35. Today, Respondent No.1 is in the control of day-to-day management of the Respondent No.2 Company i.e., M/s Agros Impex India Pvt. Ltd. Consequently, any undisclosed liability would have a negative impact on the value of Respondent No.1 Company's shares and it is the Respondent No.1 Company who has suffered damage as a result of Appellant's failure to pay taxes/penalties for the years 2006-07 to 2010-11.

36. The lifting of corporate veil is a well-known and acceptable principle of the company law. A cursory lifting of corporate veil will demonstrate that the Respondent No.1 decides the day-to-day affairs of the Respondent No.2 Company and is also the owner of the entire shareholding of Respondent No.2 Company. On the other hand, permitting the appellant to take advantage of this hyper technical view of Respondent No.1 and

Respondent No.2 being separate legal entities having their separate liabilities, and the liability towards Respondent No.2 not being capable of being recovered by Respondent No.1, would be permitting the appellants to take advantage of their own fraud, and will be complete violation of the indemnity provisions contained in the Share Purchase agreement.

37. In this view of the matter, we are of the view that the Sole Arbitrator has correctly appreciated the contentions which have been so upheld by the learned Single Judge, as reproduced by us above. We find no infirmity in the impugned order. The appeal is dismissed.

JASMEET SINGH, J

VIPIN SANGHI, J

NOVEMBER 23, 2021
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