

(2018) 02 DEL CK 0632

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 37 Of 2016, Miscellaneous Application No. 1903 Of 2016

Convention Hotels India Private Limited

APPELLANT

Vs

Ager Hotels Group Limited & Ors

RESPONDENT

Date of Decision : 27-02-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Order 8 Rule 6(A)
Arbitration And Conciliation Act, 1996 — Section 34, 37, 37(1A)
Foreign Exchange Management Act, 1999 — Section 8, 10(1), 10(4), 11(1), 13(1A)
Income Tax Act, 1961 — Section 96(i)(c), 97(b)(i)
Indian Contract Act, 1872 — Section 73, 74

Citation : (2018) 02 DEL CK 0632

Hon'ble Judges : Yogesh Khanna, J

Bench : Single Bench

Advocate : Shailesh Madiyal, Sudhanshu Prakash, Amar Dave, Sonia Nigam, Arjun Sharma, Neha Khandelwal, Rajan Karanjawala

Final Decision : Dismissed

Judgement

Yogesh Khanna, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the award dated 6.10.2015 passed by the arbitral tribunal.

The brief gist of transactions contemplated under the Share Subscription Agreement hereinafter referred as 'SAS' inter alia were agreed to

between the parties as under:

1. Rights/obligations of Ager Mauritius [respondent no. 1]

(i) Ager Mauritius was to subscribe to shares of CHI by paying Rs. 27.15 Crore.

(ii) Ager Mauritius to subscribe to shares of CHI by paying Rs. 13.50 Crore.

(iii) Total percentage of shares post subscription would be 7.89%.

2. Rights/obligations of Ager India [respondent no. 2]

(i) Ager India was to subscribe to the shares of CHI by paying a sum of Rs. 47.50 Crore in three tranches (Documents Part).

(ii) Ager India was to subscribe to shares of CHI by paying a sum of Rs.16.01 Crore.

(iii) Total percentage of shares post subscription would be 12.69%.

3. Rights/obligations of CHI [Petitioner]

(i) CHI was to purchase equity shares of Visu Hospitality Pvt. Ltd. ['VHPL'] that were held by Ager Mauritius [64.45%] by paying a sum of Rs.

27.15 Crore, subject to certain conditions precedent that are stated at Clause 8.2.

(ii) CHI was to purchase 49% of a Company by the name of Radhamohan Builders Pvt Ltd. [in which Ager India held the shares] for a consideration

of Rs. 16.01 Crore. ['referred to for short as 'Jaipur Transaction']

(iii) Ager India was to assign to petitioner its rights to purchase certain land at Amritsar from Omaxe Ltd. and Heritage Ltd. for a consideration of

Rs.47.50 Crore, subject to certain conditions precedent stated at Clause 8.1 of the SSA [referred to for short as 'Amritsar Transaction']

C. Brief Details of the Arbitral Proceedings initiated by respondents:

The arbitral proceedings arose inter alia from a claim of the Respondent No.1 for refund of a sum of Rs. 12,69,12,090/- with interest. It is the case of

the Claimants that this amount was paid towards share subscription amounts by Ager Mauritius to CHI and the shares were not issued by CHI. It is

therefore claimed in terms of Clause 10 of the SSA, the amount is to be refunded to the Claimant No. 1[i.e. Ager Mauritius], The claimants also

claimed damages to the tune of Rs. 4,44,67,137/-. Clause 10 of the SSA is as under:

10. Consequence of Non-allotment of Equity Shares to Ager Mauritius In event Ager Mauritius Shares-I to III (as single block) or Ager Mauritius

Shares-IV cannot be allotted and issued to Ager Mauritius within the Term of the Agreement for whatsoever reason, then the Company shall return to

Ager Mauritius through normal banking channels the Ager Mauritius

Subscription Amount-I or such corresponding amount for which Ager Mauritius Shares-I to IV (as single block) have not been allotted within the

Term of the Agreement.

The Petitioner filed a statement of defence and a counter-claim before the learned Arbitrator contending the Claimants had committed a series of

breaches of SSA and therefore is liable to pay a sum of Rs.65,11,00,000/- towards losses and damages suffered on account of loss of business

opportunity etc. and Rs.47,50,00,000/- towards the refund of the amount paid by it for the Amritsar Transaction to the present Petitioner. D. AWARD

By its Award dated 06.10.2015, the Tribunal awarded Rs.19,92,51,981/- to Ager India and Ager Mauritius against the respondent with interest @12%

per annum from 26.8.2015 till payment. The sum of Rs.19,92,51,981/- was calculated on the basis of the principle of Rs.12,69,12,090/- plus interest

@12% upto the date of the Award. The said sum of Rs.19,92,51,981/- was to further carry interest @12% till the date of payment. The amount of

Rs.12,69,12,090/- was said to be the amount paid by Ager Mauritius to CHI in terms of Clause 3.1 of the SSA. Although the SSA required 13.50

Crore to be paid, admittedly only Rs.12,69,12,090/- was paid by Ager Mauritius.

2. The petitioner has challenged the award primarily on two counts, besides other; (a) the learned arbitrator erred in awarding interest on the claim of

the respondent in contravention of clause 10 above and (b) the report of M/s. Dun & Bradstreet Information Services India Private Limited filed by the

petitioner qua damages was wrongly rejected without going into its details.

3. Qua (a) it is submitted by the learned counsel for the petitioner that RBI has specifically barred the refund of share subscription money and

secondly clause 10 above does not provide for any interest to be paid on the same. The learned counsel for the petitioner referred to a circular dated

November, 12, 2002 issued by the Reserve Bank of India, Exchange Control Department, Central Officer, Mumbai-4000001 which is as follows :

Repatriation of refund of funds received for purchase of shares

A.P. (DIR Series) Circular No.45 (November 12,2002)

RESERVE BANK OF INDIA

EXCHANGE CONTROL DEPARTMENT

CENTRAL OFFICE

MUMBAI 400 001

A.P. (DIR Series) Circular No.45

To November 12,2002

All Authorised Dealers in Foreign Exchange

Madam/Sirs,

Repatriation of refund of funds received for purchase of shares

Under the current exchange control regulations authorised dealers require prior permission of the Reserve Bank to allow repatriation of

funds received for purchase of shares.

2. It has now been decided to delegate the authority to authorised dealers to allow repatriation of surplus funds/refund of remittance

received for purchase of shares to a person resident outside India in the following cases;

(a) Refund of funds received towards allotment of shares under Regulation 5(I) of the Reserve Bank Notification No. FEMA20/ 2000-RB

dated May 3, 2000.

(b) Remittance of surplus funds received for purchase of shares offered on rights basis.

(c) Remittance on account of surplus funds received for purchase of shares or on account of cancellation of trade, under Two-way

fungibility of ADRs/GDRs.

3. Authorised dealers may, accordingly allow remittances representing refund of funds received from a person resident outside India for

purchase of shares, in the cases listed in paragraph 2 above, provided that the authorised dealers are satisfied:

(i) with the bonafides of the applicant

(ii) that the repatriation represents refund of funds received for purchase of shares, by way of inward remittance from outside India or by

debit to NRE/FCNR account maintained with an authorised dealer in India;

(iii) that no part of remittance represents interest on the funds received.

4. Authorised dealers may bring the contents, of this circular to the notice of their constituents concerned.

5. The directions contained in this circular have been issued under Section 10 (4) and Section 11(1) of the Foreign Exchange Management

Act 1999 (42 of 1999).

Yours faithfully,

Grace Koshie

Chief General Manager

4. The learned counsel for the petitioner has also referred to Section 10(1) and 10(4) of the Foreign Exchange Management Act which is as under:

â??10(1) The Reserve application made to authorise any person Bank may, on an it in this behalf, to be known as authorised person to

deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner

as it deems fit.

10(4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions

or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an

authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with

the terms of his authorisation under this section.â??

5. The learned counsel for the petitioner referred to an email dated 07.12.2012 from Gaurav Kukreja to respondents no. 1 and 2 and the relevant part

of the email is as under:

â??A. With RBI permission, Cash of Rs 12.69 crores goes back to Ager Mauritius as return of share subscription money as part of

settlement.

B. Interest reimbursement-Instead of Interest, Ager signs a consulting agreement to provide CHI some consulting services and the payment is

calculated as the interest equivalent.â??

6. Hence it is submitted by learned counsel for the petitioner that by awarding interest in violation of aforesaid circular which has a tapping of law, the

learned arbitrator has gone against the fundamental policy of law. He cited Associate Builders V. Delhi Development Authority (2015) 3 SCC 49

says.

Coming to each of the heads contained in the Saw Pipes judgment, we will first deal with the head ""fundamental policy of Indian Law"". It

has already been seen from the Renusagar judgment 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 judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

7. Further it is argued clause 10 of the share subscription agreement stated above does not provide for any interest. It is argued the interest probably has been awarded by the arbitrator by way of damages but since the claim of the damages made by the claimant is rejected then how interest be awarded as damages.

8. Another issue raised by the learned counsel for the petitioner is his counter claim for 65.11 crores in addition to refund of his investment (Jaipur as well as Amritsar) was not considered by the arbitrator despite the issues framed in this regard and that the learned arbitrator had dealt with the counter claim as under:

There is a third reason as to why the question as to who committed default becomes unnecessary. This is because of the subsequent

statement made by the learned counsel for the respondent, Mr.Muralidharan that the respondent is not seeking specific performance of the

SSA and is also not examining any witness to prove the quantum of damages mentioned in the counter claim .

We shall now refer to this aspect.

Counsel for respondent no. I stated, even at the stage of the Sec.17 Application, that the respondent is not seeking specific performance of

the SSA but that it is only claiming damages as stated in the Counter claim.

So far as damages are concerned, the Respondent filed a Report regarding loss of profit etc as estimated by M/s Dun & Bradstreet

Information Services Pvt.Ltd., (pages 279-371 of Respondents. documents). RW1, in fact, during the course of his evidence, wanted to

produce and prove the above report before the Tribunal.

But there was an objection by the claimant's counsel that the said Report cannot be proved by RW1 as RW1 is not the author of the said

report. It was contended that the author of the said Report must be allowed to be examined.

Mr.Muralidharan, for the 1st respondent, then took time to examine the author of the said Report. Time was granted by the Tribunal.

However, subsequently, by e-mail dated 21-11-014 to the Tribunal and to the Counsel for the claimants, Mr.Muralidharan stated that the

Respondent is not examining anybody to prove the said Report which estimated the damages allegedly suffered by the 1st respondent. This is

clear from the contents of said e-mail dated 21-11-2014 sent by Mr .Muralidharan:

We have to state and submit that no further witnesses are sought to be examined on behalf of the respondent no.1. It is therefore requested

that the directions issued on 6-11-2014 for holding the next meetings of the Hon'ble Arbitral Tribunal at Hyderabad on 2-2-2015 and 3-2-

2015 for cross examination of RW2 be recalled and the said meetings may be cancelled.

Therefore, if according to the learned Counsel for the Respondent, the Respondent is not seeking specific performance of the SSA nor

proving the damages as set out in the Counter claim of the Respondent, there is, in our opinion, no need to consider whether claimant has

committed breach of SSA in not complying with its obligations under the Ager Conditions Precedent.

9. It is argued by learned counsel for the petitioner that despite there being a breach of contract by the respondent, the learned arbitrator did not award

any damages only because of non-producing the author of the report on damages despite there being sufficient oral evidence on record to prove such

loss/counter claim of the petitioner which the learned arbitrator had ignored.

10. The learned counsel for the petitioner relied upon M/s A.T. Brij Paul Singh and others vs. State of Gujarat (1984) 4 Supreme Court Cases 59

which notes:

â??7. A Division Bench of the High Court examined the voluminous evidence bearing on the question whether the rescission of the contract

by the respondent was justified and recorded a categorical finding which reads as under:

In that view of the matter, therefore, we are of the opinion, that the respondent-State was not justified in rescinding the contract 1 under

Clause (3) of the contract document. This finding clearly establishes that the respondent was guilty of breach of contract. xxxx

8. Once is it held that the respondent was guilty of breach of works contract, part

of which was already performed and for performing

which the appellant, a Poona based contractor had transported machinery and equipment from Poona to the work site near Rajkot in

Saurashtra, certainly he would be entitled to damages. One of the heads of damages under which claim is made is 'loss of expected profit in

the work'. The claim under this head as canvassed before the High Court was in the amount of Rs. 4,30,314/-.

9. It was not disputed before us that where in a works contract, the party entrusting the work commits breach of the contract, the contractor

would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the

measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly

admissible.â??

11. It is argued the learned arbitrator had not given any finding qua breach of contract but had only decided about quantum of damages and since

there was no proof of the quantum, the counter claim was rejected. The finding of the Arbitral tribunal referred to is as under:

Therefore, if according to the learned Counsel for the Respondent, the Respondent is not seeking specific performance of the SSA nor

proving the damages as set out in the Counter claim of the Respondent, there is, in our opinion, no need to consider whether claimant has

committed breach of SSA in not complying with its obligations under the Ager Conditions Precedent.

Plea of fundamental breach

Learned counsel for the respondent no.1, then contended that this is a case of a ""fundamental breach"" of the SSA and that therefore, the

provisions of Clause 10 of the SSA requiring refund of the amounts to claimants by .respondent no.1, cannot be applied. No authority has

been cited by the learned counsel for the 1st respondent for the above contention. If the words ""for whatever reason"" in Clause 10 are of

wide amplitude, as mentioned by us and are without any limitation, we are unable to carve out an exception to cases of ""fundamental

breach"", as opposed to ordinary breaches of contract even if we assume that there is a fundamental breach by the claimants as contended

by Respondent no.1. We therefore, reject this contention.â??

12. The learned counsel for the petitioner then referred to para 7.3 of the award which is noted as under:

â??7.3 On Part (A), the Tribunal held that prima facie, the claimant no.1 and 2 had committed breach of, ,several Conditions Precedent

which they had to perform under the SSA and therefore, they had not made out any prima facie case.

On Part (B), the Tribunal, however, held in favour of the claimant, in the light of provisions of Clause 10 of the SSA, that as within 120 days

of SSA, the respondent no.1 company had not allotted shares in the respondent no.1 company to claimants, the amount paid by claimant no.1

(Rs.12,69,12,090/-) to Respondent 1), has to .be prima facie refunded to the claimant by Respondent No.1. It was held that the non-allotment

of shares may be ""for any reason whatsoever"" under Cl.10 i.e., even if it is due to the defaults of claimants 1 and 2.â??

13. The learned counsel for the petitioner referred to Order 8 Rule 6(A) CPC which runs as under:

â??6A. Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way

of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the

plaintiff either before or after the filing of to suit but before the defendant has delivered his defence or before the time limited for delivering

his defence has expired, whether such counter claim is in the nature of a claim for damages or not:

Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit,

both on the original claim and on the counter claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be

fixed by the court.

(4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints.â??

14. If the amount of the counter claim is to be allowed then as per the petitioner the entire award could have been adjusted in the said counter claim.

He argued the counter claim filed by petitioner was never considered by the arbitral tribunal and it rejected the damages payable.

15. The third argument of the learned counsel for the petitioner is the amounts were payable on round trip basis. The arbitral tribunal notes the same as under:

â??It is here that the ""round tripping"" payments by respondent no.1 to claimants for purchase of the claimant no.2's interest in Amritsar

property, and the Jaipur property and the simultaneous payback of the said amounts by claimants to respondent no.1 for purchase of shares

in 1st respondent company, becomes important.â??

16. It is submitted the round trip payment is violative of Section 96 (i) (c) and Section 97 (b) (i) of the Income Tax Act.

â??Impermissible avoidance arrangement.

96.(1)An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit, and itâ?

(a) creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;

(b) results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;

(c) lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or

(d) xxxx.

Arrangement to lack commercial substance.

97. (1) An arrangement shall be deemed to lack commercial substance, ifâ?

(a) the substance or effect of the arrangement as a whole, is inconsistent with, or differs significantly from, the form of its individual steps

or a part; or

(b) it involves or includesâ?

(i) round trip financing;â??

17. Further submissions raised by the learned counsel for the petitioner is qua a cheque of Rs.2.50 crores issued by the respondent no.1 to petitioner

which was for encashment but the learned tribunal held otherwise:

â??We have considered the evidence of the claimants and the respondents. We agree with the contention of the claimants that the evidence of RW1 is consistent with the plea of claimant that the cheque was given only as security as stated by the claimant and not for purpose of encashment. On the other hand, the evidence of RW1 in regard to this deposit is not consistent and full of gaps and is not reliable . We accept the evidence of CW1 and reject the evidence of RW1. We, therefore, hold on Issue No.5 of the claim that the cheque bearing no.240926 for Rs.2.50 Crores was given by claimant no.2 to respondent no.1 only as security and not for encashment. We also hold that the respondent no.1 was not entitled to present the cheque for payment and claimant no.2 was justified in stopping payment by letter addressed to Bank.â??

18. The learned counsel for the petitioner referred to Questions no. 105 and 106 alongwith its answers given as under:

â??Q105. Was the cheque of Rs.2.50 crores forming subject matter of the Section 138 proceedings referred to above handedover to

Respondent No.1 as part of the transaction which is presently pending in this arbitration?

A. Yes.

Q 106. I put it to you that the cheque of RS.2.50 crores referred to in previous question was given to Respondent No.1 to secure the transfer

of the intercorporate deposit of Rs.2.50 crores as referred to in Clause 6.4 of Ex.C-2 extended by Claimant No.2 to the Company known as

Radhamohan Builders Private Limited to Respondent No.1 and that Respondent No.1 was not entitled to have encashed that cheque. What

do you say?

A. No, as per EGM dated 15th May 2010 the resolution which was passed by Respondent No.1 Company, the said sum of Rs.2.50 crores

was paid to Claimant No.2 for transfer of inter corporate deposit that Claimant No.2 had made with Radhamohan Builders Private Limited

in favour of Respondent No.1. The cheque was issued towards refund of the ICD paid to Claimant No.2.â??

19. Hence it is argued the award be set aside.

20. I have heard the arguments. The facts reveal an idea conceptualized by the

parties to develop hotels and only for this reason the money was paid by the respondents for purchase of land and to build a hotel and to have control over the land by purchase of shares in such hotels. Since the assets were to be purchased so the respondent need to control the said company.

21. Now the basis issues involved are (a) the award if is opposed to public policy and (b) if no interest can be awarded per clause 10 of share subscription agreement, besides other connected issues.

22. The relevant provisions of Foreign Exchange Management Act (FEMA) viz. Section viz. 10(1), 10(4), 11(1), 13(1A) and Section 8 of the Foreign Exchange Management Act (Transfer or Issue of Security by a Non Resident of India) are as follows:

10(1) The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.

10(4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.

11(1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security.

13(1A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign

security or immovable property.

Proviso: Provided further that the Reserve Bank may, on an application made to it and for sufficient reasons permit an Indian Company to

refund the amount of consideration received towards issue of security, if such amount is outstanding beyond a period of 180 days from the

date of receipt.

8. Realisation and repatriation of foreign exchange.â?" Save as otherwise provided in this Act, where any amount of foreign exchange is

due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such

foreign exchange within such period and in such manner as may be specified by the Reserve Bank. â?" Save as otherwise provided in this

Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable

steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve

Bankâ??

23. All these provisions above are rather to monitor the money coming from outside to India. It tells us how to deal with such money. Mere reading of

aforesaid provisions and circular(s) reveal such provisions delegate the authority to the various dealers to allow repatriation of surplus funds/refund of

remittance received for purchase of shares but it nowhere provides an absolute bar on such remittances which include the component of interest,

especially ordered under a legally binding award. Even the permission(s) may be taken from Reserve Bank of India in this regard. Such prohibition is

neither contemplated under the FEMA Act nor is in any of the circular(s). There is no prohibitive bar prescribed in the aforesaid circular as sought to

be claimed by the petitioner. It only provides general provision available to the Indian companies to refund the amount received towards the purchase

of share from time to time. The present circular of RBI only outlines the scheme of establishment under the enactment with regard to the purchase of

equity instruments by a person resident outside India and mechanism with regard to the inward remittance and refunds in such case if any. The crux is

if any money comes to India for purchase of shares and the shares are not purchased within 180 days, the money needs to be refunded, as simple as

that.

24. In *Cruz City 1 Mauritius Holdings vs. Unitech Limited* (2017) 239 DLT 649 it was 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 expression “fundamental policy” connotes the basic and substratal rationale, values and

principles which form the bedrock of laws in our country.

104... There was a paradigm shift in the statutory policy. The focus had now shifted from prohibiting transactions to a more permissible

environment. The fundamental policy of FEMA no longer proscribes or prohibits Indian entities from expanding their business overseas and

accepting risks in relation to transactions carried out outside India. And, as the title of FEMA suggests, the policy now is to manage foreign

exchange. Under FEMA, all foreign account transactions are permissible subject to any reasonable restriction which the Government may

impose in consultation with the RBI. It is now permissible to not only compound irregularities but also seek ex post facto permission. Thus,

the question of declining enforcement of a foreign award on the ground of any regulatory compliance or violation of a provision of FEMA

would not be warranted.

108. Having held that a simpliciter violation of any particular provision of FEMA cannot be considered synonymous to offending the

fundamental policy of Indian law, it would also be apposite to mention that enforcement of a foreign award will invariably involve

considerations relating to exchange control. The remittance of foreign exchange in favour of a foreign party seeking enforcement of a

foreign award may require permissions from the Reserve Bank of India. There may also be a question whether the initial agreement

pursuant to which a foreign award has been rendered required any express permission from RBI. However, as indicated earlier, the policy

under FEMA is to permit all transactions albeit subject to reasonable restrictions in the interest of conserving and managing foreign

exchange. India has not accepted full capital account convertibility as yet. Thus, there are transactions for which permission may not be

forthcoming. Whereas certain transactions are permitted under FEMA and regulations made thereunder without any further permissions;

other transactions may require express permission from the RBI. However, these considerations can be addressed by ensuring that no funds

are remitted outside the country in enforcement of a foreign award, without the necessary permissions from the Reserve Bank of India. This

would adequately address the issue of public interest and the concerns relating to foreign exchange management, which FEMA seeks to

address.

109. As discussed hereinbefore, this Court while considering the question whether to decline enforcement of a foreign award on the ground

of public policy, is also required to consider the nature of the policy that is alleged to have been contravened. The approach that this Court

would bear is one that favors enforcement of a foreign award and if the public policy considerations can be addressed without declining

recognition of the foreign award, the Court would lean towards such a course.

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.

113. In view of the aforesaid, the conduct and the stand of Unitech can most charitably be described as plainly dishonest. This court is of

the view that permitting Unitech to prevail on such contentions to resist the enforcement of Award would plainly amount to rewarding

dishonesty and would be manifestly unjust.

114. Curiously, no such contentions were advanced by Unitech before the Arbitral Tribunal. Further, Unitech has also failed to indicate

any credible explanation for not urging the same before the Arbitral Tribunal. Thus, Unitech cannot be permitted to raise such contentions

at this stage. It is also necessary to bear in mind that the present proceedings

are for enforcement of inter se rights between Cruz City and

Unitech and Cruz City cannot be precluded from enforcing its rights which fall within the ambit of private international law.

121Plainly, if an investment is made on representations which are breached, the investor would be entitled to its remedies including in

damages. The aforesaid circulars proscribe assured return instruments brought in India under the guise of equity. However, in the present

case, Cruz City is only seeking to enforce its obligations against Burley, an overseas entity.

122. Even if it is accepted that the Keepwell Agreement was designed to induce Cruz City to make investments by offering assured returns,

Unitech cannot escape its liability to Cruz City. Cruz City had invested in Kerrush on the assurances held out by Unitech and

notwithstanding that Unitech may be liable to be proceeded against for violation of provisions of FEMA, the enforcement of the Award

cannot be declined.â??

The above law clarifies the award of interest is in no way against the fundamental policy of Indian Law.

25. The next issue raised is of damages and round tripping. The arbitral tribunal has held:

â??Whether Respondent No. 1 is entitled to a refund of a sum of Rs. 47,50,00,000/- and interest thereon as claimed ?

While according to the claimant, on account of the non allotment of shares by respondent no.1 to claimant no.1 and 2, the share purchase

money of Rs.12,69,12,090/- paid to the Respondent no.1 has to be refunded, it is the contention of the respondent no.1 that if that be so, all

the payments made by respondent no.1 to claimants I and 2, in respect of the interest of claimant no.2 in Amritsar property, and the Jaipur

property, being payments of Rs.4 7,50,000/- and Rs.16,01,000/- respectively, should also be refunded to the Respondent no.1. (Admittedly

there was no payments in respect of the third item, the Visakhapatnam property of Visu).

In answer, Claimants contend that under the ""round tripping"" method of mutual payments adopted by both parties, identical amounts of

Rs.47.50 Crores and Rs.16.01 Crores have already been paid back by claimants

to respondent no.1 for purchase of shares in 1st respondent company.

Then the following method was adopted by both parties for the payments of Rs.47.50 Crores and Rs.16.01 Crores to each other for the

Amritsar and Jaipur properties, namely, the "round tripping" procedure. It will be seen that all the payments by each party to other in

respect of Rs.47.50 Crores and Rs.16.01 Crores were made from the initial amount of Rs.12,69,12,090/- paid by claimant no.1 through

claimant no.2 in rupees and not in USD. This is done by way of respondent no.1 issuing a cheque for Rs.5 Crores from out of

Rs.12,69,12,090/- in favor of claimants and simultaneously, claimants issuing a cheque for Rs.5 Crores in favor of respondent no. 1 and

repeating such issuance of cheques by each side to the other, to complete the mutual payments of Rs.47.50 Crores and Rs.16.01 Crores. We

shall explain this procedure in more detail. The net result is that only the first payment of Rs.12,69,12,090/- made by claimant no.1 (through

claimant no.2) to respondent no.1, remains with the respondent unpaid. We have already held under Issue no.2 of the claim that the

respondent no.1 has to pay back Rs.12,69,12,090/- to claimants.â??

26. To find if petitioner is entitled to any damages we need to refer to Section 73 of the Contract Act:-

â??73. Compensation for loss or damage caused by breach of contract.â?"When a contract has been broken, the party who suffers by such

breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby,

which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely

to result from the breach of it. â?"When a contract has been broken, the party who suffers by such breach is entitled to receive, from the

party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course

of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it." Such

compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to

discharge obligation resembling those created by contract."When an obligation resembling those created by contract has been incurred

and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in

default, as if such person had contracted to discharge it and had broken his contract. "When an obligation resembling those created by

contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same

compensation from the party in default, as if such person had contracted to discharge it and had broken his contract." Explanation."In

estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the

non-performance of the contract must be taken into account."

27. Under Section above if damages are not proved it cannot be awarded. The arbitral tribunal noted the petitioner had to prove the damages which it

did not prove hence damages were never granted and rightly so.

28. In Fateh Chand Vs. Balkishan Dass (1964) 1 SCR 515 the Court held:

"10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum

to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not

concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure

of damages in the case of breach of a stipulation by way of penalty is by s. 74 reasonable compensation not exceeding the penalty

stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as

it deems reasonable having regard to all the circumstances of the case. jurisdiction of the Court to award compensation in case of breach

of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court

duty to award-compensation according, to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive

compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the

breach. Thereby it merely dispenses with proof of ""actual loss or damages""; it does not justify the award of compensation when in

consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good

loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to

result from the breach.â??

29. Thus even if there is any breach on the part of the petitioner then also clause 10 of the agreement would be applicable i.e. if the shares were not

given within stipulated period the money need to be returned to the petitioner.

30. Another issue raised by the petitioner is if no damages were to be granted to the respondent then interest also ought not to have been granted. It is

a wrong argument, the respondent raised two claims i.e., of Rs.12 crores approx. and of Rs.4.44 crores etc. which were for the exchange rate

fluctuation. The arbitral tribunal did not grant the exchange rate fluctuations and if such claim was not granted then it is wrong for the petitioner to

allege the interest on outstanding dues also ought not to have been granted.

31. On issue of security the arbitral tribunal also took a plausible view to hold:

â??We, therefore, hold on Issue No.5 of the claim that the cheque bearing no.240926 for Rs.2.50 Crores was given by claimant no.2 to

respondent no.1 only as security and not for encashment. We also hold that the respondent no.1 was not entitled to present the cheque for

payment and claimant no.2 justified in stopping payment by letter addressed to Bank.â??

32. There is no need to interfere in the above reasoning.

33. Another issue raised is of round tripping. The Cruz (supra) takes care of that. Moreso I would also like to refer to various provisions of the

agreement to show certain warranties given by the petitioner.

â??(iii) The execution and delivery of this Shareholders' Agreement does-not and will not contravene; (I) any provisions of the respective

Memorandum and Articles of Association of or charter or partnership deed, as the case may be; (II) result in a default or give rise to any

right of termination, cancellation or acceleration under any of the terms, conditions or provisions of any material Indenture, mortgage,

note, lien, license, government registration, contract, lease, agreement or other Instrument or obligation to which it is a party or by which

the Company or the Promoters may be bound; or (III) violate any law, order, writ, judgment, Injunction, decree, statute, ordinance, rule or

regulation applicable to it

(iv) Each party has all necessary consents, licenses and approvals in connection with the entry Into, and performance of, its obligations

under this agreement and as a shareholder In the Company.

(vi) The Parties hereto confirm the enforceability of these presents Inter-se.â??

34. Though on round tripping the learned counsel for petitioner highlighted certain provisions of Income Tax Act, but had itself taken its benefit and the

department never proceeded against either of the parties till date so its allegations are also frivolous.

35. I would here like to refer to K.Sugumar and Another vs. Hindustan Petroleum Corporation Ltd. and Anr., Civil Appeal No. 419 of 2018 wherein

the Court held:

â??3. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare

reading of Section 34 of the Act indicates the highly constricted power of the Civil Court to interfere with an arbitral award. The reason for

this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to

the wisdom of the decision of the arbitrator and the role of the Court should be restricted to the bare minimum. Interference will be justified

only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal

perversity by the arbitrator.

6. A reading of the materials placed on record, including the award and the order passed under Section 34 of the Act, would disclose that

the view taken by the arbitrator is on a consideration of the evidence and materials placed before him and the conclusion that the

respondents are liable to compensate the appellants is a possible and reasonable conclusion. This is precisely what has been held by the

Court while exercising jurisdiction under Section 34 of the Act. If that is so, we do not see how in an appeal under Section 37 of the Act, the

High Court could have re-appreciated the evidence to come to a contrary finding. The High Court was not sitting in appeal over the award

of the arbitrator but it is the order passed under Section 34 of the Act, which was the subject matter of challenge before the High Court. The

High Court seems to have missed the subtle difference between the two jurisdictions and thereby committed an error which would require to

be corrected in this appeal.â??

36. Thus the facts disclose the award passed by the learned arbitrator is a reasoned one, based on appreciation of evidence so recorded and this Court

would not sit in appeal against a reasoned award. The petition being devoid of merits is thus dismissed. The pending miscellaneous application also is

dismissed.

37. No order as to costs.