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Arb.O.P.(Com.Div.)No.296 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	03.01.2023
Delivered on	03.02.2023

CORAM:

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Arb.O.P(Com.Div).No.296 of 2021

1. Aapico Hitech Public Company Limited,
99, Mool Hitech Industrial Estate,
Tambol Ban Lane, Amphur Bang, Pa-In
Aytthaya 1310, Thailand.

2. Aapico Investment Pte Ltd,
745, Toa Payoh Lor # 01-07,
The Actuary,
319455-Singapore.

3. Sakthi Global Auto Holdings Limited,
100, New Bridge Street,
London EC4V6JA,
United Kingdom.

All three petitioners Rep.by their
Common Authorised Representative
Kaikhushru Vicaji Taraporevala
Level 42, Six Battery Road,
Singapore-049909.

...Petitioners

Versus

Sakthi Auto Component Ltd,
180, Race Course Road,
Coimbatore,
Tamilnadu-641018.

...Respondent



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PRAYER :

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Arbitration Original Petition is filed under Sections 47 & 49 of the Arbitration and Conciliation Act, 1996, praying to declare that the Arbitration Award in SIAC Arbitration No.376 of 2019 dated 06.10.2021 be enforced as a decree of this Court, as against the respondent and for costs.

For Petitioners : Mr.J.Sivanandaraj
for Mr.Roshan Balasubramanian
For Respondent : Mr.R.Vidhya Sankar

ORDER

This Arbitration Original petition has been filed dated 08.12.2021 under Sections 47 & 49 of the Arbitration and Conciliation Act,1996 for enforcement and execution of the final Award passed by Foreign Arbitral Tribunal dated 06.10.2021.

2. In brivity, the 1st petitioner “Aapico Hitech Public Company Limited” is herein referred to as “Aapcio Thailand”; the 2nd petitioner “Aapico Investment Private Limited” as “Aapico Singapore” and the 3rd petitioner “Sakthi Global Auto Holdings Limited” as “SGAH” and the respondent, “ Sakthi Auto Component Limited” as “SACL”.

3.The brief facts of the case are as follows:



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“3.1 Aapcio Thailand” is a public listed company, incorporated under the laws of Thailand. “Aapico Singapore” is incorporated under the laws of Singapore.

3.2 Aapico Thailand holds 100% shares of Aapico Singapore and hence, Aapico Thailand and Aapico Singapore are collectively referred to as “Aapico Group” and its Founder and the President is one Mr.Yeap Swee Chuan (Mr.Yeap). “SGAH” is incorporated under the laws of England and Wales. In 2017-18, Aapico Group invested in SGAH which was then part of the Sakthi Group of Companies (“Sakthi Group”). As on date, as Aapico holds 100% of the shareholding in SGAH, Aapico and SGAH are hereinafter collectively referred to as 'petitioners'.

3.3 SACL/respondent is a public unlisted company incorporated in Coimbatore, Tamil Nadu (India), which is among the Sakthi Group, controlled by Dr. Mahalingam.

3.4 The genesis of the entire dispute between the parties originates from the dealings of two groups, one being “Sakthi Group” and the other being “Aapico Group”.

3.5 Initially, in about 2000, the automative foundry part of Sakthi



Group's business was hived off into a separate company, i.e Sakthi Auto Components Limited, viz., SACL, the respondents herein, controlled and managed by Dr. Manickam Mahalingam and family. In 2004, SACL began supplying steering knuckles to General Motors (GM) and expanded its production capacities through various factories in different countries. One such expansion was in USA namely Sakthi Auto Group USA Inc., which is herein referred to "SAGUSA". In 2012, SAGUSA entered into a Joint Venture (JV) with the Chinese company namely Bethel Automotive Safety Systems Co. Ltd (Wehei China), because of an increased demand from the GM. The terms of this JV were eventually set out in an agreement dated 16.02.2019. The JV was carried out through two new companies, viz., namely Wehei Bethel Sakthi Automotive Safety Systems Co. Ltd (WBS) wherein SAGUSA owned 49% and Wehei China 51% and the other one is Wehei Bethal Sakthi Automotive Co. Ltd, (Sakthi Bethel) wherein, SAGUSA owned 51% and Wehei China owned 49%. In a simplified outline, WBS produced steering knuckle castings for SAGUSA in China, which SAGUSA then machined in the USA before on-sale as finished products to GM.

4. **The background of the present dispute can be stated as under:**



4.1 In 2017, SACL and the Aapico Group began a JV agreement dated 10.04.2017. SGAH was formed to be the Joint Venture company.

The shares in SGAH were to be held as to 74.9% by ABT Auto, as to 24.1% by Aapico Hitech and as to 1% by Aapico Investment. SGAH was to become the owner of SAGUSA and the owner of a 70% interest in SACL. Both shareholdings were to be contributed by ABT Auto. The Aapico Group's contribution to the Joint Venture was to be financial, in the form of USD 50m in equity and USD 50m by way of loan, secured by guarantees given by Dr.Mahalingam and by ABT Auto.

4.2 In 2018, SAGUSA was experiencing financial problems, these were attributed by Dr Mahalingam primarily to thefts of castings and to technical issues and by Mr.Yeap primarily to mismanagement. Then Aapico provided an injection of USD 65m, i.e. USD 25m was in the form of equity capital, taking Aapico's shareholding in SGAH to 49.9% and the remaining USD 40m was in the form of loan from Aapico Hitech on the terms of an amended and restated loan agreement dated 29.09.2018, namely, Share Holders' Agreement (hereinafter called as "SHA"). This loan was again guaranteed by Dr.Mahalingam and by ABT Auto. On this occasion, ABT Auto also provided a charge over its shares in SGAH



dated 01.10.2018, to secure the amounts due both under the 2017 and 2018 loan agreements.

4.3 Alleging defaults under the Loan agreements, on 04.06.2019, Aapico appears to have taken complete control of the Board of SGAH. Subsequently, on 15.08.2019, by enforcing the charged shares, Aapico appropriated 50.01% shares of ABT UK thereby becoming 100% equity holder of SGAH, which position is not disputed and is also reflected in the UK Companies House and through SGAH, a 77.04% holder of SACL, indirectly. The value of appropriated shares, based on a valuation report dated July 31, 2019 tendered by an internationally renowned firm namely, FIZ Consulting LLP, was around USD 27 million.

4.4 As sole shareholder and the majority shareholder of SACL, Aapico is entitled to control and manage SACL pursuant to its rights under the 2018 SHA. As Aapico has been prevented from exercising those rights by the entities of Sakthi group, Aapico and SGAH invoked the terms of arbitration agreement and issued a notice of arbitration on 11.10.2019 to ABT UK and SACL. Accordingly, Aapico commenced the SIAC Arbitration with regard to:



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(i) Control and management rights including proportionate representation on the board of director of SACL at clauses 4.1,4.3,4.14,6 and 22 of the SHA.

(ii) Informational rights including corporate, financial and other information relating to SACL at clause 7 of the SHA;

(iii) Right of appointment of the Chief Financial Officer (CFO) at clauses 4.4 of the SHA.

(iv) Governance rights as set out in the SHA and which, it was agreed, were to be reflected in amendments to SACL's articles of association ("AoA") at clauses 4.1, 4.3, 4.4, 4.7 to 4.15, 6, 22 and 4. 17 and 27 of the SHA.

4.5 Pursuant to the Shareholders Agreement executed in 2017 and 2018 Amended agreement, Aapico has right to appoint the Nominee Directors on the Board of SACL. Factually, continuously from 10.11.2017, Aapico had Mr.Yeap.

4.6 On 06.10.2021, the SIAC Arbitral Tribunal passed the Award allowing the prayers sought by the Petitioners and ordering costs in their favour. Therefore, now the petitioners have come forward with the present Original Petition, seeing enforcement of the foreign Award dated 06.10.2021 in terms of Section 47 and 49 of the Arbitration & Conciliation Act, 1996, hereinafter referred to ('the Act').



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5. According to the petitioners, by virtue of investment for an amount of USD 75m, Aapico acquired 59.99% shares in SGAH and the remaining 50.01% shares of SGAH were held by UK based Sakthi Group entity, called ABT UK and Aapico also advanced a loan of USD 90 m and consequently, Aapico, ABT UK, SGAH and SACL entered into Shareholders' Agreement (SHA) on 29.9.2018 *inter alia*, setting out Aapico's rights of management and governance as shareholders of SGAH and its subsidiaries, including SACL and thereby, SHA conferred several rights on Aapico in respect of SACL, viz., control and management rights, information rights, right of appointment of Chief Financial Officer, etc. He would also submit that SHA is governed by English law with a disputes resolutions clause providing for arbitration seated in Singapore and administered by the institutional rules of Singapore International Arbitration Centre and admittedly, there were defaults committed by SGAH under the loan agreements, Aapico exercised its rights under the SHA and appropriate the charge created over 50.01% of ABT UK's share in SGAH in accordance with English law and thereby, Aapico acquired 100% shares in SGAH and consequently, since SGAH



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holds 77.04% in SACL, Aapico now became holder of 77.04% shares in SACL through its 100% shareholding in SGAH. However, despite Aapico's shareholders of SACL having 77.04% shares, the petitioners have been prevented from exercising their rights management/control of SACL under the SHA by the entities of Sakthi Group in breach of the SHA. Therefore, due to breaches under the SHA, the petitioners initiated arbitral proceedings and conducted before the SIAC Arbitral Tribunal, which, after giving the parties a full opportunity to be heard and after applying its mind to the facts and circumstances and after considering all the relevant aspects of the dispute and all the evidence adduced by the parties, has passed a detailed and comprehensive Award, which requires no interference and therefore, enforcement of the Award cannot be refused under Section 48(1)(b) of the Act. He would also submit that the Arbitration Clause contained in the 2018 SHA is valid and the composition of the SIAC Arbitral Tribunal was also as per the choice of the parties under the law of Singapore, which is the seat of arbitration.

6. It is further case of the petitioners that the Award is a foreign Award within the meaning of Chapter I of Part II of the Act and the only



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recourse against the Award is under the Singapore International Arbitration Act and since the Award has become final and binding upon the parties in any Court of competent jurisdiction and the respondent has not filed any application to challenge the Award. He would submit that the requirements contemplated under Sections 47 and 48 of the Act have been duly complied with and virtually, there is no legal flaw or impediment for this Court to direct the enforcement and execution of the Award. The Award contains only on matters falling within the terms of the submission to arbitration and within the scope of the submission to arbitration and the enforcement of the Award will not be contrary to the public policy of India. He further states that the Award concerns enforcement of full rights of management and control of SACL, which has its registered office and carries on its business within the territorial jurisdiction of this Hon'ble Court. Therefore, enforcement of the Award cannot be refused under all clauses of Section 48 of the Act.

7. Mr.J.Sivanandaraj, learned counsel appearing for the petitioners, at the out set, would submit that the foreign Award passed by the Tribunal SIAC fulfils all the requirements of Sections 44 and 47 of



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Part – II and 48 of the Act, which has also attained finality under the law of the seat of SHA Arbitration and the same has not been disputed by the respondent. He submits that since the Act adopts pro-enforcement bias, the burden of proof falls upon the party who resists the enforcement of the Award and in the present case, since respondent has also failed to establish any grounds for refusing the enforcement of the Award under section 48 of the Act as reiterated in “**Gemini Bay Transcription (P) Ltd. v. Intergrated sales service Ltd**”, reported in (2022) 1 SCC 753 that “unless a party is able to show that its case comes clearly within the section 48(1) or 48(2) the foreign Award, must be enforced”, this Court cannot refuse the enforcement of the Award. He also submits that as the scope of the power of the Court under the enforcement proceedings restricts this Court from acting as an Appellate Court thereby interfering with the Award's findings on merits or on facts or taking a second look at the Award. He referred to the decisions in “**Shri Lal Mahal v. Progtto**” reported in (2014) 2 SCC 433, and in “**Vijay Karia v. Prysmian**” reported in (2020) 11 SCC 1 (hereinafter called as “*Vijay Karia* case law”)



8. The learned counsel submits that though the respondent filed additional counter and brought on certain new documents and raised supplementaty grounds, those documents were not formed part of the records of the Tribunal SIAC for passing the final Award. He contended that the alleged non-production of documents/supression of documents as contended by the respondent is not a fraud that can be attributed against the petitioners and further, it is baseless, erroneous and falls outside the purview of Section 48 of the Act and in this regard, he relies upon the decisions in “**Sleepwell industries Co.Ltd v. LMJ International Ltd**” reported in **2017 SCC Online Cal 12109**; in “**LMJ International Ltd v. Sleepwell industries Co.Ltd**” reported in **2019 (5) SCC 302**]. Therefore, he pointed out that there is no obligation on the part of the petitioners to produce the alleged documents before the Tribunal and hence, the Award shall be held enforceable. Further non-production of irrelevant documents in a foreign seated arbitration, cannot be termed as breach of fundamental policy of India. The learned counsel further submits that the contention of the respondent about the pendency of certain separate/distinct/unrelated litigations is not a ground for resisiting the enforcement of the Award as it does not fall under the preview of



public policy and has no relevance to the enforcement of the Award. The learned counsel also submits as it was contended by the respondent that petitioners suppressed several materials concerning the below proceedings, viz.,

i) Criminal Complaint filed by the Respondent before the Special Court under Companies Act, 2013, relating to Aapico's acquisition of control of the Respondent's Portugal operations. It was alleged that the Special Court has ordered an enquiry by the ROC.

ii) ABT UK's claim filed in the High Court of England and Wales in relation to the appropriation of SGAH shares under the Share Charge Agreement by Aapico to become SGAH's sole shareholder. The Respondent relied on the above proceeding to contend that the issue of whether Aapico is entitled to control SGAH is the very basis of passing the Award which was pending adjudication in the UK Share Charge.

iii) Pending proceeding before the National Company Law Tribunal, Chennai ("NCLT") by one Sakthi Group called Sakthi Sugars Limited ("SSL") (CP 387 of 2020), alleging oppression against Aapico and SGAH in respect of the affairs of the Respondent ("NCLT Proceedings").



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9. As regards to the first proceeding of the above, the learned counsel pointed out that the allegations were sought to be raised by the respondent in its counter claim before this Court, in fact, were not pressed before the Arbitral SIAC. Further, the criminal case has been stayed by this Hon'ble Court vide order dated July 15, 2022 in CrI. O.P. Nos.16645-16646 of 2022. Without prejudice to the above contentions, civil and criminal proceedings are independent of each other, and such the findings made in any of the proceedings are not binding on the other. In this regard, he referred to the decisions in “**Syed Askari Had Ali Augustine Imam v. State Delhi Admn.**” reported in (2009) 5 SCC 528, paras 24, 25 and “**Kishan Singh v. Gurpal Singh** reported in (2010) 8 SCC 775, para 18.

10. As regards the second proceedings mentioned above, the learned counsel would submit that UK High Court has delivered its final judgement wherein, the ABT UK's challenge to Aapico's appropriation of SGAH shares has been outrightly rejected. Further, as regards the proceedings before the NCLT pertaining to the oppression and



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mismanagement under Section 241 of the Companies Act, 2013 he would submit that it has no relevance to the arbitration which dealt with the breach of the SHA. The above position has been confirmed in the Award by the Tribunal, which observed that- “.....*the Tribunal accepts the Respondents' submission that a number of claims raised in the SSL NCLT Proceedings pertain to factual and legal aspects which are not matters to be determined in this arbitration*”. These concerns the claims relating to the allegedly oppressive conduct of SGAH (through Aapico) as the majority shareholder of SACL and the complaints relating to the takeover of Sakthi Services S.A. and Sakthi Portugal S.A.”.

11. The learned counsel would further submit that the allegation of the fraudulent conduct of the petitioners is baseless and irrelevant since in the present proceedings 'fraud' as contemplated under section 48 of the Act is not a 'fraud' or 'corruption' in making of the Award , hence it is enforceable. He also submits that with regard to the withdrawal of the counter-claim, the respondent alleged that the counter-claim had to be withdrawn due to non-production of the documents on behalf of the respondent before the Tribunal SIAC which in reality, was only due to



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non-payment of filing fees, which is clear from the E-mail sent by the respondent to the Tribunal dated 25.11.2020.

12. As regards the E-mails which were relied upon by the respondent, said to have been discovered from the UK Court proceedings is concerned, the learned counsel would submit that those E-mails, viz., E-mail though which a Memo circulated by Srinidhi Investments and Advisor Pvt Ltd., dated January 8, 2019, Email addressed by Mr. Venkat to Mr. Manickam dated January 7, 2019; Email addressed by Mr. Venkat to both Mr. Yeap and Mr. Manickam dated February 19, 2019; Email addressed by Mr. Venkat to both Mr. Yeap and Mr. Manickam dated March 11, 2019; Email addressed by Mr. Venkat to Mr. Manickam dated march 11, 2019; email addressed by Mr. Venkat to Mr. Yeap dated March 16, 2019; Emails exchanged between Mr. Venkat Ramaswamy and Mr. Yeap from January 08, 2019 and March 16, 2019, the relevant portion of the deposition of Mr. Yeap before the UK Court, which is on Day-3 of trial. The learned counsel for the petitioners submits that those e-mails have no relevance at all to the arbitration proceedings. As stated earlier the arbitration proceedings pertain to the breach of the SHA committed



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by the respondents, all the issues raised and decided thereof is only to the breach of the SHA. Further, Mr. Manickam was always in possession of or aware of these E-mails and no explanation or excuse has been provided by the respondent as to what prevented the respondent from furnishing those documents (E-mails) before the Tribunal. He also pointed out that Mr.Venkat is a part of Shrinidhi Investment and Advisors Pvt.Ltd and it was falsely stated before this Court that he is a part of the Sakthi Group, and the respondent is attempting to misinterpret the above E-mails, which is a deliberate attempt to play fraud on this Court. The learned counsel submits that the respondent's own admission that the issues based through these additional documents do not arise from the SHA and the documents sought to be produced before this Court have no causative link and the counter-claim is not a set-claim and for the above reasons, the documents have no relevance at all for making of the Award by the Tribunal. Therefore, the learned counsel contends that the objections/grounds taken by the Respondent and filing of the above documents is an abuse of the process of law and intended to confuse the issues and delay the enforcement of the Award. It is one the several frivolous tactics deployed by the respondent to prevent the petitioners



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from exercising their rights as 77.04% majority shareholder. The learned counsel would submit that non-enforcement of the Award will cause grave prejudice to the petitioners, who had invested more than INR 1000 crores, as the respondent continues to be run by the nominees of its minority shareholder, contrary to the terms of the SHA and the Articles of Association of the respondent. The learned counsel submits that the petitioners and their nominees do not have any access to the office/factory premises of the respondent. There is absolute lack of visibility on the financial health vis-a-vis state of affairs of the company, despite the Award recognising the petitioners information rights under the SHA.

13. With these contentions, the learned counsel for the petitioners would urge this Court to petition for the enforcement of the Award filed under Section 47 to 49 of the Act be allowed by this Hon'ble Court.

14. Mr.R.Vidya Shankar, learned counsel appearing for the respondent would vehemently contend that the present petition itself is unsustainable and the enforcement of the Award is opposed to public



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policy of India which is liable to be dismissed. He pointed out that the crucial facts and pending legal proceedings have been suppressed in the present petition, which have a direct bearing on the enforceability of the Award. The petitioners/Aapico are guilty of seriously fraudulent and abusive conduct and has had a track of usurping companies. They are a corporate raider, in the habit of orchestrating actions and usurping control over critical subsidiaries of the Sakthi Automotive group i.e. Portugal operations of SACL and there is a pending criminal proceeding before the Special Court under the Companies Act and the investigation is going on which fact has not been raised before SIAC. Enforcement of this Award will result in Aapico gaining control of board of SACL will be grossly opposed to public policy of India in the said context. He further contends that the petitioners 1 and 2 states they are the sole shareholder of the 3rd Petitioner, which subject matter was pending litigation in UK and the courts in UK have directed the parties to go on trial in this regard. He further submits that there is a minority shareholders action pending in NCLT for oppression and mismanagement under S.241 of the Companies Act which are not arbitrable issues.



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15. The learned Counsel for the Respondent, resisting the implementation of the foreign Award passed by the SIAC Tribunal would primarily contend that the impugned Award was obtained on the back of wilful concealment of documents despite an order of the tribunal directing disclosure in terms of Redfern Schedule process and the Petitioners had deliberately suppressed very vital documents. He referred to the Procedural Order no.2 dated 20.06.2022 passed by the Tribunal SIAC directing the parties to produce the vital documents set out in the completed Redfern schedules, but the petitioners has not produced though available with them. But on the other hand, since the said documents were not available with the respondent, it was constrained for the respondent to give up its counter-claim before the SIAC Tribunal. However, during the course of the trial before the High Court of England and Wales CL-2020-000398, discovery was ordered and in that process, access to entire e-mail domain of the petitioners was taken and during the discovery process which took place between 2021 and February 2022, discovery of vital documents and e-mails concealed by the Petitioners from the respondents were unearthed and in one of such e-mails would show how the Petitioners had orchestrated a fraud on the respondent



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through Mr.Yeap, the founder of Aapico and Mr. Venkat Ramasamy of Shrinidhi investment and advisers in January 2019. Therefore, he would contend that since the Award has been obtained by fraud by suppression of vital documents, this Court is empowered to refuse the enforcement of the foreign Award in terms of Sec.48(2)(b) of the Act as fraud is clarified under said provision as conflict with public policy of India. He also submitted that fraud initiates all solemn acts and it has been repeatedly held by the Apex Court and the High Courts held that if Award is obtained by reason of commission of fraud, even the principles of natural justice are not required to be complied with for setting aside the same. He also submitted that even suppression of material documents would amount to fraud on the Court and any order or decree obtained by practising fraud is a nullity. In this regard he relied upon following judgements of the Hon'ble Supreme Court, viz.

- i) ***India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.*** (2007) 5 SCC 510;
- ii) ***Hamza Haji v. State of Kerala***, (2006) 7 SCC 416;
- iii) ***Patch v. Ward*** (1867) 3 Ch App 203 ; 18 LT 134;
- iv) ***Bhaurao Dagdu Paralkar v. State of Maharashtra*** (2005)7 SCC 605;
- v) ***Jai Narain Parasrampuriah v. Pushpa Devi Saraf***



(2006) 7 SCC 756;

vi) *Venture Global Engg. v. Satyam Computer Services Ltd.*, (2010) 8 SCC 660;

vii) *Vijay Karia v. Prysmian Cavi E Sistemi SRL* (2020) 11 SCC 1;

viii) *Venture Global Engg. LLC v. Tech Mahindra Ltd.*, (2018) 1 SCC 656;

ix) *Associate Builders v. DDA* (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204".

Therefore the learned counsel for the respondent would contend that until the Award was passed by the SIAC tribunal, the respondent was not even aware of the existence of the crucial documents concealed by the petitioners and obtained the Award by fraud which vitiates the entire Award since the same can be termed as conflict with public policy and therefore this Court can refuse the enforcement of the said Award.

16. The learned counsel for the respondents also demonstrated as to how the petitioners wrongfully usurped the control of Portugal operations and unjustly enriched themselves. According to him, the Aapico is guilty of serious fraudulent and abusive conduct and had track record of usurping companies, being a Corporate raider, in the habit of orchestrating actions and usurping the control over critical subsidiaries



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of Sakthi Automotive group and in this regard criminal prosecution has launched. Likewise Aapico has usurped control of Portugal operations of SACL and in this regard also a Criminal Complaint has been filed against Aapico before the Additional District and Sessions Court, Coimbatore, wherein investigation has been ordered. Further one of the minority shareholders of SACL,i.e Sakthi Sugars Limted has filed Company petition, alleging oppression and mismanagement of the files of SACL and wrongful loss caused as a result of Aapico usurping Portugal operations. These Portugal operations were behind the back of Sakthi group usurped by Aapico. Sakthi Portugal SA is a Wholly owned subsidiary of SACL involved in the manufacture auto components. Portugal operations were supported by a loan from Oxy Captial, which debt Aapico promised to take over by substituting itself as a lender and thereby providing financial gain to SGAH. However contrary to such representation, Aapico behind the back of SGAH, colluded with Portugal Executives and usurped the entire Portugal operations. Further not stopping with usurping the subsidiary, the value created by the Aapico for such takeover was grossly undervalued and caused wrongful loss to the tune of several crores to SACL. In fact, this was exhaustively pleaded



before the SIAC tribunal, but for want of evidence the respondent was constrained to withdraw the same. However subsequent discovery of the memo before UK Court would have enabled the respondent to vehemently agitate the issue as regards the loss of Portugal operations before SIAC.

17. The learned counsel would further submit that the respondent/SACL discovered an Email exchange between Aapico and Oxy Capital in June, 2019, wherein, a step by step action plan was deployed by Aapico behind the back of respondent/SACL to usurp control over Portugal Operations. Therefore, he would submit that the Aapico by series of orchestrated actions, caused SACL to loose its Portugal operations valued in excess of Rs.1000 crores and appropriate the same for a meagre amount of approximately Rs.175 crores and thereby caused wrongful insurmountable loss to SACL.

18. The learned counsel would further contend that since the valuation report ascribing NIL value to Portugal and the Memo exchanged between Mr.Venkat Ramaswamy, who is CEO of Srinidhi Investment and Advisers Pvt.Ltd., and Mr.Yeap were unearthed only in



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the process of UK proceedings, which the respondent was unable to present its case effectively before the SIAC Tribunal and was unfairly prejudiced. He pointed out that the concealment of documents is clearly a fraud as held by the Apex Court in "*Satyam and Tech.Mahindra*" case, wherein, also after recognizing the fraud, the Hon'ble Apex Court was pleased to refused the recognition and enforcement of the Award. He would submit that despite a request for production of documents and contrary to the procedural order of the SIAC Tribunal dated 20.06.2020, the petitioners failed to come forward to produce any material documents resulting in a conflict with public policy of India and therefore, the Award is liable to be held as violative of public policy of India and this Court, without any hesitation, can refuse the enforcement of such Award.

19. With these contentions, the learned counsel for the respondent would pray this Court to refuse the enforcement of the Award and to dismiss the petition.

20. Heard Mr.J.Sivanandaraj, learned counsel appearing for the petitioners and Mr.R.Vidhya Shankar, learned counsel appearing for the



respondent and perused the materials available on record including the written arguments filed by both the parties.

21. The present Arbitration Original Petition was filed for the enforcement of the Foreign Arbitration Award passed by the SIAC in Arbitration No.376 of 2019 dated 06.10.2021, to be enforced as a decree against the respondent under Sections 47, 48 and 49 of the Act.

22. This Court heard the learned counsel elaborately on the various aspects. However, this Court generally will not interfere with the Foreign Award, unless and otherwise, the same is hit by any of the conditions mentioned in Section 48 of the Act. For ready reference, it would be appropriate to extract the provisions of Section 48 of the Act, which read as follows:

“48. Conditions for enforcement of Foreign Awards.—

(1) Enforcement of a Foreign Award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or; failing any indication thereon, under the law of the country where the Award was made; or

(b) the party against whom the Award is invoked was



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not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the Award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the Award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(e) the Award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that Award was made.

(2) Enforcement of an arbitral Award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the Award would be contrary to the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an Award is in conflict with the public policy of India, only if,—

(i) the making of the Award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

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.]



(3) If an application for the setting aside or suspension of the Award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the Award and may also, on the application of the party claiming enforcement of the Award, order the other party to give suitable security.”

23. A perusal of the above provisions make it clear that a Foreign Award may be refused from enforcement as a decree in India under any of the following grounds:

a) The parties to the agreement referred to in Section 44 of the Act under some incapacity or the said agreement is not valid under the law to which the parties are subjected to.

b) The party against whom the Award is invoked was unable to present its case.

c) The Award deals with the difference not contemplated by or not falling within terms of the submissions of the Arbitration or it contains decisions on matters beyond the scope of submission of the arbitration.

d) The composition of arbitration authority or the arbitral procedure are not in accordance with the agreement of the parties or failing such agreement was not in accordance with the law of the Country where the arbitration took place.



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e) The Award has not yet become binding on the parties or has been set aside by the Super-seated competent Authority of the Country under law, which the Award was made.

f) The subject matter of the difference is not capable of settlement by arbitration under the law of India.

g) The enforcement of the Award would be contrary to the public policy of India.

The conflict of Public policy refers to the following situations:

i) The making of the Award was induced or affected by fraud or corruption or was in violation of Section 75 and 81 of the Act, or

ii) If it is in contravention of fundamental policy of Indian law or

iii) If it is in contravention with the most basic notions and morality or justice.

24. Except the grounds mentioned above, the Court, in general, will not entertain any other objections to refuse the enforcement of the Foreign Award.



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25. Though, the learned counsel made very many submissions on various aspects, this Court captured only the relevant, which are justifiable under the grounds mentioned in Section 48 of the Act.

I. NON-COMPLIANCE OF TERMS AND CONDITIONS OF KMB'S LOAN SANCTION LETTER DATED 11.09.2018

26. In the present case, the respondent-company borrowed a sum of Rs.22,353 lakhs from Kotak Mahindra Bank (hereinafter referred to as “KMB” or “Bank”), who became the sole Banker of SACL by taking over of all the credit payments availed in SACL from multiple Banks. In this regard, the said KMB issued a sanction letter dated 11.09.2018. One of the material conditions imposed by the KMB against the SACL in the said letter reads as follows:

“Any change in shareholding/Directorship/ partnership/ownership shall be undertaken with prior permission of the bank.”

27. Further, it was contended that the said the sanction letter was placed for consideration and approval of the Board of Directors of respondent at the Board meeting held on 12.09.2018 at the Corporate



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Office of Aapico Investment Pvt. Ltd., at Thailand. The minutes of the said Board meeting was marked as Ex.R.48 before the Tribunal SIAC.

The said Board meeting was also attended by the nominee of the petitioners, Mr.Yeap. As stated above, the sanction letter dated 11.09.2018 issued by KMB was placed before the Board for perusal and discussion. After extensive discussion, the Board has taken a decision and passed the following resolution *interalia* recording that,

“Resolved that the company do avail from KMB (“the bank”) said facilities aggregating to INR 22,353 lakhs in terms of the bank's sanction letter 11.09.2018”.

28. Under Section 48(2) of the Act, the enforcement of a foreign Award may be refused, if it is in conflict with basic notions of justice or public interest or public policy. In the present case, though, the second Share Holders' Agreement dated 29.09.2018 (hereinafter called as “SHA”) provides for the change of Directorship, Management, etc., both the parties have also agreed to the terms and conditions mentioned in the sanction letter issued by the KMB by virtue of the Board Resolution passed at the Board meeting held on 12.09.2018 wherein one of the common condition was that the parties should not change the share



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holdings, Directorship, ownership in the company without prior permission of the bank. In the present case, no such prior approval from the bank has been obtained, even subsequent to the pronouncement of the Award, but before filing the present original petition. The KMB's sanction letter was approved by the respondent company's Board, which is much prior to the execution of SHA dated 29.09.2018. Thus, both parties had knowledge about KMB's letter dated 11.09.2018. Therefore, the parties to the SHA are well aware of the fact that the enforcement of terms and conditions of SHA will be always subject to the loan sanction letter of KMB. Hence, any attempt to change the shareholding, directorship, management, etc., without prior approval of KMB, would be contrary to the terms and conditions of loan sanction letter of KMB. Hence, suppressing the above facts, the petitioner obtained the award from SIAC. SHA will be always subject to loan sanction letter of KMB.

29. Further in the said Board meeting, it had also resolved to authorise the Managing Director and CFO to execute all undertakings and documents as required by the Bank. In the same meeting, the SHA to be entered into between the parties was placed as subject No.5 and the



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Board has approved the same. At the very same Board meeting, subject No.7, the terms and conditions of the sanction letter issued by the KMB were discussed and the loan was availed by SACL as per the sanction letter approved by the Board. The minutes of the said Board meeting was marked before the Tribunal SIAC as Ex.R.48.

30. Subsequent to the passing of the above Board Resolution, the respondent had acted upon the resolution and executed all undertakings and documents and also filed the same with the Ministry of Corporate Affairs with the relevant documentary evidence in the availment of the facilities and terms thereof and the same has been marked as Ex.R.49 before the Tribunal SIAC.

31. Therefore, a submission was made that unless and otherwise the prior permission is obtained, the Share holding, Directorship and ownership of the respondent-company cannot be changed. In the present case, the Arbitration Award was passed giving effect of complete change of the Directorship and the shareholding pattern of the respondent-company. Though, these aspects were brought to the knowledge of the Tribunal SIAC, the Tribunal in its Award at paragraph Nos.183, 184 and



185 has stated as follows:

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“183. The claimant also rejected the respondents' suggestion for the reason why SACL has failed to amend its Articles of Association is because such an amendment would amount to a breach of an obligation in the facility granted by KMB (“KMB”) to SACL. The claimants argued that the rights between the shareholders under the SHA are not affected by a facility arrangement between SACL and KMB as there is no requirement in the SHA which requires obtaining KMB's prior permission. Further at the main hearing, Dr.Mahalingalam had admitted that the respondents have not even sought permission from KMB and the question of whether KMB's permission has been granted does not even arise. The claimants contended that the real reason why SACL has not amended its Articles of Association is because the respondents hope that the share Charge Proceedings would ultimately be determined in their favour. However, even if ABT Auto succeeds in the Share Charge proceedings, this would only lead to an adjustment of the security value taken by Aapico. The respondents' obligation to amend their Articles of Association would not be affected since that obligation had been in place and breached even prior to Aapico's appropriation of security.

184. The respondents submitted in their closing submissions that they do not seek to persuade the Tribunal to revisit what they have already found. The respondents accepted that under the interim order, the Tribunal had



already found that the respondents are obliged to procure that SACL's Articles of Association are amended to incorporate the rights of Aapico under the SHA. Since SACL's Articles of Association had been amended to provide at Article 119 that all rights under the original SHA were entrenched in the Articles of Association, there was no basis for them not to be updated to reflect the rights under the SHA. The respondents also acknowledged that in the order on the stay application dated 8 October 2020, the Tribunal had held that the Claimants had attempted to put into effect the amendments to SACL's Articles of Association, but were unsuccessful as the SACL Board did not call an EGM, and the respondents' representatives on the SACL Board have not acted in any way to put into effect (1) and (6) of the interim order.

Tribunal's findings and decision

185. In light of the confirmation and acknowledgment by the respondents as discussed above, the Tribunal considers it appropriate to make a final order in terms of the prayer for relief sought at [182.3] of the statement of claim, being:

“The Respondents are directed to amend or procure the amendment of the articles of association of SACL such that the said articles of association are updated to incorporate the relevant terms of the SHA”



32. A perusal of the above Award would show that only the Tribunal has recorded the submission of the respective parties, but has not given any findings to protect the interest of KMB, when the parties to the SHA also approved the sanction letter of the bank dated 11.09.2018 in the presence of the petitioners' representatives at the Board meeting of the respondent held in Bangkok, Thailand on 12.09.2018. In the said meeting, the resolution in subject No.5 was passed with regard to entering into the SHA. The submission of the learned counsel for the petitioners was that the right between the Shareholders under the SHA are not affected by a facility arrangement between SACL and KMB. Therefore, the learned counsel submits that the SHA would prevail over the undertaking given to the KMB, while availing a loan of a sum of Rs.22,353 Lakhs by SACL. As discussed above, at the Board meeting held on 12.09.2018, the draft SHA was placed as agenda No.5 and the same was approved. In the same Board meeting, the KMB's sanction letter was also placed as agenda No.7 and the same was approved. Thus, the petitioner, cannot now take a stand that getting the approval of KMB to change directorship, etc., is beyond the scope of SHA, but it is an obligation casted upon the petitioners by virtue of SHA's terms and



conditions to management of the SACL.

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33. Now, it is for this Court to decide whether there is any public interest involved with regard to the breach of undertaking given by the respondent/SACL to the KMB or such breach is in conflict with the basic notion and justice, while passing the order for enforcement of the Award?

34. The KMB sanctioned a sum of Rs.22,353 lakhs as loan by virtue of sanction letter dated 11.09.2018. The said letter was placed before the Board at its Board meeting held on 12.09.2018 at Thailand, where the representative of the petitioners, Mr.Yeap, was also present and in the said meeting, a decision was taken to avail the financial facilities from the KMB in terms of the bank's sanction letter dated 11.09.2018 and subsequently, the said facilities were availed by the respondent and necessary documents were also executed.

35. No doubt that the KMB has lent the respondent out of the public money i.e., KMB lent the money to the respondent, which was mobilised through public deposit. Hence, in this way larger public



interest is involved in the process of lending money to the respondent by KMB. Only to protect the interest of the public, the Bank has put up conditions that no change in shareholding and Directorship shall be made without prior permission of the KMB. However, while passing the Award, though all these facts were brought to the knowledge of the Tribunal SIAC, it has not given any finding except merely recording the submissions of the respective parties. Virtually it is a non-speaking Award with respect to the present issue is concerned. Thus any change of shareholder, directorship, management, etc., as prayed by the petitioners in the claim statement, without prior approval of the KMB, it will clearly amount to making an attempt to loot the public money, which is clearly against the public policy of India. For this acts of the petitioners, this Court either wittingly or unwittingly cannot be a party by allowing the enforcement of the subject foreign award.

36. In the present case, there are two types of interest involved. The first one is share holders' interest and the next is the public interest. As far as the share holders' interest is concerned, it is based on the SHA and as far as the public interest is concerned, lending the public money



by the KMB to the respondent. The Tribunal has taken into consideration mainly the interest of shareholders based on the SHA. However, it has completely ignored to provide any weightage for the public interest and the role of parties to manage the respondent in terms of the SHA, when the KMB lent public money to the respondent-Company, where the parties who approved the loan sanction letter are also required to manage the company in terms of SHA, and those parties are also parties to the SHA. It is pertinent to point out that the management of the respondent-company includes process of obtaining loan, complying of terms and conditions of sanction letter and utilisation of the fund in the case of managing the company.

37. In the present case as stated above, in the sanction letter of KMB, the terms and conditions of the lending is mentioned and the said terms and conditions had already been placed before the Board meeting and the same had been agreed by both the parties. Therefore, both the parties are liable to comply the terms and conditions of the sanction letter and at any costs, no party shall breach the said terms and conditions. In the present case, the petitioners have not obtained any permission either



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before passing of the Award and placed the same before the Tribunal or after the obtaining of Award before filing the present petition for enforcement of the foreign Award. It is the bounded duty of the petitioners to obtain prior approval from the KMB atleast before the enforcement of the Award. Without obtaining any approval, it clearly amounts to the breach of undertaking given by the respondent to the KMB and contrary to the provisions of management of the respondent in terms of SHA.

38. The Tribunal has given priority to the private interest between the two share holders. However, it has not given any importance to the public interest. As far as the interest of the public is concerned, the public interest will always prevail over the private interest. In the present case, the Award was passed as if private interest will prevail over the public interest. Therefore, this Court is of the considered view that enforcement of the present Award is against the public interest and breach of undertaking given to the Bank, while borrowing money by the respondent from the bank. Under the ground of public interest, even something is not pleaded and the same is brought to the knowledge



before this Court, when the petition is filed for enforcement of foreign Award, this Court certainly can entertain the submissions and examine the aspects of the public interest and thereafter, decide about the enforcement of foreign Award.

39. In the written arguments, the learned counsel for the petitioner has stated that the following prayer as stated in the counter statement filed before SIAC was withdrawn by the respondent:

“declaring that the claimants are bound by the undertaking given to KMB of SACL not to effect change of management or ownership of SACL without the prior permission of the said Bank and grant a consequential permanent injunction restraining the claimants from effecting any change of management or ownership of SACL without the prior permission of the KMB”

According to the petitioner, this prayer was withdrawn. Therefore, the Arbitral Tribunal has not passed any order with regard to the prior approval of KMB. In the present case, the claim was filed for the change of management, shareholdings, Directorship, ownership, etc. The main prayer in the claim statement was with regard to the change of management, directorship, shareholdings, etc. When such being the case, merely withdrawing the prayer in the counter claim by the respondent



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would not deny the right to make objections to the main prayer in the claim statement. Since the petitioners have agreed for the terms and conditions of the loan sanction letter of KMB, the said loan sanction letter has to be read with the SHA. Conjoint reading of the SHA and the loan sanction letter makes it clear that the petitioners, who are the parties to the SHA have agreed for the loan sanction letter. Therefore, when the petitioners intend to change the shareholding pattern, directorship, ownership, etc., it is their bounded duty to get prior approval from KMB as per the terms and conditions of the said loan sanction letter. This vital fact was not at all considered by the Tribunal. This fact cannot be merely ignored by stating that the respondent withdrew his prayer while withdrawing his counter claim, since the main prayer in the claim statement, which the claimant sought for in the Arbitration proceedings before the tribunal was with regard to the change of shareholding, directorship, etc. Admittedly, the submissions of both the parties are recorded by the Tribunal SIAC but no finding was given as narrated above. So, merely withdrawing the above prayer will not absolve the duty of the Tribunal to consider the submissions when main claim was only for the change of directorship, shareholdings, etc. Therefore, I do



not find any force in the submissions made by the learned counsel for the petitioner. Further parties by virtue of the approval of the terms and conditions of the loan sanction letter of the KMB, they have incapacitated from implementing the terms and conditions of the SHA dated 29.09.2018 without prior approval of the KMB. For the reasons stated above, this Court is of the considered view that there is injustice caused not only to the respondent but also KMB including the public at large. Without considering all the above aspects, it is clear that the rendering of Award is conflict with the most basic notion of the justice and also against the public policy of India. Therefore, this Arbitration award is liable to be rejected on this ground and for this reason, this Court is not inclined to grant any approval for enforcement of the subject foreign Award.

II. RESPONDENT UNABLE TO PRESENT ITS CASE BEFORE

SIAC:

40. The next point for consideration is, whether the respondent was unable to present its case on the ground under Section 48(1)(b) of the Act. The respondent has filed a reply statement cum counter claim, wherein the stand taken by the respondent at paragraph Nos.III and IV,



are as follows:

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“III. The claimants abused their position, and orchestrated actions with the motive of engineering an alleged event of default to usurp control of the automotive group from the existing promoters, and the claimants are answerable in counter-claim; consequently, claimants are not entitled to any relief

3.1. Aapico is aware that, under the Amended and Restated Loan Agreement (“the 2018 Loan Agreement”), there was an obligation for SGAH as the Borrower to make the March 2019 Repayment (in the amount of USD 14 million plus interest) by 31st March 2019 (pursuant to Clause 6.1). There is also an obligation to pay interest under the 2017 Loan Agreement.

3.2. Under the 2017 Shareholders Agreement and under the Amended and Restated Shareholders' Agreement ("the 2018 Shareholders' Agreement") between ABT UK and Aapico, the parties owe the following obligations to each other:

A. Clause 14.1-Further Cooperation - "ABT [UK] and Aapico intend to collaborate and work together in good faith for the purpose of expanding each of their businesses in automotive parts manufacturing and distribution across the globe."

B. Clause 16-Supremacy-"Aapico and ABT [UK] shall each use their respective votes in SGAH and all other means at their disposal so as (a) to ensure that the 2018 Shareholders' Agreement is duly performed; and (b) to ensure that the provisions of the Articles of SGAH are not infringed";

C. Clause 22.1 - Further Assurances- "Aapico and ABT (UK) (either directly or through its Affiliates) shall perform (or procure the performance of) all further acts and things and execute and deliver (or procure the execution and delivery of) such further documents, as may be required by law or as may be necessary or required to implement and give effect to the 2018 Shareholders' Agreement."

D. Furthermore, pursuant to, among others, Clauses 4 (especially 4.18), 5.3 and 6, Aapico has been granted a high



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level of operational and financial control over SGAH, including to:

i. appoint the CEO and the CFO of SAGUSA (the main US operating subsidiary of SGAH), in the persons of Ramachandran Balasubramaniam (Financial Analyst), Jet Lian (Financial Controller), Shuro Matsubara (Group CFO) and Joginder Singh (CEO); and,

ii. have the day to day operations of SAGUSA reported to the Executive Vice Chairman of SAGUSA, Aapico's Mr. SC Yeap.

3.3. In any event, the 2018 Shareholders' Agreement is a relational contract carrying an implied duty of good faith and consequently, an obligation on Aapico to exercise their powers under the Shareholders' Agreement in the best interests of the Company (SGAH) as a co- operative joint enterprise, and in line with its fiduciary duty and obligation, having regard to Aapico's position of influence and control.

3.4. Aapico's Mr Yeap has also assumed the role of Group CEO for SGAH since January 2019 (Exhibit R-2). By reason of their positions, each one of them owed fiduciary duties to SGAH; and in view of Aapico's position of influence given by the provisions of the 2018 Shareholders' Agreement, Aapico itself owed fiduciary duties to SGAH.

3.5. Acting with an intent to cause a default to both trigger security enforcement and a takeover:

A. Under Aapico's effective operational and financial control, SAGUSA (a 100% owned subsidiary of SGAH) has been deliberately mismanaged in order, among other ends, to strategically ensure that SAGUSA did not have cash available to honour its commitments. This was done with a view to ultimately try to render SGAH unable to meet its March 2019 Repayment obligation.

B. By way of example only, from January 2018 to June 2018, SAGUSA's audited accounts demonstrate that its profit before tax was USD 2.5 million, and this is evidenced by Exhibit R-3. In contrast, in the period from July 2018 to December 2018, under Aapico's effective operational and financial control, SAGUSA suffered catastrophic losses of



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USD 21.4 million (loss for the year USD 18.9 million after adjusting the profit made up to June 2018 amounting to USD 2.5 million) and this is evidenced by Exhibit R-4. The causes of these losses include:

i. Non-payment to critical suppliers:

a) From approximately September 2018 onwards, payment was deliberately delayed or stopped to critical suppliers of SAGUSA, such as Cadillac Castings, Rio Tinto for aluminium ingots, Vibroacoustic/CTR as bushing suppliers, and perhaps most importantly, SAGUSA's Joint Venture partner in China, Weihail Bethel Sakthi Safety Systems Limited ("WBSSS") for castings.

b) Aapico caused SAGUSA to delay or stop these payments, notwithstanding the fact that SAGUSA was generating approximately USD 2.5 million in revenue from customers per week, and had other funds available to it up to USD 4 million (which Aapico chose to cause SAGUSA to deploy to make a non-critical payment to Oxy Capital).

c) Because of Aapico's non-payment of critical suppliers, SAGUSA's overdue payment amounts rose rapidly during this period (by way of example only, over USD 8 million became overdue to WBSSS).

d) As a result, and as would have been obvious to Aapico, most of SAGUSA's critical suppliers changed their terms of trade with SAGUSA from an average of 45 days for payment to Cash on Delivery. This had a significant negative impact on SAGUSA's cash flow.

e) Moreover, and as would have been obvious to Aapico, because of the non-payment of its invoices, WBSSS put a stop to the shipments of its castings from China to SAGUSA's plant in Detroit, causing SAGUSA to incur very significant further expense in the order of about USD 18 million, on in-bound and out-bound air-freight of WBSSS's castings, in order not to miss deliveries to critical customers such as General Motors

f) To meet this additional and un-budgeted expense of USD 18 million, SAGUSA had to seek additional finance, which it chose to do in the amount of approximately USD 10 million from General Motors, therefore incurring not only additional and unnecessary financing costs but also, as would have been obvious to Aapico, causing significant



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reputational damage to SAGUSA.

g) In the circumstances significant sums are still due by SAGUSA to its suppliers.

ii. Meeting with suppliers:

a) At Mr Yeap's instigation, a meeting was held in January 2019 with over 15 of SAGUSA's suppliers (including suppliers of raw materials, general supplies and machine and equipment).

b) At that meeting, Mr Yeap informed SAGUSA's suppliers that SAGUSA did not have sufficient funds to pay them. This was not in SAGUSA's interest and was contrary to usual business practice and more importantly contrary to the fiduciary position that Aapico and particularly Mr Yeap owed to SAGUSA.

c) As a direct result, and as would have been obvious to Aapico, critical suppliers to SAGUSA such as Cadillac Castings, Rio Tinto, CTR, and WSBSSS, if they had not done so already, changed their terms of trade to include much more stringent and protective payment terms: thereby serving to exacerbate SAGUSA's difficulties.

iii. Meetings with customers:

a) From about October 2018 onwards, at Mr Yeap's instigation, separate meetings were held with major customers of SAGUSA including General Motors, Ford and Volkswagen.

b) At these meetings, and contrary to accepted business practice in the automotive industry, Aapico attempted to destroy the long- term trust and confidence that SAGUSA had established with those customers over many years, through ABT UK, Dr Manickam Mahalingam and Mr Lalit Kumar.

c) This was done by informing the customers (1) of the cash flow difficulties in which SAGUSA had found itself (without admitting that these difficulties had occurred while SAGUSA was under Aapico's effective, operational and financial control) and (2) that ABT UK was not in a position, or was not capable, of raising further finance in order to assist SAGUSA.

d) As would have been obvious to Aapico, SAGUSA's cash flow difficulties were of great concern to its customers, who have very tight production schedules, and Aapico also



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made statements to SAGUSA's customers that, if ABT UK would sell more equity in SGAH to Aapico, Aapico would invest further funds into SAGUSA. The effect of these statements was for SAGUSA's customers to put untoward pressure on ABT UK to do so.

e) None of this would have been necessary had Aapico not mis-managed SAGUSA's operational and financial affairs to cause its cash flow difficulties.

f) Furthermore, it was factually incorrect for Mr Yeap to inform SAGUSA's customers that ABT UK was not capable of raising the required finance Dr Manickam and Mr Kumar were holding discussions with a number of financial institutions and were at an advanced stage of concluding a transaction with them.

iv. Voluntary Lien for WBSSS

a) In or around November 2018, a solution to SAGUSA's non- payment of the invoices of WBSSS was suggested by its Chairman, Dr Yongbin. The solution involved SAGUSA providing a contractual lien over certain of its assets in favour of WBSSS, as security for SAGUSA's payment obligations to WBSSS, after which WBSSS would have recommenced shipments. WBSSS had a statutory lien in any event for payments due, and so what was sought was only a contractual lien.

b) ABT UK was supportive of this solution as were, accordingly, the Directors appointed by ABT UK on the boards of SGAH and SAGUSA. Such solution would have resulted in the continuation of supplies by WBSSS.

c) During these discussions, it was learnt that Aapico and specifically Mr Yeap, had unilaterally concluded an arrangement with Dr Yongbin, that Aapico failed to keep ABT UK and SAGUSA informed of, and that Dr Yongbin alleged breach of such understanding by Aapico, which escalated and complicated the situation. Aapico also took a stand that Dr Yongbin had consented to waiver of the lien, which assertion was specifically denied by Dr Yongbin.

d) On 22nd January 2019, a binding MOU was executed between SGAH and Aapico represented by Mr. Manickam Mahalingam and Mr. SC Yeap respectively, committing certain funds to inter alia address the WBSSS situation. Aapico subsequently denied the nature of the MOU,



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and requested a further definitive document with onerous clauses and defaulted on the MOU.

e) Notwithstanding all of the foregoing and when ABT UK was supportive of the solution by providing contractual lien, in contrast, and without any reasonable basis, Aapico was not supportive of this solution and accordingly neither were the Directors appointed by Aapico on the boards of SGAH and SAGUSA Aapico even went so far as to send a legal letter to SAGUSA to stop it, claiming the subject to be falling within reserved subject under the transaction documents with Aapico, and thereby stalled passing of the resolution in this regard. In the circumstance, the contractual lien could not be perfected in favour of WBSSS, leading to supplies to SAGUSA getting severely affected. The material communications in this regard are Exhibit R-5 series.

v. Binding MOU dated 22nd January 2019 and its breach:

a) Aapico showed great urgency and exerted significant influence on General Motors, to cause a binding MOU dated 22nd January 2019 to be executed, inter alia committing to certain funds to SGAH/SAGUSA by 25th January 2019 (Exhibit R-6);

b) ABT UK was led to believe that the liquidity of SGAH/SAGUSA was being addressed through this binding MOU;

c) Having got ABT UK to commit to the MOU, Aapico recanted the MOU with the stand that the binding MOU required further definitive documentation before funding can happen, and thereby Aapico breached the MOU and also missed the timeline for injection of funds. Aapico represented the same to General Motors and caused significant influence to be exercised on ABT UK in this regard. The documentation subsequently forwarded by Aapico for discussion had several onerous clauses not flowing out of the terms agreed to in the MOU, which made it impossible for ABT UK to accept to such documentation. A brief summary of the onerous terms is set out hereunder:

i. Holding of ABT UK in SGAH was proposed to be reduced to 9.99% and no minority right of any kind was enshrined.

ii. The voting right for 9.99% in the name of ABT UK



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in SGAH was also to be ceded to Aapico.

iii. The Holding of two separate entities viz. ABT Limited and ABT IPL in SACL was to be transferred to SGAH.

iv. A Forensic audit was introduced and based on outcome all liabilities were vaguely sought to be put on the promoters, without reckoning the fact that SAGUSA was predominantly managed by Aapico.

v. Control including operational and board of the whole of the Sakthi Automotive Group, and operation of bank accounts were required to be ceded to Aapico, and there were also to be no reserved subjects;

vi. 3% and 5% of revenue of SACL/SAGUSA was to be remitted to SGAH.

vi. Breach of understanding reached on 11th March 2019 at USA:

a) When Mr Yeap was in the USA, after extensive discussions, he proposed a settlement which was captured in an email dated 11th March 2019 from Dr Manickam (Exhibit R-7). A schedule of payment was also attached to the email. It was agreed that ABT UK will manage the affairs of the operating entities and that there will be no escalation of issues and no trigger of any default clause under the transaction documents, so long as ABT UK complies with the terms. The language of the email itself was as per the terms that Mr. Yeap had said in the Meeting, and for the sake of clarity Mr. Yeap himself dictated the draft to Dr. Manickam.

b) While having led Dr Manickam to believe that the understanding would be honoured, Mr Yeap failed to formally acknowledge the mail from Dr Manickam and also failed to confirm formally his acceptance by way of reply to the email

c) To further derail the progress made, Aapico supported a motion initiated by Huntington National Bank for a preliminary injunction and appointment of a receiver to SAGUSA, thereby not only escalating but also hampering the honouring of the commitment. Aapico was clearly therefore and at every stage, taking malafide steps to trigger a default.

3.6. Proceedings initiated by Huntington National Bank and action of Aapico, against the interest of SGAH and SAGUSA:



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A. Even while having caused the aforesaid significant actions having a negative impact on SGAH and SAGUSA, and with a view to prevent ABT UK averting an event of default from occurring to SGAH under 2017 Loan Agreement and/or the 2018 Loan Agreement with Aapico, and even while remaining a significant shareholder in SGAH, Aapico went as far as to support a notice of motion for preliminary injunction and appointment of Receiver moved by Huntington National Bank in the US District Court, at the hearing on 28th March 2019. Such course of action, as is reflected in the transcript of proceedings (Exhibit R-8), effectively stalled all fund-raising efforts of ABT UK.

B. Subsequent to the oral hearing Aapico has followed up its support for Huntington National Bank, with a statement in support of notice of motion dated 9th April 2019, favouring the appointment of a Receiver (Exhibit R-9).

C. The actions of Aapico in this regard lack bonafide and good faith. As a Joint Venture partner and equity holder, Aapico was equally responsible to meet the obligation of SAGUSA. However, Aapico, having primarily triggered the default on repayment of the sums owed to Huntington National Bank, owing to its several misdeeds as narrated hereinabove, attempted to take advantage of its own wrong, in not preventing Huntington National Bank from pushing SAGUSA into Bankruptcy/Receivership.

D. The said action taken by Aapico was also to thwart the efforts of ABT UK and Dr Manickam to redeem the situation created by Aapico, and even at this stage cause compliance with the payment obligation under the Transaction Documents with Aapico, by irreparably damaging the credibility and solvency status of SAGUSA. SAGUSA was specifically permitted to raise funds to discharge the obligations under the 2018 Loan Agreement and it is precisely to prevent such fund raising that Aapico had indulged in such action. Eventually the said proceedings culminated in the appointment of a Receiver for SAGUSA by the Court, vide order dated 20th June 2019 (Exhibit R-10)

3.7. The malafide intent of Aapico further manifested itself in Aapico submitting an offer to purchase the assets of



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SAGUSA and as a result, the receiver and Aapico signing a Purchase Agreement called a “Stalking Horse Purchase Agreement”. This fact is recorded in the Receiver's motion to the District Court for the Eastern District of Michigan, Southern Division dated 04 September 2019 (Exhibit R-11) and a copy of the Stalking Horse Purchase Agreement is Exhibit R- 12.

3.8. The actions, omission, concealment and the gross abuse of position indulged in by Aapico with regard to SAGUSA have been with an intent to deceive and gain control of the Respondents' entire automotive corporate group and to prejudice the interest of the Promoters, ABT UK, SACL and its other stakeholders.

3.9. The manner in which the defaults under the Loan Agreements have been engineered, combined with further malafide actions of Aapico as are detailed hereinafter in this Defence including the appropriation of charged shares at a low valuation, the manner in which the entire investment of SACL in the Portugal operation has been usurped by Aapico through clandestine dealings; the manner in which Aapico has breached the trust, abused the fiduciary position, acted behind the back of the Promoters and other stakeholders, deceived the Promoters and other stakeholders are all actions motivated by the sole objective of making wrongful gain for Aapico and Aapico is fully answerable in counter claim and liable to status quo ante and/or liable to ABT UK for compensation.

3.10. It is submitted therefore, that it is Aapico which has usurped wrongful control of SGAH. It is false to allege that there has been a wrongful attempt by ABT UK and its affiliates to retain control of SGAH, in breach of clause 4 and 22 of SHA.

IV. Aapico wrongfully usurped control of Wholly owned Step- Down Subsidiary of SACL in Portugal and unjustly enriched themselves for which again Aapico is answerable in counter claim.



4.1. *Sakthi Portugal SA is a wholly owned step-down subsidiary of SACL engaged in manufacture of automotive components having a significant turnover of Euro 119.21 million as per the last financial statement (Exhibit R-13) as at 31st December, 2018.*

4.2. *The fair market value of the Portugal operations had been assessed periodically. Oxy Capital which granted a loan, had valued the Portugal operation at Euro 135 million vide their term-sheet dated 26th December 2016 (Exhibit R-14); M/s Swamy & Swamy, Chartered Accountants, had vide their valuation report issued in 2014 (Exhibit R-15), valued Portugal operation at Euro 132 million. As recently as February, 2019, Mazars valued the Portugal operations at Euro 168 million (Exhibit R-16). claimants had access to all the valuation reports in their due diligence prior to making an investment and subsequently as investor.*

4.3. *The shareholding in the Portugal operations was pledged towards a loan from Oxy Capital. Oxy Capital was claiming a sum of Euro 43 million as outstanding in September 2019. On 21 October 2019 (Exhibit R-17), Oxy Capital informed that the pledged shares had been sold to Aapico. Aapico notified the Stock Exchange at Thailand (Exhibit R-18), that it had purchased the entire shareholding for a mere USD 24.5 million.*

4.4. *Aapico carried out this transaction with Oxy Capital behind the back of SACL and ABT UK without any form of disclosure or discussion with the Board of SACL. Aapico clearly owed a fiduciary duty to SACL and to the primary promoters. Aapico made a windfall gain through its clandestine dealing with Oxy Capital and ended up unjustly enriching itself in a sum of not less than Euro 140 million through the deal. Given the valuation of Portugal operations, even assuming without admitting that there was necessity to allow the shareholding in Portugal operations to be sold, rationally and legally, it ought to have been restricted to sale of shareholding proportionate to fair value. Clearly, the intent that is patently manifest in the manner in which the*



transaction has been structured between Aapico and Oxy Capital, is to clandestinely undervalue the Portugal operations, at the cost of and loss to SACL. The Respondents are not privy to the details of the deal between Oxy Capital and Aapico and also the rationale behind the valuation for the transfer by Oxy Capital to Aapico and therefore, reserve their right to further substantiate on the undervaluation once the terms of the deal and the documents forming the basis for the deal are produced before the Tribunal.

4.5. It is submitted that, Aapico is liable to answer in counter-claim for this unconscionable loss caused to SACL, and hence to SGAH and ABT UK. Significantly, it is to be borne in mind that Aapico caused such a clandestine transaction to be carried out, at the cost of SACL. even without being in control of SACL.”

41. To substantiate the above claim made by the respondent, the Tribunal SIAC had passed a procedural Order No.2, dated 20th June 2020. In the aforesaid procedural order, the Tribunal directed the parties to the proceedings to produce *inter alia* the following documents:

“7.....

i. All documents from 1st September 2018 and 31st March 2010 exchanged inter se:

- a. Mr. SC Yeap,*
- b. Mr. Jet Lian,*
- c. Mr. Shuro Matsubara,*
- d. Mr. Joginder Singh, and/or*
- e. Any Aapico representative or agent or one or more of them and General Motors, (or) Ford (or) Volkswagen on the Other Part in respect of SAGUSA, concerning the*
 - a. financial status of SAGUSA;*
 - b. ability of SAGUSA to meet its obligations;*
 - c. ability of Sakthi Group to manage SAGUSA.*

ii. All documents, correspondence, emails, meeting minutes, notes or records relating to the payment of critical



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suppliers of SAGUSA from 1 September 2018 to 31 March 2019.

iii. All preparatory documents, notes of discussions, analysis and related emails which refer to the meeting held in January 2019 by Mr Yeap with SAGUSA's suppliers.

iv. All noting(s) of Meetings (or) Minutes of Meetings or Record of Meetings from 1st September 2018 and 31st March 2019 inter se

a. Mr. SC Yeap,

b. Mr. Jet Lian,

c. Mr. Shuro Matsubara, and

d. Mr. Joginder Singh

e. Any other Aapico representative or one or more of them and General Motors, (or) Ford (or) Volkswagen or any of their representative in respect of SAGUSA concerning the:

a. financial status of SAGUSA;

b. ability of SAGUSA to meet its obligations;

c. ability of Sakthi Group to manage SAGUSA.

v. All documents, noting(s) of Meetings (or) Minutes of Meetings or Record of Meetings between:

a. Mr. SC Yeap,

b. Mr. Jet Lian,

c. Mr. Shuro Matsubara,

d. Mr. Joginder Singh, and/or

e. Any other Aapico representative or one or more of them and Huntington Bank (or) any Representative of Huntington Bank in respect of affairs of SAGUSA.

vi. All documents and Minutes of Proceedings (or) noting(s) of Proceedings between Aapico representative(s) and Court Receiver Appointed by the District Court for the Eastern District of Michigan, Southern Division, in connection with SAGUSA.

vii. The valuation report and other financial statements that formed the basis for the Offer given by Aapico through the Stalking Horse Purchase Agreement in the Receiver Proceedings concerning SAGUSA, in the District Court for the Eastern District of Michigan, Southern



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viii. All documents, noting(s) of Meetings (or) Minutes of Meetings, or Record of Meetings inter se:

- a. Mr. SC Yeap,*
- b. Mr. Jet Lian,*
- c. Mr. Shuro Matsubara,*
- d. Mr. Joginder Singh, and/or*
- e. Any other Aapico representative or one or more of them and Inves Detroit, that strategically supports businesses in Detroit (or any Representative of Invest Detroit in respect of the affairs of SAGUSA concerning the:*
 - a. financial status of SAGUSA;*
 - b. ability of SAGUSA to meet its obligations;*
 - c. ability of Sakthi Group to manage SAGUSA.*

ix. Minutes of Meeting of Board of Directors (or) any Committee of claimants, or recording of any Board or Directors Committee level discussion concerning MOU dt. 22 January 2019 (Exhibit R-6)

x. Minutes of Meeting of Board of Directors (or) any Committee of claimants, or recording of any Board or Directors Committee level discussion concerning Email of Mr. Mahalingam dt. 11 March 2019 (Exhibit R7)

xi. All documents, noting(s) of Meetings (or) Minutes of Meetings or Record of Meetings inter se representative(s) of Aapico and representative of Oxy Capital.

xii. The transaction documents between Aapico and Oxy Capital in connection with the acquisition of Portugal Operations.

xiii. Valuation report (and drafts thereof or other analysis which formed the basis for Aapico disclosing the cost of acquisition of the Portugal Operations to be USD 24.5 million.”

42. However, in response to the said procedural order, the



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petitioners/claimants did not come forward to produce any material documents. Eventually, in the absence and non availability of tangible evidence to substantiate the defence as pleaded in paragraph Nos.III and IV of the reply statement at the hearing before the Tribunal on 25.01.2020, the respondent had conceded not to press its counter claim and sought permission to amend its statement of defence by deleting paragraph Nos.III and IV of the reply statement and accordingly deleted along with prayers in paragraph 22.1 to 22.5, though some of the documents were available with the respondent, which were not sufficient to prove its claim without the production of documents by the petitioners as sought by the respondent and as ordered by the Tribunal in its second procedural order. The respondent, subsequent to the Award passed by the Tribunal SIAC, discovered the documents, which were concealed by the petitioners, during the proceedings before the High Court of Justice, England and Wales in Claim No.2020-000398. Eventually in the above proceedings, during the course of trial, the discovery was ordered. In the said discovery process, which took place between December 2021 to February 2022, startling discovery of documents in the e-mail concealed from the respondent was unearthed. The process of discovery included



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access to entire email account of the claimants/petitioners. By such process, the startling discovery was made evidencing that a complete road map for orchestrating the fraud had been drawn up by the claimants through Mr.Yeap and Venkat Ramaswamy of Srinidhi Investment and Advisors Private Limited as early as January 2019, which are totally contrary to the SHA, according to the respondent. The said Venkat Ramaswamy was associated with the respondent from 2002 until 2017. He was initially representing HSBC through whom NCD was syndicated for Sakthi Sugars Limited, which was then the holding company of SACL. Subsequently, he was representing Fortress/Drawbridge Group USA, who had invested substantially in Sakthi Automotive Group in 2007 and such investment was continued till 2017. He was advising and actively interacting with the Group. Eventually, Aapico was identified as a potential investor to invest in the Sakthi Automotive Group and also take out Fortress. He was actively interacting on Sakthi's side during the transactions with Aapico. At an early point of time, i.e., from 27.12.2006 to 15.11.2008, Mr.Venkat Ramaswamy's father, Mr.K.V.Ramaswamy was a Director on the Board of Directors in Sakthi Sugars Limited and the said Venkat Ramaswamy himself was a Director of SACL from



26.06.2013 to 14.06.2017. Therefore, he had a long association and claims with Sakthi Group.

43. Under these circumstances, vide e-mail dated 08.01.2019, he had circulated a confidential and personal memo to the petitioners/Aapico, titled “Strategic Financial Advise on consolidation of Aapico's position in Sakthi Global Auto Holdings (“SAGH”) and its subsidiaries”. The relevant portion of the memo, which incorporates an executive summary and detailed action plan is as follows:

“Executive Summary:

1. ENHANCE MAJORITY CONTROL:

a. Aapico to get a majority stake in SGAH from current 49.99% to 90% or higher and also take charge of the operations globally to prevent any further lapse in operations.

b. SGAH to own at least 80% (ideally higher closer to 90%) directly in Sakthi Auto Component Limited ("SACL") to have a substantial hold on Indian operations.

2. CHINA DEJURE and DE-FACTO JV CONTROL:

a. Aapico to take immediate steps to infuse funds to pay all dues to China so that there is no case for the Chinese JV partner to "lien" the shares.

b. Detailed documentation related points listed in the detailed section of report.

c. Reduce dependency on China for rough castings- think strategically of develop alternatives. (Venkat to discuss on ability of source alternative sources for Aluminum castings elsewhere);



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3. CUSTOMER MEET AND TAKEOVER OF RELATIONSHIPS:

a. It is heard in market that GM is quite upset with SAGUSA and is actively looking to "re-source" from the competition or sell SAGUSA to competition. Also heard on the street that GM does not perceive clear leadership to be there for decision making at SAGUSA and that the two JV partners are not on same page.

b. To meet with GM, Ford and other customers to dispel the above notions and assert clearly- that Aapico has taken **"Management" and "Equity"** control. To assert Aapico has leadership and clear any misconceptions about a shareholder disagreement and lack of clarity about leadership at Sakthi with all customers.

c. Specifically to meet Mr. Stephen Kiefer, the senior most purchasing head at GM and give him assurance that Aapico is now firmly in control and that you are the Global CEO and will ensure that all production issues are sorted at the earliest and no lines will be stopped.

d. To repay the USD 12 Million to GM at the earliest. This will give GM lot of confidence along with improvements in the production scheduling and delivery matching.

4. CONSOLIDATION OF CONTROL ON PORTUGAL:

Consolidate the hold and control on Portugal by taking out Oxy deal asap and bringing in strict financial discipline in the Portugal operations. Oxy deal to be negotiated and funding source to be tied up asap. Bangkok Bank is a possibility. Other sources are also possible.

5. CONSOLIDATION OF OPERATIONAL AND FINANCIAL CONTROL OF SGAH AND THE ENTIRE GROUP:

To consolidate legal and de- facto control of operations by making these key appointments and changes in operating matters:

a. To remove joint signatory of the bank accounts in SGAH and all other group entities.

b. To review the signing authority of the CFO and CEO of each operation and set new limits in accordance with



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Aapico policy.

c. To appoint a CEO and CFO for the USA operations and eventually for the Group;

d. To appoint a Head of Human Resources for SAGUSA;

e. To appoint a Head of Quality for SAG USA;

f. To appoint a Head of Production for SAGUSA;

g. Remove unwanted and unproductive staff in USA: (To be identified and will tell in person).

h. To reduce and curtail the involvement, shareholding of Mr. Lalit Verma.

i. Reconstitute all the Boards of the Group entities from SGAH onwards to all the subsidiaries. To bring in true professional management and rigorous monthly reviews. Reconstitute Audit committees of all these Boards

j. To consider appointing a strong internal auditor for review of all operations until they are streamlined. (This includes all jurisdictions).

k. And set up weekly, monthly and in some cases daily meetings with all the staff globally.

l. Call for a CEO/ CFO summit at the next opportune moment in which full authority of Aapico to be asserted.

m. To start the consolidation of accounts process and roll out AAPICO group policies and procedures to the entire Sakthi Group. (For example: Expenses management, accounting policies etc.)

6. To conduct a forensic audit asap to determine the quantity of loss in SAGUSA and to use the evidence found in the forensic audit to frame the "thieves" and realize the lost funds through proper legal and police action.

Detailed Action Plan:

1. Increase the Aapico Stake in SGAH to 90% and SGAH stake in SACL to 80%:

i. Aapico shall invest USD 7MN into SGAH at such price that the stake increases from the current 49.99% to 90%.



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This detail on the number of shares will be worked with Jordan and we will advise you of the exact numbers. However, based on the share math we see in the last balance sheet we believe USD 7 Million will get Aapico to 90%. Anything over the USD 7 Million investment can be taken to get a higher share as desired.

ii. From the above USD 7 Million two things will happen:

a. As per the clause 6.2 of SSA (dated 29th September 2018), ABTIP and ABT are obligated u a condition subsequent to contribute their shares in SACL into SGAH without an increase in stake for ABT in SGAH. In order to facilitate such contribution, SGAH shall do the following accommodation, subject to a water tight real control of the funds through the rotation. SGAH shall invest USD 1.45 Million from the above to purchase the shares owned by ABTIP and ABT in SACL (#shares 10,139,760) at par amounting of USD 1.45MN which result in an increase in stake for SGAH from current 77.04% of 80.19%. ABT and ABTIP will immediately invest the USD 1.45 Million into ABT UK and then onwards into SGAH forno increase in shareholding.

b. Balance USD 5.5 MN will be invested in SACL for which fresh shares will be allotted to SGAH at face value (INR 10) this will increase SGAH stake further to 82.30% from earlier 80.19%.

iii. SACL will make a step-down investment of USD 5.5 MI to 'Orlando fin B. V.

iv. Orlando fin B. V has a payable amount of USD 5.5 MNI ot ABT UK.

v. ABT UK will assign its receivables from Orlando in the favour of SGAH for USD 5.5Mn. Jordans and Srinidhi to work on this documentation to ensure that this is possible under UK law.

vi. Orlando then shall remit USD 5.5 Mn as repayment of loan on behalf of ABT UK to SGAH. If the assignment of the debt is not possible then we need to have a bank account control of ABT UK into which Orlando Fin BV will send thefunds and we will take it back to SGAH.



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The above steps are to be confirmed with the Jordan team in London.

2. Increase of Stake in SACL to greater than 90%:

The following is an idea to enhance the shareholding of SGAH into SACL. Platinum Partners to be engaged-Ankit Majmudar is evaluating if there is a more elegant solution on the detailing of this broad idea. {To check the FEMA and RBI norms on the limits of onwards investment from SACL to OFBV};

a. Invest Euro 29 Million (i.e., the amount needed to settle Oxy) equivalent in USD from Aapico or new investor into SGAH. Then SGAH invests the INR equivalent into SACL to obtain new shares. We believe with a USD32 Milion (approx conversion of Euro 29 Million) SGAH shareholding in SACL will be greater than 90%.

b. SACL will invest the Euro 29 Million into OFBV and then it will be given as a loan onto Sakthi Portugal to buy out Oxy. Sakthi Portugal can service this loan over a 5-year period.

3 .Legal battle in case of claim on oppression and mismanagement:

In case of dispute as per Indian Companies ACT 2013 any shareholders who hold not less than 10% of the share capital can only make an application to National Company Law Tribunal ("NCLT") for oppression and mismanagement

However, provided that the Tribunal may, on an application made to it in this behalf, waive this requirement and still admit this case in NCLT.

Is it oppression and mismanagement?

*1. Analysis of recent judgment clearly lays that "a petitioners approaching the Tribunal under section 241 alleging mismanagement, will now have to meet the twin conditions of **(i) mismanagement and (ii) the existence of just and equitable ground for winding-up the company.**"*

2. Minority shareholders are bound by the rule of majority mere unfairness of the action complained of is not enough to invoke application for oppression and mismanagement.



Hence it is clear that in case of any legal dispute under the oppression and mismanagement as per Companies act, SACL has a clear case of no such ground of mismanagement which leads to equitable ground for winding up of SACL.

4.Precursor Steps: Aapico shall immediately issue a notice on the pending "Condition subsequent" ("CS" as per the loan agreement and Share Subscription ("SSA") agreement dated 29th September 2018 which are:

- Clause 4.4 of Loan agreement: **SGAH will amend its articles of association to disapply the directors' discretion to refuse to register a transfer by or on behalf of the Lenders following an Event of Default**
- Clause 6.2 of SSA: **"The Company (SGAH) shall, and the Promoters, ABT Auto and ABTIP undertake to ensure that the Company shall, after the Completion Date, acquire the 10,139,760 (ten million one hundred thirty-nine thousand seven hundred and sixty) shares of SACL, which constitute all the shares of SACL currently held by ABTIP and ABT Limited for a price acceptable to Aapico. ABTIP and the Promoters shall ensure that they shall, or shall procure that any other person shall, invest a sum equal to such price into ABTAuto. ABT Auto, in turn, shall invest such price into SGAH without increasing the shareholding of ABT Auto in SGAH from: 50.01%. ABTIP shall procure that ABT Limited adheres to the provisions of this clause"**
- Clause 6.3 of SSA **"The Parties shall implement arrangements in accordance with applicable law whereby 3% (three percent) of the revenues of SACL and 5% (five percent) of the revenues of SAG shall be remitted annually to SGAH"**
- Clause 6.5 of SSA- **"The Company (SGAH) shall submit a five-year business plan to Aapico, containing the details as Aapico shall request"**

5.Steps to be taken in China to Protect the China operations:

- i. Ensure proper legal diligence is done by checking on all documentation signed in the past between Mr. Lalit, Mr. Manickam and the Chinese JV partner. And then takeover of



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the entire relationship with the Chinese JV partner. Infuse funds to undo the current deadlock situation in Sakthi China. To manage the relationship in such a manner to prevent a hostile takeover from the JV partner as this may lead to loss of China operations, which will directly have an adverse impact on SGAH valuation.

ii. Quickly and swiftly plan and develop alternative sources of Aluminum castings in USA or Thailand or Portugal so that we can reduce the dependence on the Chinese JV partner.

iii. To fix all documentation issues with the Chinese JV partner- for example there are supposed to be two companies- one marketing company and one production company and there is supposed to be an exclusivity arrangement between the production company and the marketing entity such that the production entity will only sell through the marketing entity. Marketing entity is 51% owned by SAGUSA whereas the production entity is 49% owned by SAGUSA. Appoint a local Chinese CFO for these JV operations asap.”

44. Though, all those documents as mentioned were very much available with the Aapico consequent to the procedural order passed by SIAC, they have failed to produce them before the Tribunal. These are all the documents pertaining to the plans orchestrated by the said Venkat Ramaswamy joining with Mr.Yeap, who is the representative of the petitioners and proceeded to take over the SGAH and other its subsidiaries, where the petitioners' representatives were appointed as CEO, CFO and other top position to make losses and thereby to reduce the value of shares and making the company to default all the loans against terms and conditions of SHA and thereafter, acquire the company



by virtue of transferring the pledged share by acquiring the company through liquidation process. This is what exactly happened in the present case. When a Joint Venture partner was appointed as CEO, CFO and other top positions to look after the affairs of the SGAH and its subsidiaries abroad, he is supposed to work for the improvement of the company, in terms of SHA.

45. At this juncture, it would be relevant to extract clause 5.3 of the SHA dated 29.09.2018, which states as follows:

“5.3 Aapico, together with professionals nominated by and at the sole discretion of Aapico, shall control the end use of funds by the Company. The Company acknowledges that this is to enable ABT Auto and the Company to complete (I) the conditions subsequent to Closing, which are stated in the Share Subscription Agreement dated 25 May 2017 between SGAH, ABT Auto, ABT Investments (India) Private Limited, AAPICO, Dr.M.Mahalingam, Mr.Lalit Kumar; SAG, Sakthi Auto Component Limited (SACL), ABT Limited and AAPICO Investment PTE Limited; and (ii) the conditions subsequent to Closing, which are set out in the Subscription Agreement upon the injection of the new capital under the Subscription Agreement. As part of the disbursements by Aapico to the Company, all present dues and overdues to Aapico from the Company shall be cleared and made current.”



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A perusal of the above clause shows that AAPICO was permitted to appoint CEO and CFO and other top positions in the SGAH and its step down subsidiaries, with the intention to improve the performance in the SGAH and its step down subsidiaries and to clear all the present dues and over dues. In the present case, the petitioners acted against the terms and conditions of the SHA. Therefore, in the award passed by the Tribunal, it has to be examined that whether the involvement of the representatives of the petitioners was within the scope of SHA. The submission of petitioner was that the subject dispute to the Arbitration is beyond the scope of SHA and is not in accordance with the terms and conditions of SHA. Further, a submission was made before this Court on behalf of the petitioners that nothing prevented the petitioners with the available documents to proceed before the learned Arbitrator, since for the non production of documents, the Tribunal can take adverse inference against the petitioner. However, in the present case, the submission of the learned counsel for the respondent was that some of the vital documents was not at all available. In the event, the original documents are not available and if the respondent provide only the photocopy, the Tribunal can take adverse inference. However in the present case, no such



document is available and only they have heard about the commission of fraud and therefore, the Tribunal directed the petitioners by way of second procedural order to submit the relevant documents. However, the petitioners had not submitted the same and ultimately in the discovery proceedings before the UK Court, all the documents came to light. Under these circumstances, as contended by the learned counsel for the respondent, this Court is also of the view that even in the absence of photocopy of the documents, it is very difficult for the tribunal to take any adverse inference. Accordingly, no adverse inference can be taken.

46. On the other hand, *prima facie* it appears in the instances narrated above, that Mr.Yeap, who is the representative of the petitioners in collusion with Venkat Ramaswamy, had worked to damage the SGAH and its step down subsidiaries to minimise the wealth and thereafter to acquire the company, either through the winding up process or through purchase of borrowing. This is what happened with regard to the SAGUSA is concerned, where the representative of Aapico was appointed as CEO to look after the company. As narrated above, it appears that Mr.Yeap made the company to suffer into loss and also



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assisted for the liquidation process and acquiring the said company at throw away price, thereby minimised the wealth of its holding company SGAH, which is totally contrary to Clause 5.3 and other applicable clauses of the SHA dated 29.09.2018.

47. In a similar fashion, for Sakthi Portugal SA, the Oxy Capital was the original lender, who lent around 43 million Euro as on September 2019 and the said shares were purchased behind the back by the Aapico at 24.5 Million USD when Mr.Yeap of Aapico sent the mail to Dr.Manickam, who is the Group Chairman, stating that the Oxy Capital, loan can be acquired by the Aapico by the lesser price of 25 Million USD. When these talks were going on behind the back, the Aapico purchased the shares at the throw away price of 24.5 Million USD as narrated above and thereby, petitioners made loss to the Sakthi Portugal SA and ultimately it would reflect in the balance sheet of SGAH, and its valuations.

48. These are all the conspiracies appear to be made against the interest of the company and also SGAH, so as to enable the Aapico to



enforce the pledge and thereby acquiring the control of the SGAH and its subsidiaries including the respondent-company. The acts committed by the Aapico/petitioners are totally contrary to the agreed terms and conditions of the SHA. Though those aspects are pleaded, since due to non-availability of evidences at the instance of the petitioners' failure to comply its second procedural order, ultimately the respondent was not able to prove the same. Due to said reasons, it appears, the counter claim was withdrawn. Further since many of the documents are not available, the respondent found it was difficult to substantiate his contention, establish the counter claim including fraud and considering the aspects of huge cost involved in the event of respondent's unsuccessful in its counter claim, this ground is also a reason for withdrawal of the counter claim.

49. However all the frauds, as narrated above, have been brought to the knowledge of the respondent, only on the discovery proceedings initiated before the UK Court, which is subsequent to the passing of the Award. Though, these documents were directed to be produced to the respondent by the petitioners through the second procedural order, the



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petitioner failed to produce the same, but the petitioner concealed these documents deliberately without complying the second procedural order of SIAC. Therefore, the respondent was unable to present its case due to the failure of provision of these documents, by the petitioners as directed in the second procedural order passed by the SIAC and under these circumstances, in violation of the principles of natural justice, the Award came to be passed. Had the petitioners been complied with the above order and produced all the documents, the respondent would have obtained the fair opportunities to present its case. Therefore, the present Arbitration Award is liable to be suffered under the grounds mentioned in Section 48(1)(b) of the Act.

50. In ***Vijay Karia*** case, the Hon'ble Apex Court had dealt with the situation in which the parties are unable to present their case on the grounds mentioned under Section 48 of the Act, and it has also held the consequence of failing to obey the procedural order by the parties. The relevant portions of the said judgement read as follows:

“63. A recent Delhi High Court judgment in Glencore International AG v. Dalmia Cement (Bharat) Limited 2017 SCC OnLine Del 8932 puts it thus:



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*“25. The inability to present a case as contemplated under [section 48\(1\)\(b\)](#) of the Act (which is *pari materia* to Article V(I)(b) of the New York Convention) must be such so as to render the proceedings violative of the due process and principles of natural justice. It is rudimentary that for a fair decision each party must have full and equal opportunity to present their respective cases and this includes due notice of proceedings. In the event a party opposing the enforcement of a foreign Award is able to present sufficient proof of such infirmity in the arbitral proceedings, the courts may decline to enforce the foreign Award.*

26. A clear distinction needs to be drawn between cases where a party is unable to present its case, rendering the arbitral Award susceptible to challenge as falling foul of the minimal standards of due process/natural justice and cases where the arbitral tribunal does not accept the case sought to be set up by a party. The latter case, obviously, does not give rise to a ground as mentioned in Section 48 (1)(b) of the Act, even if the decision of the arbitral tribunal is erroneous.”

64.....

65.....

66. *An application of this test is found in [Jorf Lasfar Energy Co. v. AMCI Export Corp.](#) 2008 WL 1228930, where the U.S District Court, W.D.Pennsylvania decided that if a party fails to obey procedural orders given by the arbitrator, it must suffer the consequences. If evidence is excluded because it is not submitted in accordance with a procedural order, a party cannot purposefully ignore the procedural directives of the decision-making body and then successfully claim that the procedures were unfair or violative of due process. Likewise, in [Dongwoo Mann+Hummel Co. Ltd. v. Mann+Hummel GmbH](#) (2008) SGHC 275, the Singapore High Court held:*



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“145. A deliberate refusal to comply with a discovery order is not per se a contravention of public policy because the adversarial procedure in arbitration admits of the possible sanction of an adverse inference being drawn against the party that does not produce the document in question in compliance with an order. The tribunal will of course consider all the relevant facts and circumstances, and the submissions by the parties before the tribunal decides whether or not to draw an adverse inference for the non-production. Dongwoo also had the liberty to apply to the High Court to compel production of the documents under s 13 and 14 of the IAA, if it was not content with merely arguing on the question of adverse inference and if it desperately needed the production by M+H of those documents for its inspection so that it could properly argue the point on drawing an adverse inference. However, Dongwoo chose not to do so. 146. Further, the present case was not one where a party hides even the existence of the damning document and then dishonestly denies its very existence so that the opposing party does not even have the chance to submit that an adverse inference ought to be drawn for non-production. M+H in fact disclosed the existence of the documents but gave reasons why it could not disclose them. Here, Dongwoo had the full opportunity to submit that an adverse inference ought to be drawn, but it failed to persuade the tribunal to draw the adverse inference. The tribunal examined the other evidence before it, considered the submissions of the parties and rightfully exercised its fact finding and decision making powers not to draw the adverse inference as it was entitled to do so. It would appear to me that the tribunal was doing nothing more than exercising its normal fact finding powers to



determine whether or not an adverse inference ought to be drawn.”

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51. Therefore, as held by the Hon'ble Apex Court as above, due to non-compliance of the second procedural order passed by the Arbitrator in the present case, naturally the petitioner must suffer the consequences. In the present case, the petitioner failed to comply with the second procedural order, by not producing the documents as if the petitioners did not have the documents. However, the petitioners had the relevant documents and the same were traced out in the discovery proceedings before the UK Court, subsequent to the pronouncement of the award. The acts of the petitioners, ultimately proved the various fraud played in the course of the transfer of shares in SGAH, managing the company and valuing the shares, which are all well within the scope of agreement as the same would reflect in the step down subsidiaries of SGAH. Due to the non-availability of these documents, the respondent was not in a position to present his case before the tribunal. Therefore, the present award is liable to be suffered on the ground mentioned in Section 48(1)(b) of the Act. Hence the enforcement of the award is liable to be rejected on this ground also.

III. FRAUD



52. The learned counsel for the respondent also made submissions with regard to the allegation of fraud. Let the Court now examine whether the present Award is suffered by fraud. In general, no Court will blind-foldedly grant the enforcement of the Foreign Award when a plea of fraud has been brought to the notice of this Court.

53. According to the respondent, the instance “fraud”, under Section 48(2) Explanation 1(ii) of the Act, came to light while purchasing SAGUSA by the Aapico, after letting the company went into liquidation, which was orchestrated with the complete involvement of Mr.Yeap, Aapico's representatives and the other representatives of Aapico, as narrated above. That apart, the Oxy's loan was purchased at throw away price of 24.5 million USD and thereby Sakthi Porugal SA was acquired by the Aapico. The Aapico originally informed Dr.Manickam, that they are going to lend money and purchase the loan only to the extend of 25 Million USD, so as nearly 15 million would be profit to Sakthi Portugal SA. When the Aapico is one of the Joint Venture partners of entire business and behind the back they are not supposed to have purchased the shares of one of the step down subsidiary of SGAH



i.e., Shakti Portugal SA, hence there appears that they have played fraud in purchasing the loan of Oxy and thereby made Sakthi Portugal SA into loss, which is contrary to the SHA dated 29.09.2018. The intention of the Aapico was that to make all the step down subsidiaries of SGAH into loss and thereafter to acquire all the entities of SGAH at throw away price by taking advantage of the positions of managing the company in the capacity as CEO and CFO etc., and ultimately, the losses made to these subsidiaries of the SGAH would reflect in the valuations. All these frauds orchestrated by the Aapico, which acts are against the terms and conditions of the SHA entered on 29.09.2018. The Hon'ble Supreme Court in *Venture Global Engg. v. Satyam Computer Services Ltd.*, reported in **(2010) 8 SCC 660** at paragraph Nos.35, 36, 39 and 40, held as follows:

“35. The concept of public policy in the A and C Act, 1996 as given in the explanation has virtually adopted the aforesaid international standard, namely, if anything is found in excess of jurisdiction and depicts a lack of due process, it will be opposed to public policy of India. When an Award is induced or affected by fraud or corruption, the same will fall within the aforesaid grounds of excess of jurisdiction and a lack of due process. Therefore, if we may say so, the Explanation to Section 34 of the A and C Act is



like “a stable man in the saddle” on the unruly horse of public policy.

36. It is well known that fraud cannot be put in a strait jacket and it has a very wide connotation in legal parlance. In the decision of the House of Lords in *Reddaway (Frank) and Co. Ltd. vs. George Banham & Co. Ltd.*, [1896 AC 199 : (1895-99) All ER Rep 133 (HL)], Lord Macnaghten explained the multifarious aspects of fraud very lucidly, and which we quote:

"But fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court."

37.....

38.....

39. Therefore, this Court is unable to accept the contention of the learned counsel for the respondent that the expression ‘fraud in the making of the Award’ has to be narrowly construed. This Court cannot do so primarily because fraud being of ‘infinite variety’ may take many forms, and secondly, the expression ‘the making of the Award’ will have to be read in conjunction with whether the Award ‘was induced or affected by fraud’.

40. On such conjoint reading, this Court is unable to accept the contentions of the learned counsel for the respondents that facts which surfaced subsequent to the



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making of the Award, but have a nexus with the facts constituting the Award, are not relevant to demonstrate that there has been fraud in the making of the Award. Concealment of relevant and material facts, which should have been disclosed before the arbitrator, is an act of fraud. If the argument advanced by the learned counsel for the respondents is accepted, then a party, who has suffered an Award against another party who has concealed facts and obtained an Award, cannot rely on facts which have surfaced subsequently even if those facts have a bearing on the facts constituting the Award. Concealed facts in the very nature of things surface subsequently. Such a construction would defeat the principle of due process and would be opposed to the concept of public policy incorporated in the explanation.”

54. In regard to the fraud played by the petitioners, the respondent had initiated and filed a criminal complaint before the Court of law in India and also filed oppression and mismanagement petition, which is pending before the NCLT, Chennai.

55. As contended by the respondent, all these aspects of fraud came to the knowledge of the respondent only when the discovery proceedings was ordered during the course of trial in the UK Court. Therefore, when the commission of fraud by the petitioners brought into



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the knowledge of this Court against the terms and conditions of SHA dated 29.09.2018 and taking advantage of said fraud, filing claim before SIAC and obtained the Award by concealing the material facts and documents this Court feels that this Arbitration Award is not enforceable under Section 48(2) Explanation 1(i) of the Act as the Award is passed in the aforesaid situation and obtained by fraud on the part of the petitioners/claimants, which is in conflict with the public policy of India.

56. Though, very many judgements were referred to by the respective parties, only the relevant judgements, which are applicable for the present case alone are dealt with hereby, particularly, ***Vijay Karia*** case law, which was rendered by the Hon'ble Supreme Court in the year 2020, have dealt with all the aspects and also applicable for the present case. Therefore, the said case has been referred to the extent relevant for this present case.

57. Aapico deliberately withheld and concealed the documents and it amounts to fraud within the meaning of Explanation at 1(i) to Section 48(2)(b) of the Act. Therefore, this Court is of the view that the



enforcement of the present award is also liable to be rejected on this ground as well.

IV. VIOLATION OF RBI REGULATIONS AND COMMISSION OF FRAUD IN THE VALUATION OF THE SHARES OF SGAH

58. In general, this Court will not interfere into the valuations made as per the terms and conditions agreed in the SHA by the parties while passing the order for enforcement of the Foreign Award in India. However, if anything brought into the knowledge of this Court that the valuation method followed by the parties are in violation of the Section 16(1)(iii) of the FEMA Regulation of the Transfer or Issue of Any Foreign Security Regulations, 2004, which reads as follows, the same has to be considered, when fraud has been played:

“Transfer by way of sale of shares of a JV/WOS outside India

16. (1) An Indian party may transfer, by way of sale to another Indian party which complies with the provisions of regulations 6 above, or to a person resident outside India, any share or security held by it in a JV or WOS outside India subject to following conditions:

(i)

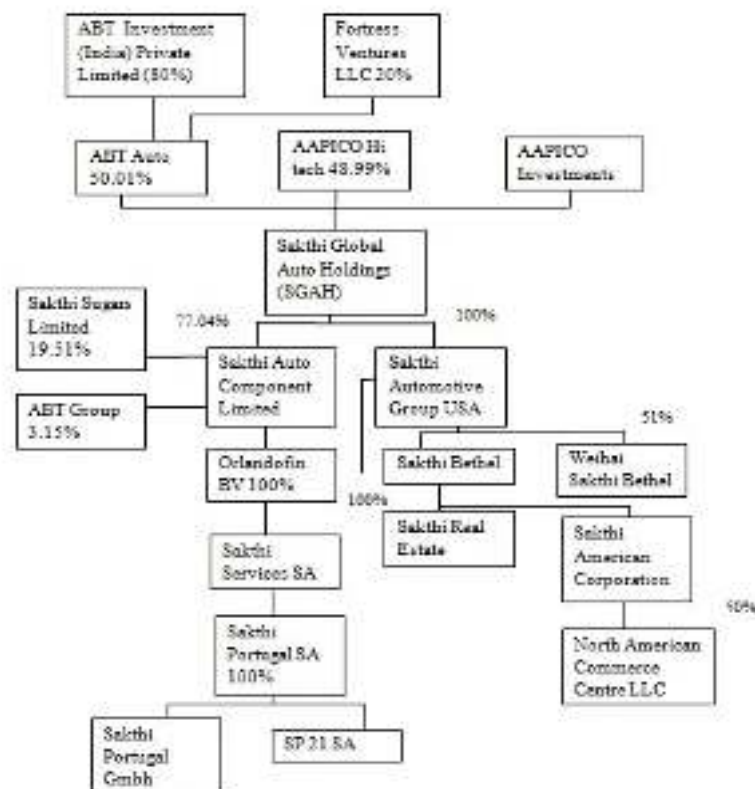
(ii)

(iii) If the shares are not listed on the stock exchange and the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant/Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of JV/WOS.”



59. In the present case, the petitioners enforced its rights of transfer of shares by virtue of invocation of pledge, in the respondent holding company namely Sakthi Global Auto Holdings Limited (SGAH). In the said company originally, ABT Auto holds 50.01% shares and 80% of the share of the said ABT Auto held by the ABT investment (India) Private Limited, which means SGAH is a step down subsidiary of Indian company. At this juncture, it would be appropriate to extract the group holding structure, as below:

Group Holding Structure pursuant to 2017, 2018 Investment:





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60. In the present case, ABT Auto pledged its 50.01% of the shares in favour of the petitioner. It is the requirement under the Regulation 18 of FEMA (Transfer or Issue of any Foreign Security) Regulation, 2004 as amended by its office circular dated 29.12.2014, a pledge is possible in favour of a overseas lender, only if such lender is regulated and supervised as a Bank. Admittedly, in the present case, Aapico is not a Bank. Therefore, the respondent submitted that since the pledge was made without approval from RBI, there is no valid pledge. In the present case, according to the respondent, there is no requirement for obtaining any permission to pledge the shares, but there is no doubt, one of the investors in SGAH, which is a step down subsidiary and holding 50.01% and as per RBI Regulations, it is mandatory for any step down subsidiary to get prior permission from RBI to pledge the shares. However, in the present case, admittedly no prior approval was obtained from the RBI in accordance with the RBI regulations. There is a procedural violation either on the part of the petitioners or the respondent to get the permission of RBI. As far as this aspect is concerned, this Court is of the considered view that merely procedural contravention of the provision is



concerned, the Foreign Award cannot be said to be refused from its enforcement, since these contraventions are curable at later point of time also. If it is cured, the position of the parties would not get changed from what the positions they are holding as on date and the same will be continued. In the event, if the position of the parties gets changed certainly, this Court can intervene with the Award that too when a fraud had been played to reduce the value of the company. The Hon'ble Supreme Court held at paragraph No.27 in the case of “***Associate Builders vs. Delhi Development Authorities***” reported in ***2015 3 SCC 49***, which reads as follows:

“Fundamental Policy of Indian Law

27. Coming to each of the heads contained in the Saw Pipes judgement, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgement that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgement of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.”

61. It has already seen from the above judgement that violation of



the Foreign Exchange Act and disregarding the orders of the Hon'ble Supreme Court in India would be regarded as the contrary to fundamental policy of the Indian law. To this, it would be added that the binding effect of the judgement of the Superior Court being disregarded would be equally violating the fundamental policy. Subsequent to this judgement, the order of the Supreme Court in **Vijay Karia** case law, it was held at paragraph Nos.84 to 89 as follows:

“Violation of FEMA Rules

84. It has been argued by the Appellants, based on the Non-Debt Instrument Rules, that a foreign Award by which shares have to be purchased at a discounted value, would violate the aforesaid Rules, and therefore, would amount to a violation of the fundamental policy of Indian law. Resultantly, the Appellants contended that as a result of this, the Award in the present case would not be enforceable in India.

85. The relevant provisions of the aforesaid rules are set out hereinbelow:

“2. Definitions:

(ac) “investment” means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India;

Explanation:-

(i) Investment shall include to acquire, hold or transfer depository receipts issued outside India, the underlying of which is a security issued by a person resident in India;

(ii) for the purpose of LLP, investment shall mean capital contribution or acquisition or transfer of profit shares;



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3. Restriction on investment in India by a person resident outside India.- *Save as otherwise provided in the Act or rules or regulations made thereunder, no person resident outside India shall make any investment in India :*

Provided that an investment made in accordance with the Act or the rules or the regulations made thereunder and held on the date of commencement of these rules shall be deemed to have been made under these rules and shall accordingly be governed by these rules:

Provided further that the Reserve Bank may, on an application made to it and for sufficient reasons and in consultation with the Central Government, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary.

9. Transfer of equity instruments of an Indian company by or to a person resident outside India.- *A person resident outside India holding equity instruments of an Indian company or units in accordance with these rules or a person resident in India, may transfer such equity instruments or units so held by him in compliance with the conditions, if any, specified in the Schedules of these rules and subject to the terms and conditions prescribed hereunder:*

(3) A person resident in India holding equity instruments of an Indian company or units, may transfer the same to a person resident outside India by way of sale, subject to the adherence to entry routes, sectoral caps or investment limits, pricing guidelines and other attendant conditions as applicable for investment by a person resident outside India and documentation and reporting requirements for such transfers as may be specified by the Reserve Bank in consultation with the Central Government from time to time;

21. Pricing guidelines – *(1) The pricing guidelines specified in these rules shall not be applicable for any transfer by way of sale done in accordance with Securities and Exchange Board of India regulations where the pricing is specified by Securities and Exchange Board of India.*



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(2) *Unless otherwise prescribed in these rules, the price of equity instruments of an Indian company, -*

(b) transferred from a person resident in India to a person resident outside India shall not be less than,-

(iii) the valuation of equity instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Merchant Banker registered with the Securities and Exchange Board of India or a practising Cost Accountant, in case of an unlisted Indian company."

86. *Based on the aforesaid Rules, the Appellants have argued that the transfer of shares from the Karias, who are persons resident in India, to the Respondent No.1, who is a person resident outside India, cannot be less than the valuation of such shares as done by a duly certified Chartered Accountant, Merchant Banker or Cost Accountant, and, as the sale of such shares at a discount of 10% would violate Rule 21(2)(b)(iii), the fundamental policy of Indian law contained in the aforesaid Rules would be breached; as a result of which the Award cannot be enforced.*

87. *Before answering this question, it is important to first advert to the decision of the Delhi High Court in Cruz (supra). The learned Single Judge was faced with a similar problem of a foreign Award violating the provisions of FEMA. In an exhaustive analysis, the learned Single Judge referred to Renusagar (supra) and then held:*

"97.It plainly follows from the above that a contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign Award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The



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expression “fundamental policy” connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.

98. It is necessary to bear in mind that a foreign Award may be based on foreign law, which may be at variance with a corresponding Indian statute. And, if the expression “fundamental policy of Indian law” is considered as a reference to a provision of the Indian statute, as is sought to be contended on behalf of Unitech, the basic purpose of the New York Convention to enforce foreign Awards would stand frustrated. One of the principal objective of the New York Convention is to ensure enforcement of Awards notwithstanding that the Awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. The expression “fundamental policy of law” must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.

102. Although, this contention appears attractive, however, fails to take into account that there has been a material change in the fundamental policy of exchange control as enacted under FERA and as now contemplated under FEMA. FERA was enacted at the time when the India's economy was a closed economy and the accent was to conserve foreign exchange by effectively prohibiting transactions in foreign exchange unless permitted. As pointed out by the Supreme Court in Life Insurance Corporation of India v. Escorts Ltd. (supra), the object of FERA was to ensure that the nation does not lose foreign exchange essential for economic survival



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of the nation. With the liberalization and opening of India's economy it was felt that FERA must be repealed. FERA was enacted to replace the Foreign Exchange Regulation Act, 1947 which was originally enacted as a temporary measure. The Statement of Objects and Reasons of FERA indicate that FERA was enacted as the RBI had suggested and Government had agreed on the need for regulating, among other matters, the entry of foreign capital in the form of branches and concerns with substantial non- resident interest in them, the employment of foreigners in India etc.

110. The contention that enforcement of the Award against Unitech must be refused on the ground that it violates any one or the other provision of FEMA, cannot be accepted; but, any remittance of the money recovered from Unitech in enforcement of the Award would necessarily require compliance of regulatory provisions and/or permissions.”

88. *This reasoning commends itself to us. First and foremost, FEMA -*

unlike FERA - refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being the Reserve Bank of India under FERA. It is important to remember that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of the Reserve Bank of India may be obtained post-facto if such violation can be condoned. Neither the Award, nor the agreement being enforced by the Award, can, therefore, be held to be of no effect in law. This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law. Even assuming that Rule 21 of the Non-Debt Instrument Rules requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign Award directs that such shares be sold at a sum less than the market value, the



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Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach. Further, even if the Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign Award on the ground of violation of a FEMA Regulation or Rule would not arise as the Award does not become void on that count. The fundamental policy of Indian law, as has been held in Renusagar (supra), must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign Award cannot be made on this ground.

89. *The Appellants, however, relied upon certain observations in Dropti Devi vs. Union of India (2012) 7 SCC 499. In that case, a challenge was made to the constitutional validity of Section 3 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA"), stating that by reason of the new legal regime articulated in FEMA, in replacement of FERA, the said provision has become unconstitutional in the changed situation. This submission was repelled by this Court stating: (SCC pp.529-90, paras 66-67)*

"66. It is true that provisions of FERA and FEMA differ in some respects, particularly in respect of penalties. It is also true that FEMA does not have provision for prosecution and punishment like Section 56 of FERA and its enforcement for default is through civil imprisonment. However, insofar as conservation and/or augmentation of foreign exchange is concerned, the restrictions in FEMA continue to be as rigorous as they were in FERA. FEMA continues with the regime of rigorous control of foreign exchange and dealing in the foreign exchange is permitted only through



authorised person. While its aim is to promote the orderly development and maintenance of foreign exchange markets in India, the Government's control in matters of foreign exchange has not been diluted. The conservation and augmentation of foreign exchange continues to be as important as it was under FERA. The restrictions on the dealings in foreign exchange continue to be as rigorous in FEMA as they were in FERA and the control of the Government over foreign exchange continues to be as complete and full as it was in FERA.

67. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange. The conservation and augmentation of foreign exchange continue to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardising the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-compliance results in civil imprisonment of the defaulter. The whole intent and idea behind Cofeposa is to prevent violation of foreign exchange regulations or smuggling activities which have serious and deleterious effect on national economy.”

It is important to note that this Court recognized that FEMA, unlike FERA, does not have any provision for prosecution and punishment like that contained in Section 56 of FERA. The observations as to conservation and/or augmentation of foreign exchange, so far as FEMA is concerned, were made in the context of preventive detention of persons who violate foreign exchange regulations. The Court was careful to note that any illegal activity which jeopardises the economic fabric of the country, which includes smuggling activities relating to foreign exchange, are a serious menace to the nation and can be dealt with effectively, inter alia, through the mechanism of preventive detention. From this to contend that any violation of



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any FEMA Rule would make such violation an illegal activity does not follow. In fact, even if the reasoning contained in this judgment is torn out of its specific context and applied to this case, there being no alleged smuggling activity which involves depletion of foreign exchange, as against foreign exchange coming into the country as a result of sale of shares in an Indian company to a foreign company, it does not follow that such violation, even if proved, would breach the fundamental policy of Indian law.”

62. From a perusal of the above judgement, it is clear that merely for the procedural violation as stated above, which are all curable in nature without affecting the parties interest, the Foreign Awards cannot be refused to be enforced. From the law laid down by the Hon'ble Supreme Court in the above judgement, it is clear that if there is any loss of foreign exchange to the country, definitely that would affect the Indian economy and thereby certainly, the interest of the public would be affected at large and this would clearly amounts to the breach of fundamental policy of Indian law, when violations of the FEMA is not curable.

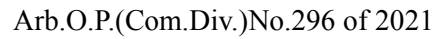
63. Now, let this Court examine that in the present case, whether loss of the foreign exchange occurred to the exchequer due to the play of fraud, violation of FEMA and contravention of the under valuation of the shares by the Aapico at the time of execution and enforcement of the



pledge of shares in SGAH, are not curable? As stated above, as per the FEMA Regulations, in the event of any transaction of securities, it should be at the fair market price or value. In the present case, the petitioners valued on its own through the FTI Consulting. It has valued the shares of SGAH for its holding company, who holds 50.01% as 27 Million USD. The total valuation of SGAH by the FTI was 55 Million USD. In the valuation report, the FTI has stated that they have relied on Multiple Analysis as:

1. This is a approach commonly used to value the assets in the Sector
2. Appropriate forecast to prepare Discounted Cash Flow (DCF) analysis are not available.

64. A perusal of the said report shows that the relevant information has not been furnished by the applicant, who was in-charge as CEO and CFO of SGAH and to that extent fraud has been played on the part of the petitioner's representatives in SGAH. There was a request from the respondent to value the shares based on the Discounted Cash Flow (DCF) method. They made opposition stating that since the value arrived at multiple analysis method is much lower than the value to be arrived in



65. In the present case, subsequent to the valuation by the FTI, the independent on behalf of the ABT Auto, conducted valuation through the Think Capital Private Limited in May 2020, which was based on the data available as on June 2019. The Think Capital has categorically stated that the Market Multiple Method was not able to apply for the following reasons:

Under this methodology, market multiples of comparable listed companies are computed and applied to the



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business being valued in order to arrive at a multiple based valuation. This is based on the premise that the market multiples of comparable listed companies are a good benchmark to derive valuation. In this method, market multiples based on a revenue/profitability metric of comparable listed companies are applied to the business being valued to derive the multiple based valuation. The difficulty here is in the selection of a comparable companies since it is rare to find two or more companies with the same product/service portfolio, size, business strategy and accounting practices. We have considered this method for the valuation of the company with closely comparable listed companies in terms of geography, size, stage of business, profitability, and produce offerings.

This method is similar to the Market Multiple Method, with the exception that the companies used as guidelines are those that have been recently acquired, under the Transaction Multiple Method, acquisition or divestitures involving similar companies are identified, and the multiples implied by their purchase prices are used to assess the subject company's value. There is no rule of thumb for the appropriate age of a reasonable transaction; however it is important to be aware of the competitive market at the time of the transaction, synergies included in the transaction value negotiated and hence factor any changes in the marketplace environment or underlying synergies into the analysis. All other things being equal, the more recent the transaction, the more reliable the value arrived at using this technique.”



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66. Since the basic information, which are required for arriving at the valuation in the Market Multiple Method were not available, the Think Capital adopted DCF method and valued SGAH as on May 2019 at 274.42 Million USD, whereas the total value arrived at by the FTI based on the multiple method is about 55 Million USD. The total difference between the DCF and multiple method is 219.42 Million USD. If the dollar rate in the year 2019 is considered as 75 Rupees, the loss of foreign exchange through the step down subsidiary for India, is as follows:

$$219.42 \text{ Crores INR} * 75 = \text{Rs.}1645.65 \text{ crores INR.}$$

Out of the said amount, the entitlement of Indian step down subsidiary is a sum of Rs.822.98 crores INR.

67. In the Indian Accounting Standard (IND AS) 113, it is stated that Fair value is market-based measurement, not an entity-specific measurement. For some assets and liabilities, observable market transaction or market information might be available. For other assets and liabilities, observable market transaction and market information



might not be available. However, the objectives of a fair value measurement in both cases is same- to estimate the price at which an *orderly transaction* to sell the assets or to transfer the liability would take place between *market participants* at the measurement date under current market condition (i.e., an *exit price* at the measurement date from the perspective of a market participant that holds the asset or owes the liabilities).

68. As far as FTI is concerned, it has valued the shares based on the Market Multiple Method. While valuing the shares by Think Capital, it has categorically submitted that relevant informations are not available and therefore, they have adopted the DCF Method. Without availability of said information, the FTI valued the shares. The comparison of the valuation of Think Capital and FTI is huge as stated above. This Court is not sitting here to decide which method of valuation is best for which party. However, this Court is concerned about whether the method of valuation adopted by the parties is in accordance with the RBI Regulations without any malpractices and commission of fraud and ultimately, it would not loose any foreign exchange compared to the methods of valuation used by the parties. By virtue of adopting Multiple



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Method, the loss of foreign exchange to the exchequer, as stated above, is a sum of Rs.822.98 Crores. In the present case, this Court had not only considered the valuation of FEMA Regulations but for the purpose of valuation the petitioners had provided wrong informations to the FTI. That apart they have orchestrated fraud by virtue of making the step down subsidiaries of the SGAH into loss and thereafter let those Company go for liquidation or acquire the debts by throw away price. Therefore, in the present case, violations of FEMA cannot be curable in nature due to the reasons of involvement of fraud played by the petitioners otherwise merely a violation of the FEMA, this Court normally will not interfere.

69. Anything which would affect the Indian economy due to the loss of foreign exchange would be certainly against the public interest and would amounts to violation of the fundamental policy of the Indian law. If any foreign Award is against the fundamental policy of the Indian law, the said Award cannot be permitted to be enforced under Section 48 of the Act. In the present case, for the reasons stated above, the valuation adopted by the petitioners is not in accordance with the RBI



Regulations, which are applicable for the step down subsidiary to value the investment while transferring the shares to other foreign entities.

Though, all these aspects have been brought into the knowledge of the Tribunal SIAC by way of appropriate pleadings, unfortunately, the said aspects have not been considered and only they have referred the parties to proceed before this Court as no way. The Tribunal SIAC, depend on the said findings, recorded as follows:

“177. Having carefully considered the submissions of the parties, the Tribunal does not accept that it should determine Issue 2.a.(i) only after conclusion of the Share Charge Proceedings. The Tribunal is of the view that its ability to do so is not dependent on any findings of the English Courts in the Share Charge Proceedings.

178. As the Tribunal held in its order dated 8 October 2020 on the Respondents' stay application, there are in fact no issues before the Tribunal is to make any observations on the respective claims of the parties in the share Charge Proceedings, including the potential share holdings if the claims are resolved entirely in one party's favour. These issues are now before the proper forum, the English Courts.”

70. The Tribunal has stated at paragraph No.177 that its ability to do so is not dependent on any finding of the English Courts in the Share Charge proceedings. Further, the findings of the Tribunal appears to be that it totally goes by the SHA dated 29.09.2018.



71. A perusal of the Clause 5.3 of the SHA, it appears that Aapico together with professionals nominated by and at the sole discretion of the Aapico, shall control the end use of the funds by the company. Further Aapico was appointed and provided sole control to dealt with the finances and appointment of Key Managerial Personnel only for the reasons that all the present dues and over dues to Aapico from the company shall be cleared and made current. With this obligation, this SHA was entered. However, as stated above, the Aapico's representatives had not worked for the company's benefit but all sort of dubious methods have been adopted by the Aapico's representatives to see that all the step down subsidiaries facing financial crises and thereafter letting the company either go for liquidation or purchase the loan, which are all evident from the documents discovered from the discovery proceedings of UK Court. The said attitude was totally contrary to clause 5.3 of the SHA and the same was nowhere dealt with by the Arbitrator, which is very vital for determining entitlement of the petitioner, since the transfer of shares in the company by way of suppressing the real value of the company as narrated above. The shares of ABT Auto was transferred by the Aapico under the pretext of enforcing the pledge. When the Aapico



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had not carried out its obligations in terms of the provisions of the agreement, certainly the Tribunal should have looked into these vital aspects and pass the orders whether the Aapico's control over the SGAH is in accordance with SHA or not. However, all those aspects have not been considered. As stated above, the petitioners have concealed various documents and failed to produce the same, subsequent to the second procedural order passed by the Tribunal and by concealing all these documents the award was obtained and the present award came to be passed under the above circumstances. Thus, this Court is of the view that the foreign award is suffered with the infirmities, as narrated above. Therefore, the enforcement of the award is liable to be rejected for the reason that violation of the FEMA Regulations coupled with commissions of fraud on part of the petitioner in valuing the SGAH shares, which are not curable in nature, apart from the other instances that are narrated above.

72. For all these reasons stated above, the prayer sought for enforcement of the foreign Award dated 06.10.2021 passed by the Tribunal SIAC, is liable to be rejected.



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WEB COPY 73. In the result, the enforcement of the Foreign Award dated 06.10.2021 is rejected. Accordingly, this Arbitration Original Petition is dismissed.

03.02.2023

Speaking order

Index : Yes

Neutral Citation: Yes

nsa/suk

Note: *Issue order copy on 03.02.2023.*



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KRISHNAN RAMASAMY.J.,

nsa/suk

Pre-Delivery Order made in
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03.02.2023