

MANU/TN/0041/2023

Equivalent/Neutral Citation: (2023)2MLJ195

IN THE HIGH COURT OF MADRAS

Arb. O.P. (Com.Div) No. 88 of 2022, O.A. No. 76 of 2022 and A. No. 67 of 2022

Decided On: 05.01.2023

GPE (India) Ltd. and Ors. **Vs.** Twarit Consultancy Services Private Limited and Ors.

Hon'ble Judges/Coram:

Senthilkumar Ramamoorthy, J.

Counsels:

For Appellant/Petitioner/Plaintiff: P.S. Raman, Senior Advocate for K. Gowtham Kumar and Athiban Vijay

For Respondents/Defendant: Satish Parasaran, Senior Advocate for Vishnu Mohan

Case Category:

ARBITRATION MATTERS

ORDER

Senthilkumar Ramamoorthy, J.

1. The first and second petitioners are companies incorporated in Mauritius. The third petitioner is a private limited company incorporated in India, which is the trustee of Gaja Capital India Fund-I, a SEBI registered venture capital fund.

2. The petition was filed to declare the final arbitral award dated 07 January 2021 (the Foreign Award) as enforceable by deeming the same to be a decree of this Court under Section 49 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act). A consequent direction to the respondents to jointly and severally pay the sums set out in paragraph 5 of the petition was also prayed for. The following interim applications were filed by the petitioners: O.A. No. 76 of 2022 to restrain the first respondent from utilising the sum of INR 265 crores from and out of monies remitted by the third and fourth respondents therein; and A. No. 67 of 2022 for a direction to deposit the sum of INR 265 crore in a separate lien marked account.

Background

3. The petitioners are shareholders of Haldia Coke and Chemicals Private Limited (the Company). 100 equity shares (on payment of INR 10,000) and 11,09,37,000 compulsorily convertible preference shares (CCPS) (on payment of INR 110,93,70,000) of the Company, representing 100% of the issued and paid-up CCPS, were subscribed to by the first and second petitioners under Share Subscription and Shareholders Agreement dated 31 May 2010. Similarly, 100 equity shares (on payment of INR 5,000) and 1,40,63,000 optionally convertible preference shares (OCPS) (on payment of INR 14,06,30,000) of the Company, representing 100% of the issued and paid-up OCPS, were subscribed to by the third petitioner under Share Subscription and Shareholders Agreement dated 31 May 2010. These agreements, which are in near-identical terms, are referred to separately as the First and Second SSHA, respectively, and collectively

as the SSHAs. The SSHAs provide for multiple exit options under Clause 15.2 thereof. These exit options include an IPO, strategic sale, buy back and the exercise of a put option.

4. In 2015, discussions and negotiations were held between the petitioners and the respondents for the purchase of the above mentioned CCPS, OCPS and equity shares, which stood in the name of the respective petitioner. In relation thereto, each petitioner entered into a separate Share Purchase Agreement dated 28 September 2015 (separately, the First, Second and Third SPA, respectively, and collectively, the SPAs) with the respondents herein, who were the purchasers, the Company, and two other non-resident entities. Apart from the SPAs, a Letter Agreement was executed on 28 September 2015 (the Letter Agreement) by the respondents and the petitioners. The Letter Agreement, inter alia, provides for the consequences of the failure of the respondents to make payments under the SPAs to the petitioners. Clause 3 of the Letter Agreement refers to Clause 15.2 of the SSHAs, which provides for the exit options. Clause 3 also defines a Purchaser Payment Breach.

5. In addition to the SPAs referred to above, a Share Purchase Agreement dated 28 September 2015 (the Fourth SPA) was entered into between the petitioners and SVL Limited. The subject of the Fourth SPA is the purchase of the equity shares held by SVL Limited in Shriram EPC Limited (now SEPL) by the petitioners. The sale consideration specified therein is INR 65,00,00,000. The Fourth SPA also provides that SVL Limited may require the petitioners, subject to applicable law, to purchase additional shares of Shriram EPC Limited either by transfer from SVL Limited or by subscription at a value not exceeding INR 10,00,00,000. A Letter Agreement dated 28 September 2015 (the Second Letter Agreement) was also executed by and between the petitioners, the Company, SVL Limited, and other parties. The Second Letter Agreement records the commercial understanding between the parties that the petitioners would invest INR 75,00,00,000 in Shriram EPC from and out of amounts received by them pursuant to the Fourth and Fifth Closing under the SPAs. Both the Fourth SPA and the Second Letter Agreement provide for dispute resolution through arbitration, and the arbitration clause is identical to that under the SPAs and the Letter Agreement.

6. The First to Third SPAs provide for the purchase by the respondents herein of the CCPS or OCPS, as the case may be, at the following consideration: the First SPA at INR 102,76,70,400; the Second SPA at INR 70,73,32,000; and the Third SPA at INR 26,49,97,600. In the aggregate, the consideration payable by the respondents for purchase of the CCPS and OCPS from the petitioners was INR 200,00,00,000. The said consideration was agreed to be paid, jointly and severally, in 14 tranches between 30 September 2015 and 30 June 2018. The remittance of each tranche is referred to as a closing. Upon receipt of part consideration, the proportionate number of CCPS or OCPS, as the case may be, were to be transferred to the respondents.

7. After paying the first tranche of INR 5,00,00,000 between 19 November 2015 and 14 December 2015, default was made in the payment of all the remaining tranches. By issuing notice dated 12 October 2017, the petitioners set out details of the defaults by the respondents and inter alia called upon them to engage in discussions and negotiations to settle the dispute. Since no response was received from the respondents, the notice of arbitration dated 14 December 2017 was issued to the Singapore International Arbitration Centre (the SIAC) pursuant to Clause 6 of the SPAs and Clause 4(f) of the Letter Agreement by the three petitioners herein. The notice pertained to disputes arising under the SPAs (First to Third SPAs) and the Letter Agreement, all of which provide for arbitration under the SIAC Rules and specify the

seat of arbitration as Singapore. The governing law of the SPAs and the Letter Agreement is Indian law.

8. At the request of the petitioners, the SIAC Court agreed to consolidate the four arbitral proceedings into one proceeding pursuant to Rule 8.5 of the SIAC Rules. Initially, objections were raised by the respondents to the jurisdiction of the Arbitral Tribunal. By a decision dated 14.02.2019, the jurisdictional objections were overruled. Thereafter, the parties completed pleadings before the Tribunal and evidence was recorded. Upon considering the pleadings, evidence and submissions, the Foreign Award was pronounced holding that the petitioners are entitled to damages for breach of the SPAs by the respondents. The Foreign Award was challenged by the respondents herein before the Singapore International Commercial Court on about five grounds. By judgment dated 24 December 2021, the challenge was rejected.

Pleadings

9. After stating that the Foreign Award is entirely in consonance with the requirements of the Arbitration Act and that the conditions specified in Section 48 (1) and (2) thereof are not attracted in this case, the present petition was filed. In response, the respondents herein filed their statement of objections. In the statement of objections, the respondents stated that the conclusion of the Arbitral Tribunal that clause 3(c) of the Letter Agreement provided for liquidated damages is flawed; that the consideration and grant of the alternative prayer warrants interference because the basis thereof was not pleaded; that parties had executed four SPAs and two Letter Agreements on the same date and that these agreements constitute a composite and integrated set of agreements.

10. The respondents further submitted that the Foreign Award is liable to be interfered with because it has the effect of enforcing contracts which are opposed to public policy in terms of Sections 23 and 24 of the Indian Contract Act, 1872 (the Contract Act). According to the respondents, the SPAs violate public policy in two respects. First, the Fourth SPA was also executed on 28 September 2015 by and between the petitioners, on the one hand, and SVL Limited, on the other, and that the said SPA provided for the purchase of 62.92% of the equity share capital of Shriram EPC Limited (now SEPC Limited), the second respondent herein, from SVL Limited by the petitioners herein. Therefore, according to the respondents, the object and consideration of the SPAs was to indirectly finance the purchase of the shares of the second respondent, and this violates Section 67(2) of the Companies Act, 2013 (CA 2013) and, therefore, contravenes Sections 23 and 24 of the Contract Act. Secondly, the respondents contended that the SPAs are designed to circumvent the provisions of the Foreign Exchange Management Act, 2000 (the FEMA) and, in particular, the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (the Security Transfer Regulations). They submit that FEMA and the Security Transfer Regulations do not permit a non-resident investor in the share capital of an Indian company to be guaranteed a return on such investment at the time of investment or exit and permit an exit only at the fair market value at the time of exit. Because the SPAs guarantee a return at a price far higher than the fair market value, it was submitted that the enforcement of these contracts has the effect of contravening law and public policy.

Contentions of Counsel

11. Oral arguments were advanced in this order: by Mr. Satish Parasaran, learned

senior counsel for the respondents, and by Mr. P.S.Raman, learned senior counsel for the petitioners.

12. Mr. Satish Parasaran opened his submissions by referring to the law laid down by the Hon'ble Supreme Court in *Vijay Karia and Others v. Prysmian Cavie Sistemi SRL and others* (Vijay Karia), MANU/SC/0171/2020 : (2020) 11 SCC 1. With specific reference to paragraph 43 thereof, he contended that a challenge on the ground that a foreign award infringes the public policy of India is decided in the same manner as a challenge on that ground under Section 34 of the Arbitration Act. By drawing reference to the SSHAs, which were executed on 31 May 2010, he pointed out that the subject of the SSHAs was the payment of the subscription amount of INR 10,000/-and INR 5000/-towards subscription of equity shares and INR 125,00,00,000/-towards subscription of CCPS and OCPS. In effect, he contended that the petitioners invested in the equity share capital and preference share capital of the Company on the terms and conditions stipulated in the SSHAs. He also pointed out that the SSHAs provide for multiple exit options under Clause 15.2 thereof. These exit options include an IPO, strategic sale, buy back and the exercise of a put option.

13. From and out of the exit options, he turned the spotlight on the put option. Clauses 15.2.3 (as amended by the Amendment Agreement dated 15 November 2011), and 15.2.4, which deal with put buy back return and the put option, are set out below:

"15.2.3 Buy Back

(a) The Investor shall be entitled to receive an IRR of at least 24% (twenty four percent) on its Total Investment Amount by exercising any of the rights under Clauses 15.2.4, 15.2.3, or 15.2.5 ("Put Buy Back Return").

The Investor shall be entitled to call upon the Company to purchase/complete a buy back of all or part of the Shares held by the Investor ("Buy Back Shares") for an amount equal to the Put Buy Back Return"

15.2.4 Put Option:

(a) The Investor shall, subject to the terms and conditions herein specified, be entitled (at its option) (i) to require the promoters and/or Shriram Minerals to purchase or cause any Person to purchase all or any number of Shares held by the Investor in the Company ("Put Securities"), and the promoters and/or Shriram Minerals shall be obliged to purchase or cause to be purchased, the Put securities ("Put Option") at such price as will provide the Investor, with a return equal to the Put Buy Back Return(the "Put Price), For the sake of clarity, the procedure for the determination of Fair Market Value as laid down in Clause 15.2.5(e) below shall not be applicable for the determination of the Put Price."

Thus, he pointed out that the put option provides for a guaranteed return to the investor at a pre-determined IRR of 24%, which is impermissible under FEMA. Consequently, the SSHAs violate FEMA and the regulations framed thereunder.

14. Learned senior counsel submitted that the investors/petitioners wanted to exit with a guaranteed return on their investment and not at the fair market value. For purposes of ensuring such guaranteed return on investment, he submitted that four SPAs were executed on 28.09.2015. These SPAs provided for the purchase of the equity, CCPS and

OCPS held by the petitioners in the Company by the respondents herein. Such purchase was to be made, not at the fair market value, but at a total consideration of INR 200 crore across the First to Third SPAs. The First SPA was between the first petitioner and the respondents, the Second SPA between the second petitioner and the respondents and the Third SPA between the third petitioner and the respondents. In effect, he submitted that the object and purpose and consideration for the SPAs is contrary to public policy because these agreements were designed to provide an assured or guaranteed return on investment for the petitioners. By drawing reference to Clause 3 of the Letter Agreement, he pointed out that it provides for the suspension of rights under the SSHAs until a purchaser payment breach occurs. It further provides for the rights and liabilities of the parties in case the purchaser payment breach occurs after making payment equal to or greater than INR 125 crore and when the purchaser payment breach occurs before payment of a sum equal to or greater than INR 125 crore.

15. According to learned senior counsel, the Foreign Award is liable to be interfered with on multiple grounds. The first ground is that the object and consideration for the SPAs are contrary to public policy. Therefore, the SPAs are void as per Section 23 and 24 of the Contract Act. Secondly, the SPAs contravene Regulation 3 of the Security Transfer Regulations. With specific reference to Regulation 9 of the Security Transfer Regulations, which was amended on 23.05.2014, learned senior counsel pointed out that the guiding principle behind the regulations is that a non resident investor is not guaranteed an assured exit price at the time of making an investment and that exit should be at the price prevailing at the time of exit. Unless the transfer from a non resident to a resident is in accordance with regulations, he submitted that the prior approval of the RBI was necessary. In this case, he submitted that the prior approval of the RBI was not applied for or obtained for the purchase of the equity and preference shares from the petitioners by the respondents herein at the price guaranteed under the SPAs.

16. He further submitted that interference is warranted with the Foreign Award because the petitioners did not exercise any of the exit options under the SSHAs. In the absence thereof, the Arbitral Tribunal exceeded the scope of reference by proceeding on the assumption that the put option under the SSHAs was exercised by the petitioners. Since the award of damages proceeds on that erroneous assumption, the Foreign Award should not be recognized and held to be enforceable.

17. The next contention of learned senior counsel was that the SPAs also violate Section 67 (2) of the Companies Act, 2013 (CA 2013) inasmuch as the obligations imposed thereunder tantamount to funding the purchase of shares of Shriram EPC. In order to buttress this contention, learned senior counsel referred to the Fourth SPA and the Second Letter Agreement and contended that it is evident therefrom that upon receipt of the fourth and fifth tranches of consideration under the First to Third SPAs, the petitioners agreed to use such consideration to purchase the shares of Shriram EPC for INR 75 crore. The last submission was on the ground that the award of interest as per Singapore law was contrary to applicable principles. Since the contracts are governed by the substantive law of India and an interest claim is substantive, the Arbitral Tribunal should have taken into account applicable Indian law such as the Interest Act.

18. Mr. P.S.Raman, learned senior counsel, made submissions to the contrary. As regards both the SSHAs and SPAs, he pointed out that these contracts were executed after extensive negotiations. In particular, he referred to the warranty provided by the respondents herein with regard to the enforceability thereof. He also referred to the

opinion provided by the respondents to the effect that the execution and enforcement of the SSHAs do not violate Indian law. He further submitted that only the First to Third SPAs and the Letter Agreement were the subject of arbitral proceedings. By drawing reference to paragraphs 87 and 88 of Vijay Karia, he submitted that a paradigm shift occurred when the Foreign Exchange Regulation Act, 1973 was replaced by FEMA. Upon recognising this transition, he pointed out that the Hon'ble Supreme Court held in paragraph 88 of Vijay Karia that transactions that violate FEMA cannot be held to be void because any breach of FEMA is rectifiable. Therefore, he submitted that the Supreme Court concluded that a foreign award cannot be held to be unenforceable on account of such rectifiable breach.

19. By referring to Clause 4(c) of the Letter Agreement, he submitted that it is an entire agreement clause. Consequently, he stated that the Fourth SPA cannot be telescoped into the other three SPAs. In order to underscore the mala fide conduct of the respondents, he pointed out the following. The Company was placed in voluntary liquidation by the respondents in order to defeat the rights of the petitioners under the SSHAs and SPAs. At the instance of the petitioners, the National Company Law Appellate Tribunal (the NCLAT) set aside the order of the National Company Law Tribunal (the NCLT) in such regard. Although the respondents carried the NCLAT order in appeal to the Supreme Court, the order was not interfered with.

20. As regards the award of damages, Mr. Raman pointed out that the Arbitral Tribunal awarded the same by interpreting the relevant contractual clauses. By drawing reference to the reasoning and conclusions of the Arbitral Tribunal, he pointed out that the Arbitral Tribunal noticed that Section 74 of the Contract Act provides for reasonable compensation. He also pointed out that the Arbitral Tribunal accepted the submission of the respondents herein that the measure of damages in a case where a buyer of shares is in breach of an obligation to complete the purchase of shares is ordinarily the difference between the market price of the shares at the time of breach and the agreed consideration for the shares. After noticing that the stipulation under Clause 3(c) of the Letter Agreement exceeded the aggregate consideration of INR 200 crore for the sale shares under the first to third SPAs, the Arbitral Tribunal considered the alternative claim for damages under the First to Third SPAs. Ultimately, the Arbitral Tribunal awarded the total consideration specified in the second to fourteenth tranches, as regards the sale shares, as damages in paragraph 260 of the Foreign Award. Since the Foreign Award was based on a reasonable interpretation of the Letter Agreement, the SPAs and the SSHAs, learned senior counsel pointed out that no interference is warranted on public policy grounds. In support of this contention, he referred to paragraph 39 of Vijay Karia and paragraphs 33 and 34 of Renusagar Power Co. Ltd v. General Electric Co (Renusagar) MANU/SC/0001/1984 : (1984) 4 SCC 679. He concluded his submissions by pointing out that the Arbitral Tribunal is empowered to decide on interest under Section 20 of the Singapore International Arbitration Act, which is applicable because the seat of arbitration was at Singapore.

21. By way of rejoinder, Mr. Satish Parasaran submitted that the four SPAs should be read together. By drawing reference to Clause 4(c) of the Second Letter Agreement, he pointed out that the said clause specified that the entire commercial understanding of the parties was contained in the Second Letter Agreement and the transaction documents. According to Mr. Satish Parasaran, the transaction documents included the Fourth SPA also. By referring to and relying upon paragraph 27 of Associate Builders v. Delhi Development Authority MANU/SC/1076/2014 : (2015) 3 SCC 49 (Associate Builders) and paragraphs 33 to 36 of Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (Ssangyong),

MANU/SC/0705/2019 : (2019) 15 SCC 131, he submitted that the contravention of the substantive law of India violates the fundamental policy of Indian law. Since the Security Transfer Regulations required the prior approval of the RBI, he contended that the violation of FEMA is not a rectifiable error.

22. By submitting that the SSHAs, the four SPAs and the two Letter Agreements constitute a composite set of agreements, he concluded his submissions by contending that the consideration specified in the SPAs clearly violates Section 67 of CA 2013 read with Section 23 of the Contract Act.

Discussion, analysis and conclusions

23. Section 48 of the Arbitration Act provides for the grounds on which the enforcement of a foreign award may be refused. The said provision is set out below:

"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 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."

24. In *Vijay Karia*, the Hon'ble Supreme Court categorised and classified the grounds contained in Section 48 into three groups. The first group consisting of grounds which affect the jurisdiction of the arbitral tribunal; the second group consisting of grounds which only affect party interests; and the third group consisting of grounds which deal with the public policy of India, as explained by Explanation 1 to Section 48(2). With regard to the jurisdictional grounds of challenge, the Hon'ble Supreme Court concluded, at paragraph 49 of *Vijay Karia*, that the court has no discretion and should refuse to enforce the award if the court concludes that the award was made without jurisdiction. With regard to grounds linked only to party interest, such as the inability of a party to present its case before the arbitral tribunal, the Hon'ble Supreme Court concluded that the court may enforce the foreign award even if such ground is made out. As regards the third category also, namely, violation of the public policy of India, there would be no discretion.

25. In the context of the grounds of challenge herein, there is no doubt that there is no jurisdictional challenge. The challenge is confined to the third category under paragraph 58 of *Vijay Karia*. In Explanation 1 to Section 48(2), it is clarified that an award is in conflict with the public policy of India only in three circumstances. The first circumstance is if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81. It is not the case of the respondents herein that the Foreign Award is tainted on grounds of fraud or corruption. The second circumstance specified in Explanation 1 is if the foreign award is in contravention of the fundamental policy of India. The third circumstance is if the foreign award is in conflict with the most basic notions of morality or justice. The respondents did not canvass the proposition that the Foreign Award is in conflict with the basic notions of morality or justice. Therefore, the Foreign Award should be tested from the

perspective of deciding whether it contravenes the fundamental policy of Indian law.

26. As correctly contended by learned senior counsel for the petitioners, the fundamental policy of Indian law should be understood in the narrow sense in which it was construed in *Renusagar*. Effectively, unless the foreign award contravenes a fundamental and non-derogable principle or core value, whether enshrined in statute or otherwise, refusal to recognise is not warranted. Indeed, even an erroneous interpretation of the law would not qualify as a ground to refuse recognition. This petition should be decided by keeping in mind the above legal framework.

27. The principal ground of challenge is that the object of and consideration specified in the First to Third SPAs is violative of public policy. The first basis of this contention is that FEMA and the Security Transfer Regulations, which were framed under FEMA, do not permit a non resident investor in securities to exit at a guaranteed price. In light of this contention, the question that arises is whether the object of or consideration stipulated in the SPAs violates FEMA and, particularly, the Security Transfer Regulations. Before delving further, a caveat is in order: the relevant contracts and the law is being examined in the following paragraphs for the limited purpose of testing whether the fundamental policy of Indian law is being infringed and not for purposes of recording definitive conclusions with regard to validity and enforceability.

28. The SSHAs deal with the investment by two non resident entities and a SEBI registered venture capital fund in an Indian company. The investment was in equity shares, CCPS and OCPS and the aggregate investment was about INR 125 crore. Under FEMA, a general prohibition in respect of dealing in foreign exchange or making payment to or receiving payment from a non-resident is contained in Section 3. This is subject to the other provisions of FEMA and the rules and regulations framed thereunder. Transactions in securities are classified as capital account transactions and are, in general, subject to greater regulation than current account transactions. The principal regulations dealing with transactions in securities involving non-residents are the Security Transfer Regulations. Regulation 5 thereof permits purchase of shares by a non-resident in an Indian company under the Foreign Direct Investment (FDI) Scheme, which is set out in Schedule 1, and provides for investment under what is described as the automatic route (i.e. without requiring express RBI approval) if the requirements of Schedule 1 are complied with.

29. Since such transaction entails inflow of foreign exchange, except with express RBI approval, the share price should be not less than the fair market value (as determined by any internationally acceptable pricing methodology for valuation of shares on arms length basis duly certified by a chartered accountant or SEBI registered merchant banker). Put differently, the fair market value will operate as a floor price. For a considerable period, there was uncertainty as to whether a clause providing an exit option to a non-resident was permissible. This was clarified by an amendment to the Security Transfer Regulations on 23 May 2014, which enables exit options subject to the condition that exit is at a price not exceeding the price arrived at by any internationally acceptable pricing methodology for valuation of shares on arms length basis duly certified by a chartered accountant or SEBI registered merchant banker. Thus, in contrast to entry, at the time of exit, unless express RBI approval is obtained, the fair market price is intended to operate as the ceiling. The underlying principle is this: as in the case of all equity investment, a non-resident investor in the share capital of an Indian company is presented with a package deal comprising uncapped upside benefit and uncapped downside risk. In short, the investment should be both ostensibly and genuinely an equity investment and not debt, which is subject to a distinct and more

exacting regulatory regime, clothed or disguised as an equity investment.

30. The SSHAs, which were executed prior to the amendment, specified exit options at Clause 15.2 thereof. Sub clause 15.2.4 provides for a put option as an exit option. The relevant clauses, which are extracted supra at paragraph 13 of this order, stipulate a guaranteed exit price at an IRR of 24% on the investment. Since the restrictions under FEMA read with the Security Transfer Regulations are intended inter alia to prevent foreign exchange outflow on account of equity transactions at prices higher than the fair market value at the time of exit by the non resident, exit under the SSHAs by the non resident at a price higher than the fair market value may not have been permissible without the prior approval of the RBI. The admitted position is that none of the exit options under the SSHAs were exercised and, therefore, there was no foreign exchange outflow under the SSHAs.

31. Turning to the SPAs (the First to Third SPAs), these SPAs provide for the purchase of securities from the petitioners by the respondents at a fixed aggregate price of INR 200 crore, which is the cumulative sale consideration. The said consideration is payable in 14 tranches. The SPAs do not indicate the basis on which the purchase price was arrived at. The Letter Agreement was also executed contemporaneously and deals with the purchase of 12,49,98,800 shares (described as subscription shares) by the respondents. Clause 3(a) to (c) of the Letter Agreement are set out below:

"3. Rights under the Existing SSHA:

(a) The parties to this Letter Agreement have agreed that the rights of the Investor under Clause 15.2 of the Existing SSHA shall stand suspended for a period commencing from the date of signing of the Transaction Documents, until the Purchasers or any of them have committed a breach of any of their obligations to make any payment under the relevant provisions of the SPAs ("Purchaser Payment Breach"). For the avoidance of doubt, it is clarified that in case of a Purchaser Payment Breach, the rights of the Investors under Clause 15.2 of the Existing SSHA shall forthwith stand reinstated and may be exercised by the Investor, without requirement of any notification or act by the Investors and/or any other Party to the Letter Agreement or the Existing SSHA.

(b) If on the date of occurrence of a Purchaser Payment Breach ("Purchaser Payment Date") the Investors have received an amount equal to or greater than Rs. 125,00,00,000 (Rupees One Hundred and Twenty Five Crores only) from the Purchasers under the SPAs, then the Purchasers' shall be liable to pay the Investors an amount equal to the difference between the aggregate amount payable by the Purchasers to the Investors under the SPAs and the amount actually received by the Investors until the Purchaser Breach Date.

(c) If until the Purchaser Breach Date, the Investors have received an amount which is lesser than Rs. 125,00,00,000 (Rupees One Hundred and Twenty Five Crores only) from the Purchasers under the SPAs, then the Purchasers' shall be liable to pay the Investors all amounts as are payable under the Existing SHA less amounts paid by the Purchasers under the SPAs till the Purchaser Breach Date.

For the purposes of this Letter Agreement, the term Transaction Documents

shall mean:

- (i) the SPAs; and
- (ii) this Letter Agreement."

32. The admitted position is that only INR 5,00,00,000 was paid by the respondents to the petitioners pursuant to the SPAs and the Letter Agreement. Therefore, the shares were not transferred by the petitioners to the respondents. In those circumstances, the petitioners invoked the arbitration agreement and submitted a statement of claim before the Arbitral Tribunal for INR 401 crore (being IRR of 24% on INR 125 crore) as damages under clause 3(c) of the Letter Agreement along with interest thereon at 18% per annum or, in the alternative, for a sum of INR 195 crore or such other sum as may be assessed by the Arbitral Tribunal.

33. Faced with the above claim, the Arbitral Tribunal examined whether clause 3 (c) of the Letter Agreement provides for a genuine pre-estimate of loss (liquidated damages) or a penalty and concluded at paragraphs 215 to 225 of the Foreign Award that it is a stipulation by way of penalty because INR 401 crore exceeds the losses incurred by the petitioners even as per their expert witness. After noticing the judgment of the Supreme Court in *Fateh Chand v. Balkishan Das* MANU/SC/0258/1963 : (1964) 1 SCR 515, the Arbitral Tribunal held that the petitioners are only entitled to reasonable compensation not exceeding the sum stipulated. The conclusion of the Arbitral Tribunal that the stipulation is in the nature of penalty cannot be faulted because the nature of the stipulation should be tested by examining whether the stipulated compensation bears a reasonable correlation to anticipated loss in the event of breach.

34. In order to determine reasonable compensation, as per the alternative claim, which is in the nature of a claim for unliquidated damages under Section 73 of the Contract Act, the Arbitral Tribunal accepted the contention of the respondents that the difference between the price agreed under the share purchase agreement and the market price on the date of breach would be the appropriate measure of reasonable compensation. This conclusion is unexceptionable because this is the appropriate measure in any contract for the sale of goods. Upon appraisal of the evidence on record, including the closing dates for tranches two to fourteen and the oral and documentary evidence relating to performance of the purchase obligation and the extensions granted in relation thereto, the Arbitral Tribunal further concluded that the date of breach was 11 July 2017. The logical follow-on question was: what was the market value of the shares as of 11 July 2017? On this aspect, the Arbitral Tribunal recorded the following findings at paragraph 246 of the Foreign Award:

"246. I accept Mr Mayal's unchallenged evidence that the value of Haldia's equity was likely negligible as at July 2017 and thereafter. I am satisfied that the market value of Haldia's shares from July 2017 onwards was zero."

35. By reckoning the market value of the Company's shares as zero, as on the date of breach, the Arbitral Tribunal concluded, at paragraphs 247 and 258 of the Foreign Award, that the loss caused due to the breach was the total unpaid consideration of INR 195 crore. This amount was directed to be paid in the following manner to the three petitioners: INR 1,00,19,78,640 to petitioner No. 1; INR 68,96,48,700 to petitioner No. 2; and INR 25,83,72,660 to petitioner No. 3. The conclusion with regard to market value of the shares of the Company, as on date of breach, was drawn on appraisal of evidence and cannot be said to be contrary to the fundamental policy of Indian law.

36. The Arbitral Tribunal considered the rival contentions on alleged FEMA violation as regards the performance of obligations under the SSHAs, SPAs and Letter Agreement and set out its analysis and conclusions at paragraphs 126 to 174 of the Foreign Award. While doing so, paragraph 88 of Vijay Karia, which is set out below, was reproduced:

"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 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 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, 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 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* [*Renusagar Power Co. Ltd. v. General Electric Co.*, MANU/SC/0195/1994 : 1994 Supp (1) SCC 644], 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."

Inter alia by relying on Vijay Karia, the Arbitral Tribunal concluded that the SSHAs are not void and that even transfer of shares in exercise of options under the SSHAs could be undertaken with RBI approval. Paragraph 139 of the Foreign Award is of particular relevance and is set out below:

"139. Put a different way, it is not the rights and obligations themselves which are contrary to the FEMA regime, it is the transfer of the Sale Shares that is allegedly contrary to the FEMA regime. I agree with the Respondents' analysis at paragraph 88 of their written closing submissions, subject to the qualification that it is open to the Parties to obtain RBI approval for a transfer that is not specifically permitted by the FEMA regime."

37. As regards the SPAs, the Arbitral Tribunal recorded that the objection that the SPAs are not capable of being enforced was taken belatedly by the respondents in the written closing submissions by citing Regulation 3 and 10(B) of the Security Transfer Regulations. Thereafter, the Arbitral Tribunal took note of evidence, in the form of an email and the attachments thereto, regarding RBI approval and the payment for the first tranche of the sale shares and concluded that obligations under the SPAs could have

been performed with RBI approval. The findings at paragraphs 172 and 173 are set out below:

"172. This demonstrates that the transactions contemplated under the First to Third SPAs were either specifically permitted under the FEMA regime or, as concluded earlier, that it was possible for the Parties to have obtained RBI approval before the transactions were completed.

173. In other words, the First to Third SPAs were demonstrably capable of being performed. If the Respondents have failed to perform their obligations under the First to Third SPAs, the Claimants are entitled to damages for breach of contract. For completeness, there is no suggestion that the Respondents attempted to seek RBI approval to perform the First to Third SPAs and that such approval was not forthcoming."

38. The conclusion that the SSHAs and SPAs are not void is substantially in consonance with the law laid down in *Vijay Karia*. It should be recognised, however, that the consequence of a contract not being void is that the contract and the rights, liabilities and obligations imposed thereunder survive. The sequitur is not that such contract is unconditionally enforceable. The Arbitral Tribunal was acutely conscious of this as is evident from the conclusions in paragraph 128, 139 and 172 that the relevant shares could have been transferred with RBI approval. Therefore, such conclusions also do not contravene the fundamental policy of Indian law. It remains to be considered whether the award of damages of INR 195 crore to non-resident entities for the breach of contracts for the purchase of shares contravenes FEMA and, therefore, the fundamental policy of Indian law, and I turn to this issue next.

39. The Arbitral Tribunal awarded aggregate damages of INR 195 crore plus interest for breach of contracts to purchase shares that were subscribed to by the petitioners for the aggregate consideration of about INR 125 crore. In effect, the entire unpaid consideration under the SPAs was directed to be paid as damages. As discussed earlier, the sum of INR 195 crore was arrived at by the Arbitral Tribunal, as representing reasonable compensation, by accepting evidence that the market value of the shares was zero on the date of breach. Especially in that factual context, if obligations under the SPAs had been fulfilled, the respective parties to the SPA could not have paid or received INR 200 crore, in the aggregate, as consideration for these shares without RBI approval. Indeed, as discussed earlier, the Arbitral Tribunal was alive to the requirement of RBI approval but concluded that the absence of such approval is rectifiable by obtaining approval and does not result in the SSHAs or SPAs being rendered void.

40. The Arbitral Tribunal also noticed the judgment of the Delhi High Court in *NTT Docomo v. Tata Sons Limited (NTT Docomo)* MANU/DE/1164/2017/(2017) 241 DLT 65, wherein the Court concluded that RBI approval is not required because the amount was awarded as damages. *NTT Docomo* was a case in which the relevant shareholders agreement imposed an obligation on the Indian partner to find a buyer for the shares subscribed to by NTT Docomo at the fair value on a specific date or at 50% of the investment, whichever is higher. Upon failure to fulfil such obligation, NTT Docomo initiated arbitral proceedings and the arbitral tribunal awarded damages. Eventually, the contesting parties arrived at a settlement and the Court disposed of the matter in terms of the settlement by overruling RBI's objections.

41. Given that FEMA is a statute aimed at regulating foreign exchange, in my view, the

receipt of damages equivalent to the entire unpaid sale consideration of INR 195 crore pursuant to the Foreign Award for breach of contracts to buy shares at an aggregate sum of INR 200 crore, when the market value of the shares at the time of breach was zero, requires the prior approval of RBI. While undertaking this exercise, the RBI will do well to bear in mind that an Indian company received investments by representing and warranting that the agreements are valid and enforceable under Indian law and thereafter reneged on contractual obligations. This resulted in the award of damages by the Arbitral Tribunal. Some relevant considerations would be: if the amount received as damages is not repatriated and is instead deployed in India, there may not be an impact from a foreign exchange outflow perspective; whereas, if the money is to be repatriated out of India, the implications from a foreign exchange perspective change significantly. These and other material aspects may be taken into consideration by the RBI upon receipt of an appropriate application. To that extent, in this context, I disagree with the conclusion in NTT Docomo.

42. The next issue is whether the object or consideration of the SPAs and the Letter Agreement violate public policy because it violates Section 67(2) of CA 2013. Sub-section 2 of Section 67 prohibits a public company from directly or indirectly providing any form of financial assistance for the purchase of its shares or those of its holding company. The respondents contended that the Fourth SPA read with the Second Letter Agreement evidence that the consideration received as the fourth and fifth tranches under the First to Third SPA were required to be deployed for purchasing the shares held by a third party, SVL Limited, in Shriram EPC Limited. Since Shriram EPC Limited is a public limited company and one of the purchasers under the First to Third SPAs, it was contended by learned senior counsel that the object and consideration of the SPAs is to finance the purchase of shares of Shriram EPC Limited by the petitioners in terms of the Fourth SPA and the Second Letter Agreement.

43. The Arbitral Tribunal's analysis and conclusions on this issue are set out at paragraphs 91 to 117. After reproducing Section 23 of the Contract Act at paragraph 82, the Arbitral Tribunal took into account the relevant clauses of all the agreements, the admitted position that the fourth and fifth tranches were not paid, the evidence and recorded the following significant findings:

"105. In my view, the Respondents have not proven that the object of providing financial assistance contrary to section 67(2) of the Companies Act was "in the contemplation of the parties when they entered into" the transaction. I have reached this conclusion on the basis of the documentary evidence and the Respondents' own factual witness evidence "

"114. Given the Claimants' undisputed objective of exiting their investments, I consider that it is unlikely that the Claimants desired financial assistance for the purchase of the Second Respondent's shares. On the other hand, it is more likely that the Respondents promised to make payments under the First to Third SPAs in consideration for the Claimants agreeing to purchase or subscribe to shares in the Second Respondent. I consider that this is the more accurate characterization of the commercial understanding between the parties."

The above conclusions are eminently reasonable and cannot be characterised as being in breach of the fundamental policy of Indian law.

44. All that remains to be considered is the award of interest. Interest was awarded by referring to and relying upon Section 20 of the Singapore International Arbitration Act

and Rule 32.9 of the SIAC Rules 2016. Section 20 empowers an arbitral tribunal to award either simple or compound interest at the rate agreed to by parties or, in the absence of an agreed rate, at a rate and from the date determined by such arbitral tribunal. Thus, it is similar to Section 31(7) of the Arbitration Act. The Arbitral Tribunal noticed Section 31(7) and the relevant provisions of the Interest Act, 1978 (the Interest Act). Indeed, the Arbitral Tribunal adopted the current rate of interest, which is a defined term under the Interest Act, albeit without applying the Interest Act, and fixed the rate of interest at 7.25% per annum on such basis. The fixation of interest is within the jurisdiction of the Arbitral Tribunal under Section 20(3) of the Singapore International Arbitration Act and such fixation by taking into account and awarding interest at the current rate of interest of 7.25% per annum certainly does not violate the fundamental policy of Indian law.

45. For reasons set out above, I conclude that the respondents failed to establish any ground on which the recognition of the Foreign Award should be refused. Consequently, subject to the requirement of obtaining RBI approval before initiating further proceedings for enforcement, the Foreign Award is recognized and held to be enforceable as a decree of this Court. As a corollary, subject to and in accordance with terms and conditions, if any, imposed by the RBI in its approval, the respondents are required to pay the amounts claimed by the petitioners in paragraph 36(b) of the petition. If the Foreign Award is not complied with, after obtaining RBI approval, it is open to the petitioners to institute appropriate proceedings in accordance with the applicable provisions of the Code of Civil Procedure, 1908. Consequently, connected original application and application are closed.

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