

2023 SCC OnLine Del 3936

In the High Court of Delhi at New Delhi
(BEFORE YASHWANT VARMA, J.)

Raffles Education Investment (India) Pte Ltd. and
Another ... Decree Holders;

Versus

Educomp Professional Education Limited ...
Judgment Debtor.

O.M.P.(EFA)(COMM.) 6/2017 and Ex. Appl.(OS) 979/2019⁵

Decided on July 7, 2023, [Judgment reserved on : 28 March 2023]

Advocates who appeared in this case :

Mr. Sandeep Sethi, Sr. Adv. with Mr. Sulabh Rewari, Ms. Nikita Garg,
Ms. Vasudha Sharma, Mr. Aditya Rajagopal, Mr. Vikram Singh, Ms.
Shreya Sethi, Ms. Tanvi Tiwari, Advs.

Ms. Malvika Trivedi, Sr. Adv. with Ms. Bani Dixit, Ms. Sujal Gupta, Mr.
Uddhav Khanna, Mr. Shailendra Slaria, Advs.

The Judgment of the Court was delivered by

YASHWANT VARMA, J.:— The instant petition preferred by *Raffles Education Investment (India) Pte. Ltd.*¹ under Chapter-I, Part-II of the Arbitration and Conciliation Act, 1996² seeks enforcement of a Final Award dated 31 March 2017³ passed by the Singapore International Arbitration Centre⁴ in Arbitration No. 179 of 2015 under the SIAC Rules, 2013. The enforcement action is resisted by Educomp Professional Education Limited⁵ which asserts that the Award is not liable to be recognised or enforced under Part-II of the Act being contrary to the public policy of India. The challenge to the Award is essentially based on the assertion of Educomp that the Award in essence results in the recognition and enforcement of a Share Purchase Agreement⁶ dated 12 March 2015 which fundamentally amounts to a for-profit entity taking over control of a charitable society as well as the educational institution established and administered by it. The charitable society which is referred to is the Jai Radha Raman Education Society⁷, a society constituted and registered under the Societies Registration Act, 1860⁸.

2. Educomp further asserts that the Award if implemented would not just result in the monetization of the assets of JRRES but also result in commercialisation of the activities of the educational institution which

is prohibited in law. It was further asserted by Educomp that in terms of the various prescriptions forming part of the SPA, Raffles would take over control of JRRES and which too is proscribed by law especially since Raffles is a foreign entity.

3. Upon disputes having arisen between parties relating to the implementation of the SPA, the matter came to be referred to the SIAC. The Arbitral Tribunal has ultimately and in terms of the Award rendered, refused the relief of Specific Performance. It has, however, awarded Damages and Costs. The Dispositif directions as embodied in the Award read as follows:—

“XX. DISPOSITIF

For the reasons set out above, the Tribunal hereby DECLARES, AWARDS, ORDERS AND DIRECTS that:

517. The SPA is not illegal or contrary to public policy under Indian law.

518. The Respondents are in breach of clauses 4.1, 4.3 and 4.4 of the SPA from 19th August 2015.

519. The Conditions Precedent under the SPA are mandatory terms, not best efforts.

520. In the alternative, even if Conditions Precedent 4.4.2, 4.4.3 and 4.4.5 were on a best efforts basis, the Respondents failed to exercise best efforts.

521. The SPA did not terminate under clause 5.9.

522. The Claimants are not entitled to an order for specific performance.

523. The Claimants are awarded damages for the Respondents' breaches of clauses 4.1, 4.3 and 4.4 of the SPA in the sum of Rs. 16.32 crore.

524. The Claimants are awarded simple interest on those damages from 19th August 2015 until payment at 5.33%.

525. The SPA can no longer be completed, and the Parties must therefore operate the provisions of the SPA under clause 3.1.2 for non-Completion, including the Respondents introducing within 30 days an amount equivalent to the total funding contributed by the Claimants in JRRES for the operations of JRRES from the date of the SPA to the date of this Final Award. Payment of that amount shall bear simple interest from 30 days after this Final Award until payment at 5.33%. No decision is made in this arbitration as to the calculation or quantum of that contribution.

526. The Parties shall jointly direct the Escrow Agent to release the 10% deposit paid by the Claimants (“Deposit”) back to the Claimants, together with any interest thereon for which the Escrow

Agent is accountable.

527. In the event that the Escrow Agent no longer holds the Deposit (unless it has previously been paid to the Claimants), or is unable to release the Deposit to the Claimants, then the Respondents shall pay the amount of the Deposit to the Claimants, together with simple interest accruing from 21 days after this Final Award until payment at 5.33%.

528. The Respondents are to pay the Claimants SGD 750,000.00 and USD 550,000.00 for their legal costs and expenses of this Arbitration, together with simple interest from the date of this Final Award until payment at 5.33%.

529. The Respondents are to bear the costs of the Tribunal, the Emergency Arbitrator and of SIAC in the amount of SGD 372,672.10 as determined by the Registrar. Any sum payable by the Respondents to the Claimants as a result of the Registrar's determination shall carry interest as under paragraph 528 above.

530. The Order of 14th January 2016 and the EA Award of 6th October 2015 in relation to interim measures are discharged.

531. Whilst respecting the principle of res judicata, this Final Award is without prejudice to any rights or claims of the Parties under the SPA being brought, or which may be brought, in any other arbitration or proceedings.”

4. Before proceeding further, it would be pertinent to take note of the following essential facts. JRRES was registered as a society under the SRA in 2004 as would be evident from its Memorandum of Association⁹. It was established to work essentially as a charitable educational society. The MoA specifically provides that all incomes, earnings, movable and immovable properties of the society would be utilised solely towards the promotion of its aims and objects and that no part thereof shall be paid or transferred directly or indirectly by way of dividends, profits or in any other manner. The MoA further stipulates that it shall not work with a profit making motive.

5. Mr. Shantanu Prakash, the promoter of Educomp Solutions Limited is stated to have become a member of JRRES in 2006 and its life member in 2008. The Greater Noida Industrial Development Authority¹⁰ is stated to have executed a Lease Deed in favour of the JRRES in 2006. The land parcel was leased to the society to enable it to develop and construct a college of higher learning. The land so allotted is held by JRRES on lease for a term of 99 years commencing from 18 October 2006.

6. The Arbitral Tribunal has in the Award noted that Mr. Shantanu Prakash upon coming to be involved with the affairs of JRRES learnt of an urgent need for infusion of funds in that society. This need is stated

to have arisen on account of a bank loan which was taken by JRRES to meet its obligations flowing from the Lease Deed executed by the GNIDA. The aforesaid financial requirement of JRRES was met with Mr. Shantanu Prakash extending a loan to the society via Educomp Infrastructure Services Private Limited¹¹.

7. The Arbitral Tribunal further records that thereafter, Mr. Shantanu Prakash also introduced certain “colleagues” who became members of JRRES on 10 May 2008. Mr. Prakash as well as his father applied for and were granted life membership of JRRES towards the end of 2008. The Arbitral Tribunal has taken specific notice of the nominees of Mr. Shantanu Prakash becoming members of JRRES in the Award. However, the Court proposes to elaborate upon and deal with this aspect in the latter parts of this decision.

8. On 16 May 2008, Raffles entered into a Joint Venture Agreement¹² with Educomp Solutions Limited, an Indian legal entity of Educomp. In terms of the JVA, both parties incorporated a special purpose vehicle being Educomp Raffles Higher Education Limited¹³. Raffles held 58.18% shares in ERHEL while Educomp held the balance 41.82% shares. Under the aforesaid JVA, the obligations of parties was described in the following terms:—

“2. OBLIGATIONS OF THE PARTIES IMMEDIATELY FOLLOWING EXECUTION

2.1 The Parties shall following execution of this agreement, attend to the following matters:—

2.1.1 Co-ordinate and liaise with each other in the development and formulation of the business plans and budgets (setting out amongst others, the proposed business, operational and implementation plans, projected capital expenditure and projected requirements for capitalisation and finance) for the purpose of the Joint Venture covering such financial periods as may be agreed between the Parties for each of the SPVs (the “Business Plan”) and which Business Plan will also identify and detail:

2.1.1.1 Specifically the Raffles HEB Courses to be offered or taught by the relevant SPV to be established or incorporated in India, and

2.1.1.2 Specifically the Educomp K12 Courses to be offered or taught by the relevant SPV to be established or incorporated in the PRC.

The development and formulation of the Business Plan shall be completed within 90 days of the date of this agreement.

2.1.2 appoint Ernst & Young or such other firm of international

accountants agreed between the Parties to investigate and advise on the relevant jurisdiction in which Raffles Educomp Ventures Limited (or such other SPV to be established or incorporated pursuant to clause 3.1.4) is to be incorporated.

2.1.3 in the case of SPVs to be incorporated or established in the PRC, Raffles shall as soon as practicable initiate all necessary preparatory steps and procedures (including the application for and obtaining of all relevant approvals from the Relevant Authorities) to facilitate the incorporation or establishment of such SPVs.

2.1.4 in the case of SPVs to be incorporated or established in the India. Educomp shall as soon as practicable initiate all necessary preparatory steps and procedures (including the application for and obtaining of all relevant approvals from the Relevant Authorities) to facilitate the incorporation or establishment of such SPVs.”

9. ERHEL proceeded to offer educational courses in Management and Design at various locations in India. The said Joint Venture entity thereafter proceeded to execute a Loan Agreement with JRRES on 01 July 2009. The college at Noida was already under construction at that time. ERHEL also incorporated a subsidiary named Millennium Infradevelopers Limited¹⁴ with which it had entered into a contract on 17 February 2010 for providing construction services to the college at Noida. The said construction agreement was titled as one for “Project Management and Construction Services” [PMC].

10. It appears that consequent to the infusion of capital and funds by Raffles, parties sought equal representation of their affiliates in JRRES. In light of the aforesaid, the rules of the society are stated to have been amended in 2014 providing for the creation of a post of a Chairman equivalent to that of the President as well as for reconstitution of the General Body and Governing Body of the society. As per the rules of JRRES, the General Body was to comprise of sixteen members while its Governing Body was to be of ten members. Mr. Chew Hua Seng, an affiliate of Raffles was at this time granted membership for life in JRRES and was also appointed as its Chairman on 26 April 2014. Simultaneously, six other members who were affiliates of Raffles also became members of the society. Upon reconstitution, the Governing Body and the General Body of JRRES became as follows:—

“List of Governing Body Members

<u>Sl. No.</u>	<u>Name</u>	<u>Address</u>	<u>Designation</u>
1.	Sh. Shantanu Prakash	C-11/1, DLF City, Phase-1,	President

		Gurgaon (Haryana)	
2.	Sh. Hua Seng Chew	32 K Nassim Road, S (258417) Singapore	Chairman
3.	Sh. Harpreet Singh	W-57 3 rd Floor, Greater Kailash- I, New Delhi- 110048	Secretary
4.	Sh. Keong Chee Yam	H 101, Ambience Island, Gurgaon -122001, Haryana	Treasure
5.	Sh. Pramod Thatoi	Vill. Singhpur, Distt. Jt. Secretary Jaipur-755016, Orissa	
6.	Sh. Jagdish Prakash	C-11/1, DLF City, Phase-1, Gurgaon (Haryana)	Member
7.	Sh. Ashok Mehta	A-202, Mantri Terrace, Bilekalli, Banner Ghatta Road, Bangalore	Member
8.	Sh. Ho Kah Chaun Kenneth	51 Merchant Road, Singapore 058283	Member
9.	Sh. Lim Hock Leong Edmund	101, 1 st floor, Eminente-II, Plot no 651 C and D, TPS III, 17 th Rd, Khar West, Mumbai 400052, Maharashtra	Member
10.	Ms. Doris Chung Gim Lian	32 K Nassim Road, S (258417) Singapore	Member

List of General Body Members

<u>Sl. No.</u>	<u>Name</u>	<u>Address</u>	<u>Designation</u>	<u>State</u>
----------------	-------------	----------------	--------------------	--------------

1.	Sh. Shantanu Prakash	C-11/1, DLF City, Phase-1, Gurgaon	President	Haryana
2.	Sh. Hua Seng Chew	32 K Nassim Road, S (258417)	Chairman	Singapore
3.	Sh. Harpreet Singh	W-57 3 rd Floor, Secretary Greater Kailash-I, New Delhi-110048		Delhi
4.	Sh. Keong Chee Yam	H 101, Ambience Island, Gurgaon-122001	Treasure	Haryana
5.	Sh. Pramod Thatoi	Vill. Singhpur, Distt. Jaipur -755016, Orissa	Jt. Secretary	Orissa
6.	Sh. Jagish Prakash	C-11/1, DLF City, Phase-1, Gurgaon	Member	Haryana
7.	Sh. Ashok Mehta	A-202, Mantri Terrace, Bilekalli, Banner Ghatta Road, Bangalore	Member	Karnataka
8.	Sh. Ho Kah Chaun Kenneth	51 Merchant Road, Singapore 058283	Member	Singapore
9.	Dr. Bindu Rana	1783, ATS Greens, Sector-93A, Noida	Member	U.P.
10.	Ms. Soumya Kanti	Subhod Villa, Sreema Raod, Tikarbasti,	Member	Assam

		Sitcher Cachar		
11.	Mohan Krishna Lakhamraju	1-11/1, Saraswati Colony, Ring Road, Uppal, Hyderabad-500039	Member	A.P.
12.	Sh. Lim Hock Leong Edmud	101, 1 st floor, Eminente-II Plot No 651 C and D, TPS III 17 th Rd, Khar West, Mumbai 400052	Member	Maharashtra
13.	Ms. Doris Chung Gim Lian	32 K Nassim Road, S (258417) Singapore	Member	Singapore
14.	Ms. Gim Ean Chung	H 101, Ambience Island, Gurgaon-122001, Haryana	Member	Haryana
15.	Ms. Xuan Wei Chew	32 K Nassim Road, S (258417) Singapore	Member	Singapore
16.	Mr. Han Wei Chew	32 K Nassim Road, S (258417) Singapore	Member	Singapore

11. These details are evident from a reading of Para 2.40 of the Reply filed by Raffles to the Statement of Defence and is extracted hereunder:—

“2.40 As of 201.4. when the rules and regulations of JRRES were amended to provide for equal representation to Raffles and. Educomp's nominees on the governing and general bodies of JRRES.

Shantanu specifically indicated that Educomp's nominees were the persons who came to be listed in Annexure D to the SPA. Further, the fact that the SPA provides for the same persons to resign in order to hand over-control of JRRES to Raffles is consistent and telling. Further, the positions held by Raffles' and Educomp's nominees with their respective nominating groups and their associated companies is instructive as to the actual position of the members in JRRES, and is set out below. The table below also includes previous positions held by the members of JRRES's general and governing bodies with Educomp and Raffles' group companies.

Governing Body of JRRES		
S. No.	Members	Position Held with Companies
1.	Mr. Chew Hua Seng (Chairman)	• Chairman & CEO, Raffles Education Corporation
2.	Mr. Doris Chung	• Director - Ops, Raffles Education Corporation • Director, Raffles Education investment (India) Pte Ltd. (first Claimant) • Director, Raffles Design International India Pvt. Ltd. (Second Claimant)
3.	Mr. Lim Hock Leong Edmund	• Director Raffles Design International India Pvt. Ltd. (Second Claimant)
4.	Mr. Keong Chee Yam	• VP - India, Raffles Education Corporation (from 15/06/2008 to 31/10/2014) • Former director, Educomp Raffles Higher Education Limited (Joint Venture Company of Educomp and Raffles)
5.	Mr. Ho Kah Chaun	• CFO, Raffles'

	Kenneth	Education Corporation
6.	Mr. Shantanu Prakash (President)	• Managing Director, Educomp Solutions Limited • Director, Educomp Asia Pacific Pte Ltd. (First Respondent) • Director, Educomp Professional Limited (Second Respondent) (3 March 2008 to 24 December 2013)
7.	Mr. Harpreet Singh (Secretary)	• Former Executive Director, Educomp Solutions Limited • Former CEO, Educomp Professional Limited (Second Respondent) • Director, Vidya Mandir Classes Limited (a subsidiary of Educomp Solutions Limited) (30 March 2014 to 27 May 2015)
8.	Mr. Pramod Thatoi (Joint Secretary)	• Director, EDU Smart Services Private Limited (a subsidiary of Educomp Solutions Limited)
9.	Mr. Ashok Mehta	• President, Educomp Solutions Limited • Director, Educomp Software Limited (a subsidiary of Educomp Solutions Limited)
10.	Mr. Jagdish Prakash	• Director, Educomp Professional Limited (Second Respondent) • Father of Mr.

		Shantanu Prakash
General Body of JRRES		
S. No.	Members	Position Held with Companies
1.	Mr. Chew Hua Seng (Chairman)	• Chairman & CEO, Raffles Education Corporation
2.	Mr. Doris Chung	• Director - Ops, Raffles Education Corporation • Director, Raffles Education investment (India) Pte Ltd. (first Claimant) • Director, Raffles Design International India Pvt. Ltd. (Second Claimant)
3.	Mr. Lim Hock Leong Edmund	• Director Raffles Design International India Pvt. Ltd. (Second Claimant)
4.	Mr. Keong Chee Yam	• VP - India, Raffles Education Corporation (from 15/06/2008 to 31/10/2014) • Former director, Educomp Raffles Higher Education Limited (Joint Venture Company of Educomp and Raffles)
5.	Mr. Ho Kah Chaun Kenneth	• CFO, Raffles' Education Corporation
6.	Ms. Xuan Wei Chew	• Daughter of Mr. Chew Hua Seng
7.	Ms. Gim Ean Chung	• Former College Director - New Delhi, Educomp Raffles Higher Education Limited (Joint

		Venture company of Educomp and Raffles)
8.	Mr. Han Wei Chew	• Asst. VP - Europe, Raffles Education Corporation • Son of Mr. Chew Hua Seng
9.	Mr. Shantanu Prakash (President)	• Managing Director, Educomp Solutions Limited • Director, Educomp Asia Pacific Pte Ltd. (First Respondent) • Director, Educomp Professional Limited (Second Respondent) (3 March 2008 to 24 December 2013)
10.	Mr. Jagdish Prakash	• Director, Educomp Professional Limited (Second Respondent) • Father of Mr. Shantanu Prakash
11.	Mr. Pramod Thatoi	• Director, EDU Smart Services Private Limited (a subsidiary of Educomp Solutions Limited)
12.	Mr. Ashok Mehta	• President, Educomp Solutions Limited • Director, Educomp Software Limited (a subsidiary of Educomp Solutions Limited)
13.	Mr. Harpreet Singh	• Former Executive Director, Educomp Solutions Limited • Former CEO, Educomp Professional Limited (Second Respondent) • Director, Vidya

		Mandir Classes Limited (a subsidiary of Educomp Solutions Limited) (30 March 2014 to 27 May 2015)
14.	Ms. Soumya Kanti	• Director, Educomp Online Supplemental Service Limited (a subsidiary of Educomp Solutions Limited) (30 September 2013 to 29 May 2015) Former President, Educomp Solutions Limited
15.	Mr. Mohan Krishna Lakhamraju	• Director, Rosebud Buildwell Private Limited (a company held by Mr. Ashok Mehta and Mr. Lakhamraju, and associated with Educomp Solutions Limited)
16.	Dr. Bindu Rana	• Director, Educomp Software Limited (a subsidiary of Educomp Solutions Limited) • Former Director of Educomp Schools, Educomp Solutions Limited • Head, Millennium Schools (managed by Educomp)”

12. The Arbitral Tribunal has while dealing with the nomination of affiliates by both Raffles and Educomp made the following pertinent observations:—

“41. Over time most of the Members of JRRES, and all of the Governing Body, came to be ‘affiliates’ in the sense that whilst being Members, they were also employees and/or directors, and/or family

members of the Raffles Group, or of the Educomp Group, or of Mr. Shantanu's family, or of Mr. Chew's family in roughly equal numbers for each side. Exactly what connection the Members had with any of the Raffles Group or the Educomp Group, including the extent to which the Parties or Raffles or Educomp could control the Members and the Governing Body, is a critical issue in this Arbitration.

42. In this Final Award, I refer to 'affiliate' merely to indicate as a convenient shorthand that the person concerned had some connection with the Raffles or the Educomp Group, or Mr. Shantanu's or Mr. Chew's family.

43. Dr. Bindu Rana ("Dr Rana") and Mr. Harpreet Singh ("Mr. Harpreet") both became Members of JRRES in February and June 2009. Mr. Harpreet was appointed as Treasurer in March 2010. Mr. Shantanu testified that he approached these persons and instigated their membership. Mr. Mike Yam was confirmed as a Member of JRRES in June 2011. He had apparently applied for membership at the request of Mr. Chew. In around April 2012, Mr. Mohan Lakhamraju ("Mr. Lakhamraju"), who is a personal acquaintance of Mr. Shantanu, was appointed a member of JRRES, along with Dr. Anjlee Prakash ("Dr Anjlee") and Priya Prakash ("Ms Priya"), Mr. Shantanu's wife and daughter respectively. The extent to which any of these persons is a nominee, or acts at the behest of, Raffles or Educomp is strongly contested.

44. In January 2013, the Governing Body of JRRES changed, and Mr. Shantanu became the President. An EGM of the General Body was held on 22nd March 2014 to pass certain amendments to the JRRES Rules. A new position of Chairman was created. Mr. Chew was appointed a life Member on 3rd April 2014, and took the position of Chairman on 26th April 2014. Under the new JRRES Rules, the Chairman and the President had substantial new powers, to be exercised jointly, including new powers to deal with assets, encumbrances or make loan payments. An EGM could not be called without their joint consent, and the Members of the Governing Body were now to be jointly appointed by them.

45. At the same time, six other persons who were affiliates of Mr. Chew became Members, including Mr. Chew's wife, daughter and son. These six, together with Mr. Chew and Mr. Yam, made eight affiliates of Mr. Chew/Raffles. To accommodate these additional persons within the overall membership limit of 16, Dr. Anjlee, Ms. Priya and Mr. Mansoor Raza ("Mr. Mansoor") all resigned. The circumstances of and reasons for these resignations are disputed."

13. Undisputedly, the Noida college which was under construction and now stands duly affiliated and recognised by the All India Council

for Technical Education¹⁵ is a technical institution conferring Bachelor of Technology Degrees as well as Post Graduate Diplomas in Management. The Noida college was granted approval by AICTE in March 2011 and was also accorded approval by the Government of Uttar Pradesh at the same time.

14. The SPA is stated to have been motivated by the decision of Educomp to exit the education sector. It is at that time that Raffles and Educomp appear to have arrived at a principled agreement for the latter to exit the Joint Venture and it was this which led to the ultimate execution of the SPA on 12 March 2015. Broadly speaking, the SPA envisaged Raffles buying all the shares of Educomp in ERHEL and also obtain exclusive control over JRRES. The principal provisions of the SPA are extracted hereinbelow:—

“3. ACTIONS ON EXECUTION DATE:

3.1. The following actions shall take place on the Execution Date:

3.1.1. The Purchasers shall jointly or individually deposit Singapore dollar equivalent of INR 9,86,40,000/- (Rupees Nine Crores Eighty Six Lac Forty Thousand Only) i.e., equivalent to 10% of the Purchase Price to the Escrow Agent, which is a sum of (a) INR 9,71,15,600 (Rupees Nine Crore Seventy One Lac Fifteen Thousand Six Hundred only) towards Educomp Asia Pacific Purchase Price; and (b) INR 15,24,400 (Rupees Fifteen Lac Twenty Four Thousand Four Hundred only) towards Educomp Professional Purchase Price. For clarification, the aforementioned 10% of the Purchase Price shall be by way of cheque drawn on a bank account in the name of REC in the amount of S\$2,180,733.12 based on the exchange rate referred to in clause 2.2;

3.1.2. On deposit of the 10% of the Purchase Price by the Purchasers to the Escrow Agent referred to in clause 3.1.1, the Sellers shall allow the Purchasers (i) to take control of the Company and JRRES, limited to the extent that the Purchasers shall have absolute say on the hiring and dismissal of employees (including existing employees); and (ii) to take charge of JRRES' application to the Government of Uttar Pradesh, India for becoming a deemed university. For clarification, upon the Execution Date, funding of the operations of the Company, JRRES, MIDL and MSB shall be the exclusive responsibility of the Purchasers, details of which shall be shared with the Sellers from time to time till Closing. In the event the Closing does not take place as envisaged in this Agreement and this Agreement is terminated, the Sellers shall within 30 (Thirty) days, introduce an amount equivalent to the total funding contributed by the Purchasers in JRRES for the operations of JRRES in this period as

working capital.

4. CONDITIONS PRECEDENT OF THE SELLERS FOR CLOSING:

4.1. On completion of all actions on the Execution Date as listed in clause 3, the Sellers jointly and severally shall be responsible for satisfying the following Conditions Precedent and they shall ensure that the below mentioned conditions are complied with and the original documents are submitted to the Escrow Agent not later than July 5, 2015:

4.1.1. Copy of the acknowledgment for submission of the annual return of JRRES to the Registrar of Society, New Delhi under section 4 of the Societies Registration Act, 1860 of India. For the purpose of the Societies Registration Act, 1860 of India, annual return means the list of office bearers of the governing body along with the minutes of the governing body and general body, where these members have been confirmed as on March 31, 2015;

4.1.2. Extract of the board resolution for sale of Educomp Professional Shares by Educomp Professional;

4.1.3. Extract of the board resolution for sale of Educomp Asia Pacific Shares by Educomp Asia Pacific;

4.1.4. Educomp Professional shall have made the necessary applications under Section 281 of the Income Tax Act, 1961 of India for the Sale of Educomp Professional Sale Shares to the Purchasers. A copy of the said application shall be submitted with the Escrow Agent;

4.1.5. No-objection letters in the formats given in Annexure duly signed by the Nominees in the Company and Representatives in MIDL for shares held by them in the Company and MIDL respectively, that they have no-objection in the Purchase Price being paid to Educomp Professional for the shares held by them; and

4.1.6. Form MGT-4 from the Nominees in the Company and Representatives in MIDL for shares held by them in the Company and MIDL respectively stating that the beneficial interest of Educomp Professional has ceased.

4.2. On confirmation by the Escrow Agent to the Purchasers of receipt of the documents listed in clause 4.1, the Purchasers shall by no later than July 10, 2015 intimate to the Escrow Agent and the Sellers in writing about availability of the funds for the discharge of the remaining Purchase Price.

4.3. After the receipt of intimation mentioned in clause 4.2, the Sellers jointly and severally shall by no later than July 23, 2015 submit the photocopies of the documents listed in clause 4.4.1 to

4.4.10 to the Purchasers and Escrow Agent.

4.4. The Purchasers shall by no later than July 27, 2015 issue a certificate to the Sellers that the Escrow Documents as detailed in this clause 4.3 are to their satisfaction ("Purchasers' Certificate"). The Sellers along with the Purchasers' Certificate shall by no later than July 29, 2015, submit the original of the following documents to the Escrow Agent:

4.4.1 Copy of the Tax Residency Certificate for Educomp Asia Pacific from the Inland Revenue Authority of Singapore;

4.4.2. Form of resolution in the formats given in Annexure K of the General Body of JRRES for the appointment of the nominees of the Purchasers as the members of the General Body, duly signed by the outgoing president of JRRES;

4.4.3. Form of resolution in the formats given in Annexure L of the Governing Body of JRRES for the approval of appointment of the nominees of the Purchasers as the members of the General Body, duly signed by the outgoing president of JRRES;

4.4.4. Duly signed resignation letters of Mr. Shantanu Prakash and Mr. Harpreet Singh resigning from the Board of the Company in the formats given in Annexure C;

4.4.5. Duly signed resignation letters of the persons listed in Annexure D resigning from the Governing Body and General Body of JRRES in the formats given in Annexure E (except that the format given in Annexure E shall not apply to the president of JRRES). The duly signed resignation of the president of JRRES shall be in the format given in Annexure M;

4.4.6. Duly signed Resignation letter of Mr. Harpreet Singh resigning from board of MIDL in the format given in Annexure F;

4.4.7. Duly signed transfer deeds with respect to the Sale Shares as per the specimen in Annexure G;

4.4.8. Duly signed transfer deeds for the Sale Shares held by Nominees in the Company and MIDL as per the specimen in Annexure G;

4.4.9. Duly signed Non Compete Agreement by Educomp Solutions Limited;

4.4.10. Duly signed letter for termination of the Joint Venture Agreement by the parties thereto; and

4.4.11. Duly signed Deed of Indemnity by (a) Educomp Asia Pacific; and (b) Educomp Solutions Limited.

4.5. The Conditions Precedent in clauses 4.1 and 4.3 can only be waived by the Purchasers. For the avoidance of doubt, no such waiver shall be permissible in respect of any Conditions Precedent, if it is mandatory under applicable law, for Closing to take place.

4.6. The Sellers must promptly notify the Purchasers in writing, if it becomes aware that any Condition Precedent that is required to be satisfied by them is incapable of being satisfied.

4.7. The Parties confirm that, in respect of any obligations of the Escrow Agent pursuant to this Agreement, the Parties shall procure the same of the Escrow Agent.

5. CLOSING MECHANISM ON THE CLOSING DATE:

5.1. The following shall take place at Closing and Closing shall be deemed to have taken place only after all the acts and steps set out below have been completed (hereinafter referred to as *Closing*):

5.2. On the Closing Date, the Purchasers shall handover the original Deed of Indemnity signed by Raffles Education Investment and the following instruments of remittance to the Escrow Agent:

5.2.1. A Cashier's Order from a reputed Singapore Bank in favour of Educomp Asia Pacific of Singapore Dollars equivalent of INR 87,40,40,400 (Rupees Eighty Seven Crore Forty Lac Forty Thousand Four Hundred only) for the balance 90% of Educomp Asia Pacific Purchase Price;

5.2.2. A Demand Draft drawn on a reputed Indian Bank payable at New Delhi, India in Favour of Educomp Professional of INR 1,52,44,000 (Rupees One Crore Fifty Two Lac Forty Four Thousand only) for 100% of Educomp Professional Purchase Price;

5.2.3. A Demand Draft drawn on a reputed Indian Bank payable at New Delhi, India in favour of Ms. Priya Prakash of INR 2,65,00,000/- (Rupees Two Crore Sixty Five Lac Only) towards retirement of loan extended by Ms. Priya Prakash.

5.3. The Escrow Agent shall handover the instruments mentioned in clause 5.1 to the respective recipient mentioned therein or their authorised representatives along with the cheque drawn on its own bank account in favour of Educomp Asia Pacific of Singapore Dollars equivalent of INR 9,71,15,600 (Rupees Nine Crore Seventy One Lac Fifteen Thousand Six Hundred only) for the 10% of Educomp Asia Pacific Purchase Price held as deposit by the Escrow Agent as per clause 3.1.1. For clarification, the aforementioned 10% of the Educomp Asia Pacific Purchase Price may be paid by the Escrow Agent in Singapore Dollars being S\$2,147,031.68 based on the exchange rate referred to in clause 2.2;

5.4. The Escrow Agent shall refund the 10% Purchase Price of Educomp Professional Sale Shares to the Purchasers equivalent to INR 15,24,400 (Rupees Fifteen Lac Twenty Four Thousand Four Hundred only), which was deposited with the Escrow Agent as per clause 3.1.1. For clarification, such refund may be made by the Escrow Agent in equivalent Singapore Dollars of S\$33,701.44.

5.5. The Sellers shall furnish the receipt from Ms. Priya Prakash acknowledging payment of the amount of INR 2,65,00,000/- (Rupees Two Crore Sixty Five Lac Only) towards retirement of loan as mentioned in clause 5.2.3;

5.6. Immediately upon the Escrow Agent handing over the instruments mentioned in clause 5.1 to the respective recipient, the following shall ensue and the Parties shall respectively, as appropriate procure the same:

5.6.1. The Escrow Agent shall deliver the Escrow Documents to the Purchasers; and

5.6.2. The Sellers shall handover the original share certificates of the Sale Shares to the Purchasers.

5.7. The Sellers hereby permit and allow the Purchasers and the Company to use the word, "*Educomp*" as a part of the name of the Company for a period of 9 months from the Closing Date. For the purposes of this clause, the Purchasers shall and shall procure that the Company, a reasonable time prior to expiry of such 9 months period take all necessary steps required to change of the name of the Company such that it does not include the word, "*Educomp*" with effect from the expiry of the aforesaid 9 months' period. For clarification, the Sellers shall procure that the Company cease to use the word, "*Educomp*" in its name forthwith upon the expiry of the aforesaid 9 months' period.

5.8. The Sellers hereby permit and allow the Purchasers and the Company to use the word, "*Millennium*" as a part of the name of its educational institutes for a period of 12 months from the Closing Date, or such longer period mutually agreed between the Sellers and the Purchasers, and the Sellers' agreement to such longer period shall not be unreasonably withheld. For the purposes of this clause, the Purchasers shall and shall procure that the Company, a reasonable time prior to expiry of the aforesaid 12 months or the longer period (as the case may be) take all necessary steps required to change of the name of its educational institutes such that they do not include the word, "*Millennium*" with effect from the expiry of the aforesaid 12 months' or such longer period (as the case may be). For clarification, the Sellers shall procure that the Company cease to use the word, "*Millennium*" as a part of the name of its educational institutes forthwith upon the expiry of the aforesaid 12 months' period or such longer period (as the case may be).

5.9. If Closing does not occur on or prior to July 31, 2015, this Agreement shall (unless otherwise agreed by the Sellers and the Purchasers) stand terminated and the provisions of clauses 9.2 and 9.3 shall apply."

15. The Conditions Precedent which stood incorporated in Clause 4 also envisaged the resignation of members who were nominees/affiliates of Educomp in JRRES. This is evident from Clauses 4.4.4, 4.4.5 and 4.4.6. Appended to the SPA was Annexure-D which set out the names of the individuals who were to submit resignations from the Governing Body as well as the General Body of the JRRES. The details of Annexure-D as captured in Paras 58 and 59 of the Award and the same are reproduced hereinbelow:—

“58. Annexure D of the SPA deals with resignations of Members from JRRES, and provides two lists. The first is titled a list of representatives to resign from the Governing Body, as follows:

1. Mr. Shantanu
2. Mr. Harpreet
3. Mr. Jagdish
4. Mr. Thatoi
5. Mr. Mehta

59. The second list in Annexure D is titled a list of representatives to resign from the General Body of Members of JRRES, as follows:

1. Mr. Shantanu
2. Mr. Harpreet
3. Mr. Jagdish
4. Mr. Thatoi
5. Mr. Mehta.
6. Dr. Rana
7. Mr. Kanti
8. Mr. Lakhamraju”

16. The terms of the SPA, however, could not be fulfilled. There arose a dispute with respect to the resignation of members/affiliates of Educomp including some which the Arbitral Tribunal has referred to as “recalcitrant” members. The breakdown of the terms of the SPA ultimately led to the commencement of Arbitration Proceedings by Raffles.

17. As has been noted by the Arbitral Tribunal, the principal issues which came to be formulated for its consideration were the following:—

“86. Illegality - Control of JRRES: Whether the SPA or its performance is illegal, in particular whether clauses 4.4.2, 4.4.3 and 4.4.5 are illegal under Indian law or public policy because their objective was to grant the Claimants, a foreign corporate, control of JRRES, a not for profit educational society?

87. Illegality - Monetisation of JRRES : Whether the SPA or its performance involves the monetisation of JRRES and its assets, and if so whether the SPA is thereby illegal under Indian law or public

policy, since JRRES is a not for profit educational society?

88. Illegality - Foreign Investment: Whether the SPA or its performance is illegal under Indian law or public policy because clause 3.1.2 of the SPA obliged the Claimants to take on the exclusive funding of JRRES upon the execution of the SPA in breach of Indian law or public policy on foreign direct investment?

89. Illegality - Enforceability: If the SPA or its performance is contrary to Indian law or public policy, whether it is enforceable as a matter of Singapore law on the foreign illegality of a contract?

90. Breach: If the SPA is not illegal and unenforceable, whether the Respondents are in breach of the SPA, in particular clauses 4.1 to 4.4, and the whether the Conditions Precedent are absolute or mandatory in nature, or only required the Respondents to use their best efforts ("Best Efforts")?

91. Best Efforts: If those obligations are absolute, whether the Respondents have failed to carry out the necessary steps, and so are in breach? If those obligations are not absolute, whether the Respondents have failed to exercise their Best Efforts?

92. Termination: Alternatively, whether the SPA is terminated under clause 5.9, and whether the Respondents are estopped from contending that the SPA stands terminated under that clause?

93. Specific Performance: If the Respondents are in breach of the SPA, whether the Claimants are entitled to an order for specific performance, including whether specific performance is impossible, whether the SPA has terminated under clause 5.9; and whether damages are adequate?

94. Damages: In the event that the SPA is enforceable, and the Respondents are in breach, what damages if any are payable to the Claimants?"

18. The illegality aspect of the SPA was advocated by Educomp which asserted that the same enables Raffles to take control of JRRES and to monetize its assets. Educomp had asserted that the terms of the SPA if implemented would not only be violative of statutory laws which apply but also prevalent public policy. Its contention appears to have been that the takeover of JRRES by a not-for-profit entity would clearly be violative not only of the AICTE Regulations but also fall foul of the fundamental policy of Indian law.

19. Educomp appears to have referred to Regulation 3.1 of the All India Council for Technical Education [Grant of Approvals for Technical Institutions] Regulation, 2012¹⁶. Regulation 3.1 which was specifically referred to by Educomp reads as follows:—

"3. Promoters of the Technical Institutions

3.1 A technical Institution may be established and administered

by the following:

- a. A Society registered under the Societies Registration Act, 1860
- b. A Trust registered under the Charitable Trusts Act, 1950 or any other relevant Act.
- c. A company incorporated under Section 25 of the Companies Act, 1956.
- d. A Company as stipulated in Regulations sub clause 2.7, having any foreign equity directly or indirectly as share-holding shall not be permitted from applying for setting up an educational Institution Central or State Government/UT Administration or by a Society or a Trust registered or a company incorporated under Section 25 of the Companies Act, 1956 or under Public Private Partnership mode by them or under Build Operate and Transfer mode.”

20. It was its case that Regulation 3.1(d) proscribes a company having any foreign equity applying for setting up an educational institution. Educomp had asserted that the SPA's terms if permitted to be implemented would result in a foreign not-for-profit entity indirectly assuming control over the affairs of a charitable society. The case of Educomp specifically was that Raffles would essentially be controlling the affairs of JRRES by virtue of its nominated members holding positions in the General Body as well as the Governing Body of the society and it would thus result in JRRES being a mere alter ego of Raffles.

21. It was further urged that corporate entities cannot be members of a society under the SRA or in fact under the general law. Dealing with the aforesaid aspects, the Arbitral Tribunal has held that Regulation 3.1(d) of the 2012 Regulations places a restriction with respect to foreign equity being held in a company incorporated under Section 25 of the Companies Act, 1956¹⁷ only. The Arbitral Tribunal has observed that the said Regulation clearly does not appear to place any restrictions with respect to a foreign interest in a society or a trust. It has gone on to hold that while it would have been open for the drafters of those Regulations to widen the language of Regulation 3.1(d) to include a society or a trust, in having failed to do so, the restriction must necessarily be read as confined to a Section 25 Company only.

22. It has additionally referred to Appendix 3 of the AICTE Handbook and more particularly to Para 3.4 thereof to hold that AICTE clearly does not appear to have ruled out the possibility of a for-profit entity establishing a not-for-profit body which may be engaged in the administration of an educational institution. Insofar as this aspect is concerned, it has observed as follows:—

“285. I agree with Mr. Gupta that AICTE contemplates the involvement of for profit corporates in a technical institution. AICTE Handbook Appendix 3 paragraph 3.4 is headed private limited or public limited company/industry establishing diploma/undergraduate/postgraduate institution. A new technical institution established by a private company or public limited company or industry having turnover of at least Rs. 100.00 crore shall be eligible for application and granted approval for intake of students up to a maximum as provided for by a table, and must follow due procedure as per the AICTE Handbook. Thus expressly, a corporate or industry may establish a technical institution.

286. By sub-paragraph (b) the institution set up by such a private limited or public limited company or industry shall be governed by the rules as in Chapter 1 of the AICTE Handbook. The rules in Chapter 1 are of course those which provide for a technical institution to be operated by a not for profit entity. The scheme permitted by that extract from the AICTE Handbook bears remarkable similarity to the set up put in place by the parties under the Joint Venture, where two corporates come together, and through a registered society, establish a technical institution, and start taking in students. Of course, a single company can equally do the same, since the AICTE Handbook clearly talks about a company in the singular.

287. An inevitable implication from this set up is that the corporate, since it is permitted to establish a technical institution, through the medium of a not for profit entity, and be granted approval for student intake, must be allowed to manage or operate the technical institution through that not for profit entity - example i.e. a prescribed trust, Section 25 Company or society. It is of the nature of a society that it does not have a board of directors, or shareholders, and so where a society is used the only way to direct operations of the institution is through the membership. Whilst the Respondents are correct to say there is a difference between establishing a technical institution, which a corporate can do, and controlling or operating one, which they say a corporate cannot, that does not answer the issue. It is clear from the combination of the AICTE Rules and Handbook that a corporate can establish a technical institution, but that includes setting up a not for profit entity which actually operates the technical institution and being given approval to take in students. This must therefore include running the technical institution, and is broadly what the Claimants are doing under the SPA.”

23. Insofar as the issue of whether a foreign entity or an individual could be a member of a charitable society under the SRA, it has

observed that the said statute only prescribes that any seven or more persons may form a society for charitable purposes. This, according to the Arbitral Tribunal, must be understood as the SRA envisaging any natural person being entitled to become a member of a society irrespective of its nationality. It has further observed that while understanding the meaning of the word "*person*" as employed in the SRA, the provisions of the General Clauses Act, 1877 would also be of relevance and which define the word "*person*" to include a body corporate. It has also taken note of Section 15 of the SRA which deals with the Government being a member of a society in India and which in turn is statutorily entitled to nominate members of a society that may be so formed.

24. Before the Arbitral Tribunal, Educomp also appears to have alluded to an Expert Group Report and which had advocated a draft legislation which may fill the perceived lacunae in the SRA. The Arbitral Tribunal has, however, held that since the terms of those recommendations were yet to be implemented or made part of the SRA, it would be inappropriate to construe its provisions in the light of the report so submitted.

25. While dealing with the argument of '*players in the shadows*', the Arbitral Tribunal has observed as follows:—

"301. That then leads to the issue about whether Indian law or public policy prohibits, as it were, remote control of a society in India by a corporate and/or a foreign entity. This issue must now be judged in the light of my findings that on balance a corporate can be a member of a society in India, and more clearly that AICTE contemplates and permits that a foreign institution or a corporate may set up and run a technical institution in India or establish a local technical institution on certain Conditions. Similarly, it seems to me plain from the AICTE Regulations and Handbook that the sort of structure provided for in the JVA and the SPA is covered and permitted. It is also not asserted that the Claimants are trying to circumvent the not for profit nature of higher education by directly running the Noida College. In those circumstances, whether or not Indian public policy would allow a corporate and/or foreign entity to establish and operate a technical institution through control of a Society is answered by the fact that this is a permitted structure.

302. What the Respondents' issue then seems to come down to is largely a question of conflict of interest. It is clear from the JRRES Rules that the Members must act in the best interests of JRRES and promote its objects, including in particular maintaining its not for profit educational status. I agree with the Respondents and Mr. Subramaniam to the extent that there is a real danger of conflict in a Member, or more so all the Members, being at the behest of an

external influence. That same risk also exists at present under the Joint Venture, but is heightened by the Transaction since the nominees of the Respondents would be replaced by the Claimants'.

303. The Respondents assert that up to now the Members have been fully independent, and so logically, they do not make any allegation that anything has been done against the JRRES Rules, at least up to the failure of Completion. I agree with the Claimants that the Respondents have not shown how the Members of JRRES being nominees of the Claimants must offend the JRRES Rules. The Respondents have not demonstrated that the manner in which the Claimants' control has been, or under the SPA would be, exercised would cause its nominee Members to act in a manner contrary to the JRRES Rules or otherwise against the interests of JRRES.

304. Such a potential conflict of interest is nothing new. Every member of every society may have personal interests which, even subconsciously, influence their decisions. The Respondents do not assert that if the Members, or even a large part of the Members, were all from the same family (as to an extent has been the case at JRRES), that would be illegal.

305. However, the risk of conflict of interest is just that - a risk, and it is alive both before and after the Transaction. Corporate entities nominate directors to their subsidiaries or affiliates all the time, and those nominee directors wear the hats of their directorship and their nominator at the same time. They need always to be alive to the fact that they must act in the best interests of the company of which they are a director, without conflict of interest or undue influence from their nominator. This is an issue which is managed daily and is not illegal.

306. Mr. Gupta tried to suggest that the solution was that the society concerned would discipline the members if they misbehave. I agree with the Respondents that this is not an answer - the society cannot be relied upon to know that the members are acting not in the society's best interest, and where a society is effectively under the control of a corporate, it is hardly likely to discipline its members for acting in accordance with the corporate wishes.

307. Nevertheless, at the end of the day, the Claimants are right that it is what happens that matters, not what might happen in theory. There is a potential conflict of interest which needs to be managed, and all the more carefully so if the Transaction completed. The Members of JRRES must always remain members in their own right, to the extent of their duties to JRRES. They sign up to the objectives and the Rules and must abide by them. They cannot take a decision at a meeting of JRRES merely because Raffles requests it, but must consider the best interests of JRRES. That is a practical

issue for the Members going forward if the Transaction went ahead. The control which the Claimants are buying is not as absolute as they may think. However, that potential conflict does not make the SPA illegal.

308. Subject to my conclusions on the question of monetisation below, I do not see any evidence that the Claimants intend to disregard the best interests of JRRES or try to coerce their nominees into acting in breach of the JRRES Rules. As I noted above, the AICTE Handbook contemplates that a single corporate may set up, through a not for profit society, a technical institution in India, under the AICTE auspices. No corporate would do that if they were not allowed to nominate members to the relevant society, just as both the experts pointed out has happened, respectively, in the oil and gas industry, and where the government is interested in a society. The AICTE Handbook in substance sanctions the Transaction.

309. The impact of the Transaction is substantially mitigated by the nature of higher education in India. The Respondents were at length to point out how highly regulated this is, and I agree. Regular returns must be sent to the Registrar of Societies, including resignations and appointments of Members and an annual return. Fee regulations set out in significant detail what may and may not be charged, and fees have to be approved. Any sale of land needs government approval. The whole set up is subject to ongoing regulation by AICTE, the government of Uttar Pradesh, and the Registrar of Societies. The substantial and detailed regulation of the Noida College and JRRES are a significant mitigating factor against the risk of conflict of interest or undue influence in the operation and management of the College through the Claimants' nominees.

310. For all these reasons, the Respondents have not made out a case that the SPA is illegal through it giving control, or indeed exclusive control, to the Claimants."

26. Turning then to the issue of monetization, the Arbitral Tribunal has found that the value of the leasehold land which was taken as a basis for the purposes of computing the consideration payable under the SPA was merely that and nothing further. According to the Arbitral Tribunal, merely because the value of the leasehold land was adopted as the parameter for the purposes of computation of consideration, the same would not amount to a monetization of the assets of JRRES. It has additionally noted that the leasehold land, in any case, had not been sold and thus monetization had not even occurred. Insofar as this aspect is concerned, it has observed as follows:—

"318. It is common ground that the JRRES land has not been sold, and so monetisation has not taken place in this respect. The Parties' motives and actions in attempting to sell the land are in

dispute, and may have a bearing on whether monetisation in the future will take place. That is addressed below. It common ground that the Parties were considering selling the JRRES land, or the entire JRRES business, and Mr. Harpreet and Mr. Yam were put in charge of engaging real estate agents. Discussions with Times Group of India took place, and they valued JRRES at around Rs. 250.00 crore, but this did not lead to an agreement. That led to Educomp's desired exit from the Joint Venture taking the form of selling out to Raffles under the SPA. The JRRES land cannot be sold without the approval of the Uttar Pradesh local government.

319. It is also key to bear in mind that a sale of the Joint Venture, or even just the JRRES part of it, is not monetisation. The Transaction under the SPA is not monetisation - the Parties agreed an arms-length price for the Respondents' interest. This may be a profitable or loss making price for one side or the other, in the same way as a sale to Times Group of India may have been at a substantial profit or loss. That does not matter : JRRES and the College still has all its assets and its accounts are intact, Mr. Shantanu says that he and Mr. Chew discussed the sale of JRRES, and both intended to sell the entire JRRES and profit from that sale. If that happened and the Parties profited from the sale of the Joint Venture, or even just JRRES, to a third party then this is a matter of their own good fortune, and is not misusing any funds of JRRES, and so is not monetisation."

27. More pertinently, it has found that no provision of the SPA envisaged or contemplated any surplus that may be generated by the sale of JRRES leasehold land being transferred either to Educomp or to Raffles. Insofar as this aspect is concerned, it has observed as follows:

—

"341. The next question put to Mr. Chew in cross-examination was that the basic intention of the Joint Venture parties at that time was to exploit the assets of JRRES for the benefit of the Joint Venture. Mr. Chew disagreed. The passage in the 5th October 2014 email which was put to Mr. Chew should be put in the context of the paragraph which goes before, and the earlier email at the bottom. The parties are here discussing options to structure a Transaction for the exit of Educomp. This talks about what is owed by JRRES, not a share of the profits. These emails can be read as evidencing some improper motive on the part of the Respondents, but all they can say is the Claimants did not write back to say no. It also seems to me equally plausible to read these emails as talking about monetisation in the sense of cashing in - i.e. when JRRES comes into money by selling some of its land, or being sold to a third party purchaser.

342. As always. When witnesses come to recall events years before, memories can be inaccurate, and it is often therefore the documents which tell the story more clearly. Nevertheless, on this question of monetisation motive, there is a plain clash in evidence between Mr. Chew and Mr. Shantanu. On this occasion I prefer the evidence of Mr. Chew. He was clear and consistent in his testimony, as he had been throughout this Arbitration. On the other hand, and as already noted, Mr. Shantanu changed his position on a number of occasions on a number of issues.

343. It would be relevant if the Parties thought the proceeds of the sale of JRRES land would go into the pockets of the Claimants (or prior to Completion, the pockets of the Parties). Mr. Shantanu at the Final Hearing made an important admission which bears emphasising : he conceded that the money would go to JRRES and not to Educomp or Raffles - *"of course not. If JRRES sells the land, the money necessarily will come to JRRES. [If he used the PMC to suck out the money] it's illegal if he does it because commercialisation of education is not permitted."*

344. Mr. Chew said:

"See, when you sell the land in any society, which is not for profit, there is a sale price. After the sale price you minus your debt whether to MIDL or to ERHEL, you pay off the debt first and then you pay off all your supplies as well you pay off your employees and what is left of all this remains in the society, and the society uses the money to do what they want maybe to start another university or by a school, but for the purpose of the mandate of the society

Q : if you were to sell the land and buildings, are you saying that Raffles is not able to get benefit of the surplus after paying off all the debts?

A : not - we are not entitled to surpluses, the society is."

xxx xxx xxx

347. I also take note again of the highly regulated nature of JRRES and the Noida College, including in particular rigorous control of fees charged, and the fact that government approval is needed for the sale of the land. All this regulation supports Mr. Chew's evidence that Raffles' involvement in JRRES is for an educational purpose rather than monetisation - as he put it, if you want to make a profit on a piece of land, there are very much easier ways to do it. Once both sides have accepted that any profit from the sale of the land would have to be paid into the accounts of JRRES, the Respondents' case is further weakened since the accounts of JRRES and the College are subject to several layers of scrutiny. Since this makes monetisation more difficult, it also makes it inherently less likely that

monetisation is the Claimants' intent."

28. The argument of profiteering and monetization as advocated by Educomp has also been debunked by the Arbitral Tribunal taking note of the highly regulated statutory regime which stands placed and which ensures that an educational institution does not indulge in commercialisation.

29. Turning then to the more important issue of the position of affiliates/nominees, the Tribunal has noted that Mr. Shantanu Prakash himself had obtained control over JRRES and placed his affiliates as members of the General Body as well as its Governing Body at a time when it had originally advanced a loan to the society. The position of the society as it stood prior to the formation of the Joint Venture has been captured in paragraph 381 of the Award and the same is reproduced hereinbelow:—

"381. Before the Joint Venture got involved, Educomp provided a loan to JRRES, and it is no coincidence that at that time Mr. Shantanu introduced some of his colleagues, namely Mr. Mehta, Mr. Kanti and Mr. Thatoi, who all became Members. Shortly afterwards, both he and his father were granted life memberships. This is consistent with Mr. Shantanu's desire to get involved with JRRES, and in my view these persons were introduced to give a degree of control and influence at JRRES and so were nominees. They were each accepted into membership, and so evidently passed the qualification criteria. They may have had some, or even significant, educational experience, which would be of value to JRRES. That would no doubt have been one factor in why these particular employees were chosen above others, but at the end of the day I do not accept that they were merely persons introduced for their educational experience, to serve as wholly independent persons with no connection to Educomp. The evidence of Mr. Shantanu was that Mr. Harpreet was Chosen for his significant experience in banking and finance."

30. The fact that the nominees of Educomp and Raffles stood on an identical pedestal has been answered in the affirmative with the Tribunal observing as follows:—

"B. Are the Affiliates Nominees?

377. The question of whether or not the affiliate Members are "nominees" of the Parties is central to the issue of best efforts, but it is also relevant to the question of construction : If it were apparent that the affiliate Members were not nominees, this would support the Respondents' case. It is therefore convenient to consider this issue at this point. The documents and what they say about nominating Members are relevant, as is the history of nominating or changing

Members.

378. I agree with the Claimants that the Parties are in the business of education. They went into the Joint Venture and the “tie-up” with JRRES to develop their joint education business in India. They are not lenders, and they are not builders. I do not believe that the Parties would have invested such substantial time, effort and money if they did not feel they had a degree of control over JRRES through the Membership.

379. That is consistent with the position which the Respondents now accept, that a primary purpose of the SPA was to give control over JRRES to the Claimants. Because JRRES is a society, such control can only come through nominating Members. This has been the Claimants’ position all along, and the fact that the Respondents now accept it supports the view that not only have the Claimants’ affiliates been nominees throughout, but so have the Respondents’ own affiliates.

380. It has been apparent from the outset of the Joint Venture that the parties intended to nominate members or trustees to any not for profit entity in equal numbers, to give a degree of control, and to share this fairly between them. The JVA reflects broadly the Respondents’ proposal, and as noted in paragraph 30, provides for equality of management rights in respect of any not for profit entity, by means of each Party having an equal number of nominees. The JVA Second Supplementary Agreement provides that Educomp and Raffles would appoint an equal number of trustees and jointly manage JRRES through ERHEL.

xxx xxx xxx

384. Mr. Chew's version of events is that in connection with additional funding to JRRES in January 2014, both sides would increase/decrease their number of Members to achieve equal representation. The position of Chairman was created, which he filled. Mr. Chew's evidence is that he triggered these changes, which reinforces his view that Mr. Shantanu had control over the Members. Mr. Shantanu states that Mike Yam was appointed to the Governing Body on Mr. Chew's insistence, further reinforcing his apparent level of control.

xxx xxx xxx

391. I also note that Annexure A of the SPA is a “*List of Persons holding shares of [ERHEL] on behalf of Educomp*”. Of the six persons named, Mr. Jagdish, Mr. Harpreet, Mr. Shantanu and Ms. Kanti are also Annexure D persons. Similarly, Annexure B is a “*List of Persons holding shares of MIDL on behalf of [ERHEL] being representatives of [the Respondents]*”. Of the five named persons, four are also Annexure D persons. Annexure D itself is headed “*List of*

Representatives to resign from JRRES". All of this reinforces the view that the Annexure D Persons are nominees of the Respondents.

392. Mr. Shantanu sought to argue that merely because these persons are identified in a list headed list of society members from Educomp does not make them nominees. I do not agree. This list, when read together with the history of the involvement with JRRES, does support the view that the affiliates of each side were nominees, and in particular that the named eight persons, plus the additional three to resign, were nominees of Educomp. Mr. Shantanu did accept that the Members were either in his camp or Mr. Chew's camp, and so each side had influence over the Members, but not control. The clear balance of this material is that the Raffles and Educomp Groups have nominated their affiliates as nominees to be Members of JRRES."

31. The Tribunal has also on facts found that none of the members were promised any consideration for resigning from the General Body or the Governing Body of the society. Insofar as the issue of Breach of Conditions Precedent and Specific Performance are concerned, they need not be dealt with in detail since those are issues which clearly have no impact or bearing on the issue of whether the Award is rendered unenforceable by virtue of being contrary to the public policy of India. The same would also hold good insofar as the question of damages and costs is concerned. It may only be additionally observed that the findings returned by the Arbitral Tribunal on the aforesaid score were also not urged before us by Ms. Trivedi, learned senior counsel appearing for Educomp, as being relevant for the purposes of answering the question of whether the enforcement action would fall within the ambit of Section 48(2)(b)(ii) of the Act.

32. Having noticed the essential facts surrounding the referral of disputes to arbitration as well as the Award which ultimately came to be rendered, the Court then proceeds to record the submissions addressed at the behest of respective sides.

33. Ms. Malvika Trivedi, learned senior counsel, addressed the following submissions on behalf of Educomp. Ms. Trivedi firstly contended that the SPA is clearly illegal since it envisaged the forced resignation of Educomp's nominees from JRRES. According to Ms. Trivedi, the underlying objective of the SPA plainly was to take over the control of JRRES and the said objective would clearly be contrary to the fundamental policy of Indian law. Ms. Trivedi contended that the SPA essentially enables Raffles, a for-profit corporate entity, to remotely control JRRES and thus clearly violating Indian law. Learned senior counsel referred to the provisions made in Regulation 3.1 of the 2012 Regulations which specifies the various categories of promoters of a technical institution and enumerates them to be either a Society

registered under the SRA, a Trust under the Charitable Trust Act, 1950 or any other relevant statute or a Section 25 Company or the Central/State Government/Union Territory.

34. Ms. Trivedi pointed out that clause (d) of Regulation 3.1 additionally disqualifies Section 25 Companies in which equity may be held by a foreign entity or an individual, directly or indirectly. Ms. Trivedi sought to underline the fact that apart from a Section 25 Company, no other private incorporated entity is envisaged under the Regulations. It was her submission that the Award accepts and upholds a proposition which would essentially enable for-profit corporate entities obtaining a backdoor entry into not-for-profit societies. This according to Ms. Trivedi, since the SPA undoubtedly was intended to vest effective and complete control in JRRES with Raffles.

35. According to learned senior counsel, this would clearly result in commercialisation of the affairs of the educational institution and thus violating the core and fundamental principles of the National Policy of Education as prevailing. It was Ms. Trivedi's contention that the SPA terms merely create a facade or a front behind which the corporate entity, Raffles, would ultimately be controlling, administering and managing a not-for-profit society. It was her submission that what the law and public policy clearly prohibits cannot be achieved indirectly by Raffles.

36. Ms. Trivedi further contended that the Award if implemented would clearly result in the aforesaid illegal objectives being attained by Raffles. It was her submission further that the terms of the SPA by virtue of which Raffles became entitled to nominate its members and obtain resignations of Educomp affiliates is also violative of the fundamental policy underlying Indian law. It was submitted that the SPA provisions essentially required members of JRRES to resign in lieu of consideration received by Educomp. According to Ms. Trivedi members of a charitable society could not have been compelled to submit their resignations on the basis of an alleged agreement arrived at between two corporate entities.

37. Ms. Trivedi submitted that the purpose of the SPA was the motive and intent of Raffles to alter the charitable and independent nature of JRRES and to run it on a for-profit basis. Ms. Trivedi then submitted that the Award in fact legitimises the attempt of Raffles to monetise a not-for-profit educational society. It was her submission that the assets of a charitable society cannot possibly be utilised for generation of profits. Ms. Trivedi submitted that the Tribunal while granting damages to Raffles has based its computation on the valuation of the leasehold properties of JRRES. According to learned senior counsel the aforesaid is sufficient to prove the allegation of monetization. It was in this context further urged that even the

consideration for the sale of shares of ERHEL was based on the valuation of the land of JRRES. It was pointed out that the Lease Deed executed by GNIDA in favour of JRRES had clearly stipulated that the land was being allotted to the society for the construction of an educational institution.

38. Ms. Trivedi also drew the attention of the Court to the relevant provisions in that Lease Deed which had stipulated that the allotted land could not be transferred without the permission of GNIDA. Ms. Trivedi pointed out that the entire valuation of the deal underlying the SPA was based on the leasehold asset of JRRES and therefore the Award insofar as it accords legitimacy to the monetization of the said asset is clearly rendered unenforceable.

39. Ms. Trivedi also referred to the testimony tendered on behalf of Raffles before the Tribunal where it had been conceded that the principal intent of the SPA was to monetize the valuable assets of JRRES. This submission was based upon the following observations as appearing in the Award:—

“119. The Times of India Group however withdrew their interest sometime in October 2014, partly on realising that the College was not recognised as a university, and so in January 2015 the Parties agreed that Raffles would purchase Educomp's stake in JRRES. Thereafter the SPA came to be drafted, allowing Educomp to exit the Joint Venture completely. In cross-examination, Mr. Chew accepted that if the SPA had completed, he would have obtained the JRRES land.”

120. The consideration paid by Raffles under the SPA priced in a significant component for the JRRES land. On the day of signing of the SPA, Mr. Sunil Peter sent to Mr. Mittal a breakdown of the consideration pursuant to the SPA. The first item on the list was gross price for JRRES Rs. 250.00 crore. In cross-examination, Mr. Chew admitted that about Rs. 51.00 crore had been priced into the SPA consideration for the value of Educomp's stake in the JRRES land, buildings and college.

121. Some Rs. 10.00 crore of the consideration was to be paid under a business advisory agreement between Raffles Education Investment (India) (“REC”) and Eduleam Solutions Ltd. for advisory services (“Edulearn”). This is apparently Mr. Shantanu's own advisory firm, but he testified that this money was to be received by him personally. I note that this agreement is dated the same date as the SPA.

122. The Respondents emphasise how the true nature of the Transaction, in their view, was disguised in the SPA, and was kept out of disclosure by Raffles. Clause 2.1 of the SPA states that the

consideration is being paid for the Sale Shares. JRRES was mentioned only as an entity with which ERHEL had a “tieup”. Nowhere in the SPA was JRRES mentioned as the subject of the Transaction. Furthermore, in its Singapore Stock Exchange disclosure at the time of execution of the SPA, Raffles made no mention of JRRES, nor was it mentioned in Raffles’ 2015 annual report. In the Respondents’ submission, this failure to disclose reinforces that the Claimants appreciated the Transaction was illegal.

123. In his evidence, Mr. Chew stated that Raffles wished to manage a premium college, i.e, the Noida College, in its stable of educational institutions. This would generate goodwill and branding to the Raffles group as a whole. The Respondents say if this had been true, the Claimants would surely not have shied away from disclosing their interest in JRRES.

124. The Respondents explain that the joint affidavit of Mr. Shantanu and Mr. Mittal that JRRES was not part of the Joint Venture is understandable in the light of the illegality of the SPA, which ought not to see the light of day. There are good reasons, including the actual backlash from JRRES’ Members after the failed Completion, as to why they were embarrassed and reserved about the legal nature of the SPA. Indeed, Mr. Shantanu's stance is to be preferred, since he now accepts the illegality of the agreement and expresses his sincere regret for getting involved.

125. There is no reason, the Respondents submit, for the Claimants to pay such a substantial amount for JRRES and its land if any sale proceeds would simply go back to JRRES and would not be extracted.

126. The Respondents play down the proposal of 2007 before the Joint Venture. They contend this was a discussion summary, not a legal opinion. Educomp's position was that the Joint Venture structure needed to comply with Indian law and regulations, not that the proposed structure would comply. Furthermore, whether or not the SPA is illegal is a matter of Indian law and public policy, for which any representations made by the Respondents are irrelevant.

127. Finally, Mr. Shantanu had proposed to Ms. Doris Chew by email of 5th October 2014 that the Parties monetise the surplus funds in JRRES. Mr. Chew accepted that this was what Mr. Shantanu had proposed in this email, and accepted that there was no reply to this email.”

40. It was further alleged that despite finding that the valuation of the leasehold asset constituted a major factor for the purposes of consideration payable to JRRES, the Tribunal has proceeded to render contradictory findings and ultimately upheld and granted the claims as

laid by Raffles.

41. Ms. Trivedi also questioned the correctness of the findings returned by the Arbitral Tribunal with respect to nominees and affiliates and contended that the SPA essentially enables Raffles to trade in the membership of a charitable society in lieu of consideration and must shock the conscience of the Court. According to Ms. Trivedi, the SPA is liable to be construed as not just restricted to the sale of shares of ERHEL but also the membership of JRRES.

42. While dealing with the aspect of “*public policy*” and “*Section 48 (2)(a)*” of the Act, Ms. Trivedi relied upon the following judgments. Referring to the decision rendered by the Supreme Court in *PASL Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd.*¹⁸, Ms. Trivedi drew the attention of the Court to the following observations:—

“67. The elusive expression “public policy” appearing in Section 23 of the Contract Act is a relative concept capable of modification in tune with the strides made by mankind in science and law. An important early judgment of the Court of Appeal, namely, *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt* [*Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630 (CA)] [*Nordenfelt*], puts it thus : (AC pp. 661-63)

“... Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce. But it is one thing to say that an occasion has arisen upon which to adhere to the letter of the rule would be to neglect its spirit, and another to deny that the rule still exists. The *dicta* which Fry, L.J. cites from *Hitchcock v. Coker* [*Hitchcock v. Coker*, (1837) 6 Ad & E 438 : 112 ER 167], from *Tallis v. Tallis* [*Tallis v. Tallis*, (1853) 1 El & Bl 391 : 118 ER 482], and from *Mallan v. May* [*Mallan v. May*, (1843) 11 M & W 653 : 152 ER 967], are all *dicta* in cases of partial restraint, where the reasonableness of the particular contract necessarily came under consideration. The necessary protection of the individual may in such cases be the proper measure of the reasonableness of the bargain. When Fry, L.J. passes on *Rousillon v. Rousillon* [*Rousillon v. Rousillon*, [L.R.] 14 Ch. 351], Ch D p. 366, to examine the question of the existence of the common law rule, he assumes, as it appears to me, without sufficient justification, that complete protection of the individual is the only reason which ought to lie at the root of the doctrine. But the reasonableness of the legal principle which forbids general restraint altogether is not the same thing as the reasonableness (as between the parties) of the bargain in any particular case. With regard to the argument that the rule, if it

existed, would be an artificial one, and would therefore admit of no exceptions, the judgments of the Judges and of the House of Lords in *Egerton v. Earl Brownlow* [*Egerton v. Earl Brownlow*, (1853) 4 HLC 1 : 10 ER 359], illustrate, I submit, the distinction between a fixed rule of customary law and a rule based on reason and policy. The latter may admit of exceptions, although the former may not.

* * *

The result seems to me to be as follows : General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee. A limit in time does not, by itself, convert a general restraint into a partial one. 'That which the law does not allow is not to be tolerated because it is to last for a short time only.' In considering, however, the reasonableness of a partial restraint, the time for which it is to be imposed may be a material element to consider."

(emphasis in original)

68. The classic judgment of this Court in *Gherulal Parakh v. Mahadeodas Maiya* [*Gherulal Parakh v. Mahadeodas Maiya*, 1959 Supp (2) SCR 406 : AIR 1959 SC 781] [*-Gherulal*] states as follows : (SCC pp. 432-34 & 439-40 : AIR pp. 792-93 & 795, paras 21 & 23)

"21. ... Cheshire and Fifoot in their book on *Law of Contract*, 3rd Edn., observe at p. 280 thus:

'The public interests which it is designed to protect are so comprehensive and heterogeneous, and opinions as to what is injurious must of necessity vary so greatly with the social and moral convictions, and at times even with the political views, of different Judges, that it forms a treacherous and unstable ground for legal decision. ... These questions have agitated the Courts in the past, but the present state of the law would appear to be reasonably clear. Two observations may be made with some degree of assurance.

First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A Judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid

down in previous decisions. He must expound, not expand, this particular branch of the law.

Secondly, even though the contract is one which prima facie falls under one of the recognised heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked [*Fender v. St. John-Mildmay*, [1938] A.C. 1 (HL)] in a leading case, “should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds ... In popular language ... the contract should be given the benefit of the doubt”.’

Anson in his *Law of Contract* states the same rule thus, at p. 216:

‘Jessel, M.R., in 1875, stated a principle which is still valid for the Courts, when he said [*Printing & Numerical Registering Co. v. Sampson*, [L.R.] 19 Eq. 462] : - You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract”; and it is in reconciling freedom of contract with other public interests which are regarded as of not less importance that the difficulty in these cases arises....

We may say, however, that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules. The application of these to particular instances necessarily varies with the conditions of the times and the progressive development of public opinion and morality, but, as Lord Wright has said [*Fender v. St. John-Mildmay*, [1938] A.C. 1 (HL)], ‘public policy, like any other branch of the Common Law, ought to be, and I think is, governed by the judicial use of precedents. If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true; but the same is true of the principles of the Common Law generally’.

In *Halsbury's Laws of England*, 3rd Edn., Vol. 8, the doctrine is stated at p. 130 thus:

‘Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy.... It seems, however, that this branch of the law will not be extended. The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now which in a former generation would have been avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion.’

* * *

“23. ... The doctrine of public policy may be summarised thus : Public policy or the policy of the law is an illusive (*sic* elusive) concept; it has been described as “untrustworthy guide”, “variable quality”, “uncertain one”, “unruly horse”, etc; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallised under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.”

This judgment has been referred to with approval in several subsequent decisions.

74. In *Zoroastrian Coop. Housing Society Ltd. v. Registrar of Coop. Societies* [*Zoroastrian Coop. Housing Society Ltd. v. Registrar of Coop. Societies*, (2005) 5 SCC 632], this Court held : (SCC pp. 661-62, para 38)

“38. It is true that our Constitution has set goals for ourselves and one such goal is the doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative intervention and not by the court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under Part III or Part IV thereof, could be declared to be opposed to public policy by the court. Normally, as stated by this Court in *Gherulal Parakh v. Mahadeodas Maiya* [*Gherulal Parakh v. Mahadeodas Maiya*, 1959 Supp (2) SCR 406 : AIR 1959 SC 781] the doctrine of public policy is governed by precedents, its principles have been crystallised under the different heads and though it was permissible to expound and apply them to different situations it could be applied only to clear and undeniable cases of harm to the public. Although, theoretically it was permissible to evolve a new head of public policy in exceptional circumstances, such a course would be

inadvisable in the interest of stability of society.”

77. A reading of the aforesaid judgments leads to the conclusion that freedom of contract needs to be balanced with clear and undeniable harm to the public, even if the facts of a particular case do not fall within the crystallised principles enumerated in well-established “heads” of public policy. The question that then arises is whether there is anything in the public policy of India, as so understood, which interdicts the party autonomy of two Indian persons referring their disputes to arbitration at a neutral forum outside India.”

43. Ms. Trivedi also relied upon the following observations as rendered in the decision in *Devas Multimedia Private Limited v. Antrix Corporation Limited*¹⁹:—

“169. We do not find any merit in the above submission. If as a matter of fact, fraud as projected by Antrix, stands established, the motive behind the victim of fraud, coming up with a petition for winding up, is of no relevance. If the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the agreement, the disputes, arbitral awards, etc. are all infected with the poison of fraud. A product of fraud is in conflict with the public policy of any country including India. The basic notions of morality and justice are always in conflict with fraud and hence the motive behind the action brought by the victim of fraud can never stand as an impediment.”

44. Turning then to the decision of the Supreme Court in *National Agricultural Coop. Mktg. Federation of India v. Alimenta S.A.*²⁰, reliance was placed on the following passages from that decision:—

“39. NAFED in the circumstances after receipt of the Letter dated 1-12-1980 of the Department of Agriculture informed the Alimenta S.A. not to nominate the vessel for shipment for the goods due to the Government's prohibition for the supply of the goods. NAFED wrote a letter again on 9-1-1981 and pointed out to the Government that they were unable to export on account of Government order. The Government was asked to apprise it of the final decision regarding the export of commodities to the respondent. Letter dated 27-1-1981 reiterating prohibition came to be issued in the aforesaid circumstances. It was taken to be a refusal to supply on the part of NAFED by the Alimenta S.A., and they asked NAFED to appoint its arbitrator. Alimenta S.A. appointed Mr. A.G. Scott as its nominee arbitrator. Another telex dated 13-2-1981 was sent by NAFED informing that it would not be possible to supply the commodity because of Government action of banning such export. Later on,

confirmation was sought from the Government by NAFED. The Ministry of Commerce, Government of India, informed NAFED on 9-1-1984 that the directions issued by the Ministry of Agriculture refusing fulfilment of previous year's contract were lawful and binding. The Letter of the Government dated 9-1-1984 is extracted hereunder:

"Vinod Rai
Deputy Secretary

8-1-1984

To,
Managing Director,
The National Agricultural Cooperative
Marketing Federation of India Ltd.,
Sapna Building 54, East of Kailash,
New Delhi — 110 024

Subject : Execution of HPS groundnuts season 1980-1981, non-fulfilment of contract entered into during 1979-1980 crop Season under 1979-1980.

Dear Sir,

Please refer to your Letter No. HO/OSC/HPS/POL/PO-81/1337 dated 9-1-1984, on the above subject.

2. The Ministry of Commerce allocated to NAFED, as the same canalising agency for HPS groundnuts, 50,000 tonnes for export during the crop season 1980-1981. Kindly refer to the letter from Joint Secretary Usha Vohra dated 21-10-1980, to Shri Shrivastava. *This quota was for the new contracts to be entered into that season at the prevailing market prices. NAFED were not entitled to use any part of the quota to fulfil the previous year's contracts. Furthermore, I must advice you, as you certainly know, that you could not have utilised any unused part of the quota for the previous year to fulfil old contracts.*

3. *Ministry of Agriculture notified you that permission for you to fulfil the previous year's contracts was refused. This was a lawful directions which you were bound to obey. However, even without this express direction you could not have fulfilled these contracts. You would have needed from Ministry of Commerce an additional export quota covering the quantities required. You applied for additional quota generally and this application was refused in view of the prevailing market conditions both internally and externally. Most certainly no additional quota would have been granted to enable you to fulfil old contracts at the previous season's prices.*

Yours faithfully
(Vinod Rai)

Deputy Secretary to the Government of India”

It is apparent that the Government of India issued a direction that was binding upon NAFED. Without permission, it was not possible for NAFED to carry out its obligation under the contract and addenda.

44. In the present case, parties have agreed, and in Clause 14 of the Agreement, it was contemplated that during the contract if there is any prohibition of the export or any other executive or legislative Act by or on behalf the Government of the country of origin, the unfulfilled part of the contract shall be cancelled. Because of the refusal by the Government, it was not permissible to NAFED to make a supply to the Alimenta S.A. Hence, the unfulfilled part was required to be cancelled. Thus, NAFED was justified in not making the supply as it would have violated the Export Control Order, and it was not permissible to carry forward the quantity of the previous year to the next year because of the Export Control Order without permission of the Government.

69. It is apparent from the abovementioned decisions as to enforceability of foreign awards, Clause 14 of the FOSFA Agreement and as per the law applicable in India, no export could have taken place without the permission of the Government, and NAFED was unable to supply, as it did not have any permission in the season 1980-1981 to effect the supply, it required the permission of the Government. The matter is such which pertains to the fundamental policy of India and parties were aware of it, and contracted that in such an exigency as provided in Clause 14, the Agreement shall be cancelled for the supply which could not be made. It became void under Section 32 of the Contract Act on happening of contingency. Thus, it was not open because of the clear terms of the Arbitration Agreement to saddle the liability upon NAFED to pay damages as the contract became void. There was no permission to export commodity of the previous year in the next season, and then the Government declined permission to NAFED to supply. Thus, it would be against the fundamental public policy of India to enforce such an award, any supply made then would contravene the public policy of India relating to export for which permission of the Government of India was necessary.

70. In our considered opinion, the award could not be said to be enforceable, given the provisions contained in Section 7(1)(b)(ii) of the Foreign Awards Act. As per the test laid down in *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]*, its enforcement would be against the fundamental policy of Indian Law and the basic concept of justice. Thus, we hold that award is unenforceable, and the High Court erred in law in holding

otherwise in a perfunctory manner.”

45. Controverting the aforesaid submissions, Mr. Sandeep Sethi, learned senior counsel appearing for Raffles, addressed the following submissions. Mr. Sethi submitted that the expression “*public policy*” is a narrow doctrine and can be invoked and applied only in clear and “incontestable” cases. Mr. Sethi would contend that the expression “*public policy*” as contemplated under Section 48(2)(b)(ii) of the Act is even more limited as would be evident from the observations rendered by the Supreme Court in the celebrated decision of *Renusagar Power Co. Ltd. v. General Electric Co.*²¹:—

“30. Having regard to the foregoing submissions of the learned counsel the questions that arise for consideration in these appeals can be thus formulated:

- (I) What is the scope of enquiry in proceedings for enforcement of a foreign award under Section 5 read with Section 7 of the Foreign Awards Act?
- (II) Were Renusagar unable to present their case before the Arbitral Tribunal and consequently the award cannot be enforced in view of Section 7(1)(a)(ii) of the Foreign Awards Act?
- (III) Does Section 7(1)(b)(ii) of the Foreign Awards Act preclude the enforcement of the award of the Arbitral Tribunal for the reason that the said award is contrary to the public policy of the State of New York?
- (IV) What is meant by ‘public policy’ in Section 7(1)(b)(ii) of the Foreign Awards Act?
- (V) Is the award of the Arbitral Tribunal unenforceable as contrary to public policy of India on the ground that—
 - (a) it involves contravention of the provisions of FERA;
 - (b) it penalises Renusagar for acting in accordance with the interim order passed by the Delhi High Court in the writ petition filed by Renusagar challenging the withdrawal of exemption from income tax on the interest paid to General Electric;
 - (c) it results in charging of interest on interest which is compounded and also damages on damages;
 - (d) it would lead to unjust enrichment for General Electric.
- (VI) Which law would govern the rate of exchange for conversion of foreign currency in proceedings for enforcement of a foreign arbitral award?
- (VII) Does *Forasol v. O.N.G.C.* [1984 Supp SCC 263 : (1984) 1 SCR 526] need reconsideration?

(VIII) Is General Electric entitled to interest pendente lite and future interest and if so, at what rate?

(IX) What should be the rate for conversion into U.S. dollars of the amount of Rs. 10.92 crores deposited by Renusagar in pursuance to the interim orders passed by this Court on February 21, 1990 and November 6, 1990 and which has been withdrawn by General Electric?

IV. Meaning of 'public policy' in Section 7(1)(b)(ii) of the Act

46. While observing that "from the very nature of things, the expressions 'public policy', 'opposed to public policy' or 'contrary to public policy' are incapable of precise definition" this Court has laid down : (SCC p. 217, para 92)

"Public policy ... connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time." (See : *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly* [(1986) 3 SCC 156, 217 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103 : (1986) 2 SCR 278, 372]).

63. In view of the absence of a workable definition of "international public policy" we find it difficult to construe the expression "public policy" in Article V(2)(b) of the New York Convention to mean international public policy. In our opinion the said expression must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced. Consequently, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act means the doctrine of public policy as applied by the courts in India. This raises the question whether the narrower concept of public policy as applicable in the field of public international law should be applied or the wider concept of public policy as applicable in the field of municipal law.

65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone

will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression “public policy” in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that “public policy” in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”

46. Mr. Sethi also invited the attention of the Court to the decision of the Supreme Court in *Shri Lal Mahal Ltd. v. Progetto Grano SPA*²² where the principles formulated in *Renusagar* were reiterated in the following terms:—

“27. In our view, what has been stated by this Court in *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must apply equally to the ambit and scope of Section 48(2)(b) of the 1996 Act. In *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] it has been expressly expounded that the expression “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression “public policy” used in Section 7(1)(b)(ii) was held to mean “public policy of India”. A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1)

SCC 644]. For all this there is no reason why *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]* should not apply as regards the scope of inquiry under Section 48(2)(b). Following *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]*, we think that for the purposes of Section 48(2)(b), the expression “public policy of India” must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]*. Although the same expression “public policy of India” is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of “public policy in India” is same in nature in both the sections but, in our view, its application differs in degree insofar as these two sections are concerned. The application of “public policy of India” doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

28. We are not persuaded to accept the submission of Mr. Rohinton F. Nariman that the expression “public policy of India” in Section 48(2)(b) is an expression of wider import than the “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act. We have no hesitation in holding that *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]* must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in *Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]* would govern the scope of such proceedings.

29. We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression “public policy of India” occurring in Section 34(2)(b)(ii) in *Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]* is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b)."

47. Learned senior counsel then drew the attention of the Court to the decision rendered by a learned Judge of this Court in *Cruz City 1 Mauritius Holdings v. United Limited*²³, where the expression “fundamental policy” of Indian law was explained in the following terms:—

“23. Any decision with regard to enforcement of the award by this Court may not have any bearing on the validity of the award or its

enforceability in other jurisdictions. However, the question whether the award will be recognised and enforced in India, cannot be adjudicated by the arbitral tribunal, the Courts in United Kingdom or for that matter any other country; only the courts in this country are competent to consider whether the award is to be recognised and enforced in this country. The principle of *res judicata* is applicable only where the issue/controversy is finally decided by a court/forum of compete jurisdiction and - although prior decision on the issue by a court in another country may be persuasive-neither the decision of the Arbitral Tribunal nor of the High Court of Justice regarding enforceability of the award, is binding on this court.

24. Recognition of a foreign award in the country where it is sought to be enforced, is a necessary pre-condition to enforcing the same; it is *sine qua non* to the same being accepted as binding by the enforcing court. Thus, it naturally follows that recognition of a foreign award is also a necessary pre-condition to apply the principles of *res judicata*. Clearly, a decision on an issue contained in a foreign award will not preclude the party resisting its recognition and enforcement, to re-agitate the issue unless that award is recognised as binding by the enforcing court. Given this position, it can hardly be contended that a challenge to recognition and enforcement of a foreign award must be rejected on the ground that the award also adjudicates the issue on the ground of which its enforcement is resisted. This would also be equally true of the decision of the reviewing court exercising jurisdiction in the state of the seat of the arbitration.

86. As observed in *Renusagar Power Co. Ltd. v. General Electric Co.* (supra), the term “*public policy is somewhat open-textured and flexible*”. The said term encompasses a broad spectrum of acts and its contours also change and evolve with the passage of time. In *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, (1986) 3 SCC 156, the Supreme Court had sought to explain the meaning of public policy as “some matter which concerns public good and public interest”. The Supreme Court had also observed that the expressions “public policy”, “opposed to public policy” or “contrary to public policy” are incapable of precise definition.

87. Plainly, it would be difficult if not impossible to exhaustively define what is encompassed within the expression ‘public policy’. The broad and somewhat undefined and unpredictable scope of the expression public policy had prompted the court in *Richardson v. Mellish* : (1824) 2 Bing 229 to observe that “*it is a very unruly horse, and when you get astride it you never know where it will carry you*”.

88. Notwithstanding, the broad sweep of the expression ‘public policy’, the courts have attempted to interpret the scope of “public policy” or what is “contrary to public policy” in different contexts. In the context of enforcement of a foreign award, the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.* (supra) had observed as under:—

89. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression “public policy” in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article 1(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that “public policy” in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality”.

90. In *Shri Lal Mahal Ltd. v. Progetto Grano SPA* (supra), the Supreme Court once again reiterated the legal position that the defence of public policy as contemplated under Section 48(2)(b) of the Act would have to be given a narrow meaning and enforcement of a foreign award would be refused if such enforcement would be contrary to (i) the fundamental policy of Indian law; (ii) the interests of India or (iii) justice or morality.

94. The aforesaid decisions have been referred only to emphasise that the width of the public policy defence to resist enforcement of a foreign award, is extremely narrow. And, the same cannot be equated to offending any particular provision or a statute.

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.

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

99. In *Oil and Natural Gas Corporation Limited v. Western Geco International Limited*, (2014) 9 SCC 263, the Supreme Court sought to explain meaning of the expression “fundamental policy of Indian Law” in the following words : -*the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country*”. The court further indicated three fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law : (i) judicial approach, (ii) principles of natural justice and (iii) reasonableness on the touchstone of *Wednesbury* principle.

100. The explanations to Section 48(2)(b) of the Act as amended/introduced by the Arbitration and Conciliation (Amendment) Act, 2015 have brought about a material change and further narrowed the scope of the public policy defence : first, Explanation 1 has sought to replace the inclusive scope of the pre-amendment provision by an exhaustive one; second, interest of India is no longer included in the scope of public policy; and third, it has been expressly provided - although the same was authoritatively settled by the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.* (supra) - that examination of whether the arbitral award offends the Fundamental Policy of Indian law, does not entail a

review on merits.

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 favours 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."

48. According to Mr. Sethi, tested on the aforesaid precepts, it would be manifest that the submission of the Award being opposed to public policy is clearly misconceived and meritless. Dealing firstly with the issue of forced resignations under the SPA, Mr. Sethi submitted that the said agreement did not even contemplate the purchase of membership of JRRES on payment of money. It was pointed out that the SPA also did not envisage any consideration being made over to members in lieu of resignation. Mr. Sethi also pointed out that the Tribunal had correctly found that the arguments addressed on this score were, in any case, based on a possibility of a conflict of interest as opposed to an actual illegality.

49. Mr. Sethi then submitted that the risk or illegality as was alleged

by Educomp was one which existed both before the execution of the JVA as well as after the SPA. This was explained by Mr. Sethi in light of the position which prevailed prior to Raffles entering the fray and at a time when Mr. Shantanu Prakash had nominated his affiliates on the General Body and Governing Body of JRRES. It was submitted that after the infusion of capital by Raffles and upon formation of the Joint Venture, it was legitimately desired by both Raffles and Educomp to have their representatives in the society. In view of the above, it was his submission that Educomp cannot possibly be permitted to urge submissions on lines noticed above.

50. Mr. Sethi submitted that even otherwise if the members of a society formed under the SRA were to conduct and manage its affairs contrary to the fundamental requirement of it being confined to charitable purposes, the statute itself incorporates appropriate measures for rectification.

51. Mr. Sethi then submitted that the argument of the Award being contrary to public policy since it allows a profit making foreign entity to gain control of and manage a not-for-profit educational society is also clearly misconceived. It was his submission that Educomp has failed to refer to any Statute, Regulation or Rule which may be said to constitute a “basic and substratal rationale”, the test propounded in *Cruz City*, prohibiting private corporate entities from being involved in the educational sector. In fact, according to Mr. Sethi, the aforesaid argument is clearly bellied when one considers the provisions of the SRA as well as the Regulations framed by the AICTE.

52. Mr. Sethi pointed out that SRA does not incorporate any prohibition with respect to a foreign individual acting as a member of a society. Insofar as the restriction placed by Regulation 3.1(d) of the 2012 Regulations is concerned, it was submitted that the prohibition of foreign equity in a Section 25 company cannot be equated or elevated to apply to membership held by foreigners in a society. It was further urged by Mr. Sethi that the AICTE Handbook itself takes note of the fundamental policy shift which had taken place from the 1980's and which accepted the involvement of private and voluntary organisations in the setting up of technical institutions on a self-financing basis. Mr. Sethi submitted that any doubts that may have been legitimately harboured in any case stand laid to rest in light of Appendix 3.4 of the Handbook and which unequivocally envisages the involvement of private corporate entities in setting up of educational and technical institutions. Mr. Sethi also referred to Chapter V of that Handbook and which contemplates the involvement of Foreign Universities/Institutions in undertaking educational activity in India. According to Mr. Sethi, not only do the Regulations framed by the AICTE sanction the establishment of a structure similar to that as contemplated under the

JVA, the respondent's own expert witness had accepted and conceded to such a structure existing in India. This submission was addressed in the backdrop of the testimony rendered by Educomp's Expert Witness and was noticed in paragraph 289 of the Award as under:—

“289. Mr. Subramaniam accepted that participants in the oil and gas industry had in India got together to put money in and set up, through a not for profit entity, a college specifically to teach oil and gas matters. That structure, which he accepted as valid, has no practical difference to the situation under the Joint Venture or under the SPA. Mr. Gupta gave a similar example of government interest in a society. Mr. Subramaniam thought that the prohibition from Regulation 3.1(d) would apply also to a society, but that this is really just a facet of his broad argument that a corporate cannot be a Member of a society. I turn to that argument next.

301. That then leads to the issue about whether Indian law or public policy prohibits, as it were, remote control of a society in India by a corporate and/or a foreign entity. This issue must now be judged in the light of my findings that on balance a corporate can be a member of a society in India, and more clearly that AICTE contemplates and permits that a foreign institution or a corporate may set up and run a technical institution in India or establish a local technical institution on certain Conditions. Similarly, it seems to me plain from the AICTE Regulations and Handbook that the sort of structure provided for in the JVA and the SPA is covered and permitted. It is also not asserted that the Claimants are trying to circumvent the not for profit nature of higher education by directly running the Noida College. In those circumstances, whether or not Indian public policy would allow a corporate and/or foreign entity to establish and operate a technical institution through control of a Society is answered by the fact that this is a permitted structure.”

53. On a more fundamental plane, Mr. Sethi submitted that assumption that the involvement of a private for-profit entity in education would necessarily result in commercialisation of education is clearly untenable. It was submitted that right from the decision of the Constitution Bench in *T.M.A. Pai Foundation v. State of Karnataka*²⁴, the Supreme Court had recognised the right of an educational institution to generate a reasonable revenue surplus for development of education and expansion as well as augmentation of infrastructure of an educational institution itself. Mr. Sethi also submitted that the involvement of Foreign Direct Investment²⁵ in the educational sector is one which stands accepted and sanctioned under the FDI Policy itself. Mr. Sethi submitted that undisputedly 100% FDI is allowed in the educational sector through the automatic route. This too, according

to Mr. Sethi, establishes that the submissions addressed at the behest of Educomp are liable to be negated.

54. It was lastly urged that the argument of monetization as addressed by Educomp is equally misconceived. Mr. Sethi pointed out that merely because the value of the leasehold asset of JRRES was factored in for the purposes of computing consideration or for awarding damages does not amount to monetization. It was pointed out that the SPA nowhere contemplated the transfer or sale of that leased asset.

55. Reverting then to the issue of public policy, Mr. Sethi sought to draw sustenance from the amendments introduced in 2015 in Section 48 of the Act in terms of which the Explanation thereto had clearly explained the phrase “*public policy of India*” as being a principle liable to be invoked only if it be found that an Award runs contrary to or contravenes the fundamental policy of Indian law.

56. Mr. Sethi to buttress his aforesaid submission also placed for the consideration of the Court the following passages from the decision of the Supreme Court in *Vijay Karia v. Prysmian Cavi E Sistemi SRL* ²⁶:—

“Enforcement of foreign awards under Section 48

38. Having heard the learned counsel on both sides, it is important to first set out the relevant parts of Section 48 of the Arbitration Act. Section 48 reads as follows:

“48. Conditions for enforcement of foreign awards.—(1)

Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that —

* * *

(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;

* * *

(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.”

40. The judgment of *Shri Lal Mahal Ltd. v. Progetto Grano SpA* [*Shri Lal Mahal Ltd. v. Progetto Grano SpA*, (2014) 2 SCC 433 : (2014) 2 SCC (Civ) 1] is important in that it made it clear that the *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] position would continue to apply to cases which arose under Section 48(2)(b), the wider meaning given “to public policy of India” in the domestic sphere not being applicable. In doing so it overruled the judgment in *Phulchand Exports Ltd. v. O.O.O. Patriot* [*Phulchand Exports Ltd. v. O.O.O. Patriot*, (2011) 10 SCC 300 : (2012) 1 SCC (Civ) 131] as follows : (SCC pp. 448-49 & 454, paras 28-30 & 45-46)

“28. We are not persuaded to accept the submission of Mr. Rohinton F. Nariman that the expression “public policy of India” in Section 48(2)(b) is an expression of wider import than the “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act. We have no hesitation in holding that *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in *Saw Pipes* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] would govern the scope of such proceedings.

29. We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression “public policy of India” occurring in Section 34(2)(b)(ii) in *Saw Pipes* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).

30. It is true that in *Phulchand Exports* [*Phulchand Exports Ltd. v. O.O.O. Patriot*, (2011) 10 SCC 300 : (2012) 1 SCC (Civ) 131] a two-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression “public policy of India” in Section 34 in *Saw Pipes* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in

para 16 of the Report that the expression “public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal” does not lay down correct law and is overruled.

* * *

45. Moreover, Section 48 of the 1996 Act does not give an opportunity to have a “second look” at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

46. In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report obtained by the buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12-5-1994 and wrongly rejected the report of the contractual agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal.”

43. It will be noticed that in the context of challenge to domestic awards, Section 34 of the Arbitration Act differentiates between international commercial arbitrations held in India and other arbitrations held in India. So far as “the public policy of India” ground is concerned, both Sections 34 and 48 are now identical, so that in an international commercial arbitration conducted in India, the ground of challenge relating to “public policy of India” would be the same as the ground of resisting enforcement of a foreign award in India. Why it is important to advert to this feature of the 2015 Amendment Act is that all grounds relating to patent illegality appearing on the face of the award are outside the scope of interference with international commercial arbitration awards made in India and foreign awards whose enforcement is resisted in India. In this respect, it is important to advert to paras 41 and 69 of *Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHA], (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213* as follows : (SCC pp. 171 & 194)

“41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]*, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital

evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

* * *

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28 (3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal.”

This statement of the law applies equally to Section 48 of the Arbitration Act.

44. Indeed, this approach has commended itself in other jurisdictions as well. Thus, in *Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd.* [*Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd.*, 2010 SGHC 62], the Singapore High Court, after setting out the legislative policy of the Model Law that the “public policy” exception is to be narrowly viewed and that an arbitral award that shocks the conscience alone would be set aside, went on to hold:

“48. It is clear, therefore, that in order for SSGC to have succeeded on the public policy argument, it had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice. Nothing of the sort had been pleaded or proved by SSGC. and its ambiguous contention that

the award was “perverse” or “irrational” could not, of itself, amount to a breach of public policy.”

50. The US cases show that given the “pro-enforcement bias” of the New York Convention, which has been adopted in Section 48 of the Arbitration Act, 1996 — the burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement and not the other way around; in the guise of public policy of the country involved, foreign awards cannot be set aside by second guessing the arbitrator's interpretation of the agreement of the parties; the challenge procedure in the primary jurisdiction gives more leeway to courts to interfere with an award than the narrow restrictive grounds contained in the New York Convention when a foreign award's enforcement is resisted.

Discretion of the Court to enforce foreign awards

51. Thus far, it is clear that enforcement of a foreign award may under Section 48 of the Arbitration Act be refused only if the party resisting enforcement furnishes to the Court proof that any of the stated grounds has been made out to resist enforcement. The said grounds are watertight — no ground outside Section 48 can be looked at. Also, the expression used in Section 48 is “may”. Shri Viswanathan has argued that “may” would vest a discretion in a Court enforcing a foreign award to enforce such award *despite* the fact that one or more grounds may have been made out to resist enforcement. For this purpose, he relied upon Sections 45 to 47, which contain the word “shall” in contradistinction to the word “may”. He also relied upon Article V of the New York Convention which also uses the word “may”.

57. A learned Single Judge of the Delhi High Court in *Cruz City 1 Mauritius Holdings v. Unitech Ltd.* [*Cruz City 1 Mauritius Holdings v. Unitech Ltd.*, 2017 SCC OnLine Del 7810 : (2017) 239 DLT 649], adverted to this issue and held : (SCC OnLine Del paras 28-32, 37-39 & 43)

“28. Whilst this Court accepts the contention that the use of the word “may” as used in the context of Section 48 of the Act does not confer an absolute discretion on the courts, it is not possible to accept that the word “may” should be read as “shall” and the court is compelled to refuse enforcement, if any of the grounds under Section 48 are established. First of all, the plain meaning of the word “may” is not “shall”; it is used to imply discretion and connote an option as opposed to compulsion.

29. *Baker, In re, Nichols v. Baker* [*Baker, In re, Nichols v. Baker*, [L.R.] 44 Ch. 262 : 59 LJ Ch 661 (CA)], Cotton L.J. observed that

‘-May” can never mean must, so long as the English language retains its meaning; but it gives a power and then it may be a question, in what cases, when any authority or body has a power given it by the word “may”, it becomes its duty to exercise that power.’

30. In *Official Liquidator v. Dharti Dhan (P) Ltd.* [*Official Liquidator v. Dharti Dhan (P) Ltd.*, (1977) 2 SCC 166] the Supreme Court had explained that in certain cases where the legal and factual context in which the discretionary power is to be exercised is specified, it is also annexed with a duty to exercise it in that manner. Keeping the aforesaid in mind, there can be no cavil that since Section 48 of the Act enables the court to refuse enforcement of a foreign award on certain grounds, this Court would be required to do so; however, if there are good reasons founded on settled principles of law, the court is not precluded from declining the same. The word “may” in Sections 48(1) and (2) of the Act must be interpreted as used in a sense so as not to fetter the courts to refuse enforcement of a foreign award even if the grounds as set out in Section 48 are established, provided there is sufficient reason to do so. Viewed from this perspective, the considerations that this Court may bear while examining grounds as set out under Section 48(1) [enacted to give effect to Article V(1) of the New York convention] may be materially different from the consideration that this Court may bear while examining the issue of declining enforcement of a foreign award on the ground of public policy [Section 48(2) of the Act]. Whereas the grounds as set out under Section 48(1) essentially concern the structural integrity of the arbitral process and inter party rights therefore considerations such as the conduct of parties, balancing of the inter se rights, etc. are of material significance but such considerations may not be of any significant relevance in considering whether enforcing the award contravenes the public policy of India.

31. It is necessary to bear in mind that Section 48 of the Act is a statutory expression of Article V of the New York Convention and is similarly worded. The object of Article V of the New York Convention is to enable the signatory States to retain the discretion to refuse enforcement of a foreign award on specified grounds and none other; it does not compel the member States to decline enforcement of foreign awards. Article V of the convention thus sets out the maximum leeway available to member States to refuse enforcement of a foreign award. This view has also been accepted by courts in the United States. In *Chromalloy Aeroservices v. Arab Republic of Egypt* [*Chromalloy Aeroservices*

v. Arab Republic of Egypt, 939 F Supp 907 (DDC 1996)], an Egyptian award, which was set aside by an Egyptian court, was enforced notwithstanding Article V(1)(e) of the New York Convention.

32. The principle that courts may enforce a foreign award notwithstanding that one or more of the specified grounds have been established, is also accepted in the United Kingdom. (See : *China Agribusiness Development Corpn. v. Balli Trading [China Agribusiness Development Corpn. v. Balli Trading*, (1998) 2 Lloyd's Rep 76]).

* * *

37. The grounds as set out in Section 48 of the Act for refusing enforcement of the award encompass a wide spectrum of acts and factors as they are set in broad terms. While in some cases, it may be imperative to refuse the enforcement of the award while in some other, it may be manifestly unjust to do so. Section 48 is enacted to give effect to Article V of the New York Convention, which enables member States to retain some sovereign control over enforcement of foreign awards in their territory. The ground that enforcement of an award opposed to the national public policy would be declined perhaps provides the strongest expression of a Sovereign's reservation that its executive power shall not be used to enforce a foreign award which is in conflict with its policy. The other grounds mainly relate to the structural integrity of the arbitral process with focus on inter party rights.

38. In terms of sub-section (1) of Section 48 of the Act, the Court can refuse enforcement of a foreign award only if the party resisting the enforcement furnishes proof to establish the grounds as set out in Section 48(1) of the Act. However, the court may refuse enforcement of a foreign award notwithstanding that a party resisting the enforcement has not provided any/sufficient proof of contravention of public policy. In such cases, the Court is not precluded from examining the question of public policy suo motu and would refuse to enforce the foreign award that is found to offend the public policy of India. The approach of the court while examining whether to refuse enforcement of a foreign award would also depend on the nature of the defence established.

39. Even where public policy considerations are to be weighed, it is not difficult to visualise a situation where both permitting as well as declining enforcement would fall foul of the public policy. Thus, even in cases where it is found that the enforcement of the award may not conform to public policy, the courts may evaluate and strike a balance whether it would be more offensive to public policy to refuse enforcement of the foreign award — considering

that the parties ought to be held bound by the decision of the forum chosen by them and there is finality to the litigation — or to enforce the same; whether declining to enforce a foreign award would be more debilitating to the cause of justice, than to enforce it. In such cases, the court would be compelled to evaluate the nature, extent and other nuances of the public policy involved and adopt a course which is less pernicious.

* * *

43. Thus, whilst there is no absolute or open discretion to reject the request for declining to enforce a foreign award, it cannot be accepted that it is totally absent. The width of the discretion is narrow and limited, but if sufficient grounds are established, the court is not precluded from rejecting the request for declining enforcement of a foreign award.”

58. When the grounds for resisting enforcement of a foreign award under Section 48 are seen, they may be classified into three groups — grounds which affect the jurisdiction of the arbitration proceedings; grounds which affect party interest alone; and grounds which go to the public policy of India, as explained by Explanation 1 to Section 48(2). Where a ground to resist enforcement is made out, by which the very jurisdiction of the Tribunal is questioned — such as the arbitration agreement itself not being valid under the law to which the parties have subjected it, or where the subject-matter of difference is not capable of settlement by arbitration under the law of India, it is obvious that there can be no discretion in these matters. Enforcement of a foreign award made without jurisdiction cannot possibly be weighed in the scales for a discretion to be exercised to enforce such award if the scales are tilted in its favour.

59. On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone, for example, that a party has been unable to present its case before the arbitrator, and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a court may well enforce a foreign award, even if such ground is made out. When it comes to the “public policy of India” ground, again, there would be no discretion in enforcing an award which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. It can thus be seen that the expression “may” in Section 48 can, depending upon the context, mean “shall” or as connoting that a residual discretion remains in the court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion is limited to the

circumstances pointed out hereinabove, in which case a balancing act may be performed by the court enforcing a foreign award.

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., 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.”

57. It was lastly urged by Mr. Sethi that the objections taken in respect of the present enforcement action clearly amounts to dishonest conduct by Educomp which under the SPA had proffered a warranty that its performance and implementation would not be in breach of applicable laws. The attention of the Court was specifically drawn to the following clause as appearing in the SPA:—

“6. SELLERS' WARRANTIES:

6.1. Each of the Sellers represent and warrant to each of the Purchasers that:

6.1.1. the execution, delivery and performance by the Sellers of this Agreement duly constitutes a legal, valid and binding agreement and obligation of the Sellers;

6.1.2. neither the execution and delivery of this Agreement, nor the consummation of the transactions contemplated herein, nor the fulfilment of or compliance with the terms and conditions of this Agreement, conflict with or result in a breach of or a default under any of the terms, conditions of any agreement or understanding the Seller is a party to or otherwise bound by or provisions of any law applicable to the Seller:

6.1.3. they are not bankrupt or insolvent under the laws of India or laws of the country in which it is incorporated;

6.1.4. the Sale Shares are fully paid up and constitute 41.82% of the issued share capital of the Company and the respective Seller is (i) the sole legal and beneficial owner of all the Sale Shares and the Sale Shares are free and clear of all Encumbrances and (ii) entitled to transfer the Sale Shares in accordance with the terms of this Agreement;

6.1.5. Educomp Professional has taken all necessary approvals from Governmental Authorities or otherwise required including corporate actions as per this Agreement under the Indian Laws;

6.1.6. Educomp Asia Pacific has taken all necessary approvals from Governmental Authorities or otherwise required including corporate actions as per this Agreement under the Singapore Laws;

6.1.7. they have clear and marketable title to the Sale Shares free from Encumbrances and, upon Closing, the Purchasers shall acquire clear and marketable title to the Sale Shares and no actions taken or decisions made by the Sellers shall impair such clear and marketable title of the Purchasers in relation to the Sale Shares;

6.1.8. they have not granted any voting rights, right to receive dividend or other economic or beneficial interests in the Sale Shares to any person;

6.1.9. they have not entered into any agreement with any Person for the sale, disposal or other alienation of Sale Shares and/or any portion thereof save and except for this Agreement; and

6.1.10. other than the express representations and warranties on the part of the Purchasers contained in clause 7, the Sellers are not relying on, and the Purchasers have not made, and shall not be deemed to have made, any representations or warranties to the Sellers (whether express or implied) in respect of the Sale Shares.”

58. According to Mr. Sethi, Educomp after having breached the SPA cannot possibly be permitted to contend that the said agreement was illegal. Mr. Sethi also submitted that an identical stand as taken was

stoutly rejected by this Court in *Cruz City* where it was held that it would not be permissible for Unitech [a party in those proceedings] to rely on such identical contentions and resist the enforcement of an Award. Mr. Sethi submitted that *Cruz City* had in unequivocal terms held that permitting such a recourse would clearly amount to a rewriting of the contract itself quite apart from being manifestly unjust. Mr. Sethi drew the attention of the Court specifically to Para 113 of the report which is reproduced hereinbelow:—

“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.”

59. It is the aforesaid submissions which fall for consideration.

60. The discussion which follows may be appropriately prefaced by the following observations. Undisputedly the Articles of Association of JRRES restricts membership to individuals only and does not contemplate corporate entities being members thereof. This aspect has been duly taken note of by the Arbitral Tribunal itself in its Award in Para 273. The question of a corporate entity being a member of JRRES thus does not appear to arise at all. The reference to Raffles, the for-profit entity, essentially appears to have been addressed in support of the contention of Educomp that its nominees would be guided and controlled by that corporate entity.

61. The Arbitral Tribunal has also correctly come to conclude that a technical institution cannot possibly be administered or managed directly by Raffles in light of the provisions made in Regulation 3.1 of the 2012 Regulations. However, the engagement of a for-profit entity under the AICTE regulatory scheme is factored and provisioned for in the AICTE Handbook, and more particularly, in Appendix 3.4 thereof. The engagement and connect of a corporate entity with a charitable society registered under the SRA is the principal argument which is addressed on behalf of Educomp as being violative of “*public policy*”. The Court therefore deems it apposite to deal with the aforesaid submission at the very outset.

62. *Renusagar* though rendered in the context of the Foreign Awards (Recognition and Enforcement) Act, 1961 is even today considered to be the locus classicus on the meaning to be ascribed to the phrase “*public policy*” in the context of challenges to an arbitral award. The expression “*public policy*” appeared in Section 7(1)(b)(ii) of the aforementioned Act. While dealing with the said question, the Supreme Court in *Renusagar* firstly held that the expression “*public policy*” as occurring in Section 7 must necessarily be understood as meaning the “*public policy*” as applied by courts in India. It went on further to

enunciate the three factors which would be relevant to answer whether an award could be described as being contrary to “*public policy*”. This was explained by their Lordships in paragraph 66 of the report where they held that the doctrine of “*public policy*” would be said to have been flouted if the award be contrary to the fundamental policy of Indian law or the interest of India or justice and morality.

63. In *Shri Lal Mahal*, the trinity tests and attributes of the expression “*public policy*” as were formulated in *Renusagar* were reiterated with the Supreme Court observing that for the purposes of enforcement of a foreign award under Section 48(2)(b), the tests as formulated in that decision would continue to apply. The Supreme Court further pertinently observed that the expansive meaning assigned to that phrase in *ONGC Ltd. v. Saw Pipes Ltd.*²⁷ would stand confined to Section 34(2)(b)(ii). It also unambiguously ruled that the “patent illegality” challenge to an Award and which may be available to be addressed for the purposes of assailing a domestic award would not be attracted to Section 48(2)(b) of the Act.

64. A more elaborate enunciation on the concept of “*public policy*” appears in the decision of the Supreme Court in *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India (NHAI)*²⁸. While explaining the aforesaid concept, the Supreme Court firstly reiterated the distinction which must be kept in mind while dealing with a challenge under Section 34 as opposed to one which relates to Section 48 of the Act. In *Ssangyong*, the Supreme Court also had an occasion to notice the statutory amendments which had come to be introduced by virtue of the 2015 Amendment Act and how the expression “*public policy*” came to be specifically explained and defined to be an award which may fall foul and contravene the “*fundamental policy of Indian Law*”.

65. The distinction to be borne in mind while dealing with a challenge to a domestic award in contrast to a foreign award was also underlined with the Supreme Court taking note of the Law Commission's Report which constituted the precursor for the amendments which ultimately came to be introduced in the Act in 2015. The Supreme Court ultimately went on to record the following conclusions:—

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “*Renusagar*” understanding of this expression. This would necessarily mean that

Western Geco [ONGC v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, *Western Geco* [ONGC v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as explained in paras 28 and 29 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that *Western Geco* [ONGC v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as understood in *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], and paras 28 and 29 in particular, is now done away with.”

66. The concept of “public policy” again fell for consideration of the Supreme Court in *Vijay Karia*. While dealing firstly with the aspect of the discretion which Section 48 confers upon a Court, and which was an issue which had also been alluded to in *Cruz City*, the Supreme Court pertinently observed as under:—

“58. When the grounds for resisting enforcement of a foreign

award under Section 48 are seen, they may be classified into three groups — grounds which affect the jurisdiction of the arbitration proceedings; grounds which affect party interest alone; and grounds which go to the public policy of India, as explained by Explanation 1 to Section 48(2). Where a ground to resist enforcement is made out, by which the very jurisdiction of the Tribunal is questioned — such as the arbitration agreement itself not being valid under the law to which the parties have subjected it, or where the subject-matter of difference is not capable of settlement by arbitration under the law of India, it is obvious that there can be no discretion in these matters. Enforcement of a foreign award made without jurisdiction cannot possibly be weighed in the scales for a discretion to be exercised to enforce such award if the scales are tilted in its favour.

59. On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone, for example, that a party has been unable to present its case before the arbitrator, and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a court may well enforce a foreign award, even if such ground is made out. When it comes to the “public policy of India” ground, again, there would be no discretion in enforcing an award which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. It can thus be seen that the expression “may” in Section 48 can, depending upon the context, mean “shall” or as connoting that a residual discretion remains in the court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion is limited to the circumstances pointed out hereinabove, in which case a balancing act may be performed by the court enforcing a foreign award.”

67. The Court then went further to explain that the expression “*fundamental policy of Indian law*” must amount to a breach of some legal principle or legislation which is so basic and foundational that it cannot be ignored. It described the expression “*fundamental policy*” to mean the core values of India’s public policy and those which even though not expressly spoken of in statutes are “*time honoured*” and “*hallowed principles*”.

68. It is these basic principles which also find resonance in *Union of India v. Vedanta Ltd.*²⁹ where the following pertinent observations were rendered:—

“83.11. *The enforcement court cannot set aside a foreign award*, even if the conditions under Section 48 are made out. The power to set aside a foreign award vests only with the court at the

seat of arbitration, since the supervisory or primary jurisdiction is exercised by the curial courts at the seat of arbitration. The enforcement court may “refuse” enforcement of a foreign award, if the conditions contained in Section 48 are made out. This would be evident from the language of the section itself, which provides that enforcement of a foreign award may be “*refused*” only if the applicant furnishes proof of any of the conditions contained in Section 48 of the Act.

83.12. The opening words of Section 48 use permissive, rather than mandatory language, that enforcement “*may be*” refused. [Refer to *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1.] The use of the words “may be” indicate that even if the party against whom the award is passed, proves the existence of one or more grounds for refusal of enforcement, the court would retain a residual discretion to overrule the objections, if it finds that overall justice has been done between the parties, and may direct the enforcement of the award. [This has been eloquently stated by the Supreme Court of Hong Kong in a 1994 decision which confirmed that: ‘... the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcement court to achieve a just result in all the circumstances’. See Hong Kong, Supreme Court, 13-7-1994, *China Nanhai Oil Joint Service Corpn. v. Gee Tai Holdings Co. Ltd.*, (1995) 20 Yearbook Commercial Arbitration 671 at p. 677. See also *Westacre Investments Inc. v. Jugoimport-SDRP Holding Co. Ltd.*, 1999 APP LR 05/12, decided on 12-5-1999; *Cruz City 1 Mauritius Holdings v. Unitech Ltd.*, 2017 SCC OnLine Del 7810 : (2017) 3 Arb LR 20 : (2017) 239 DLT 649 [the petition for special leave to appeal against this decision has been dismissed by the Supreme Court vide order dated 19-1-2018 in *Unitec Ltd. v. Cruz City 1 Mauritius Holdings*, 2018 SCC OnLine SC 3619]]. This is generally done where the ground for refusal concerns a minor violation of the procedural rules applicable to the arbitration, or if the ground for refusal was not raised in the arbitration. [Hong Kong : Supreme Court of Hong Kong, High Court, 15-1-1993 (*Paklito Investment Ltd. v. Klockner East Asia*, (1994) 19 Yearbook Commercial Arbitration pp. 664-674) (Hong Kong No. 6); Supreme Court of Hong Kong, High Court, 16-12-1994 (*Nanjing Cereals, Oils & Foodstuffs Import & Export Corpn. v. Luckmate Commodities Trading Ltd.*, (1996) 21 Yearbook Commercial Arbitration pp. 542-545) (Hong Kong No. 9); British Virgin Islands, Court of Appeal, 18-6-2008 (*IPOC International Growth Fund Ltd. v. L.V. Finance Group Ltd.*, (2008) 33 Yearbook Commercial Arbitration pp. 408-432) (British Virgin Islands No. 1); United Kingdom : High Court, Queen's Bench Division (Commercial Court), 20-1-1997 (*China Agribusiness*

Development Corpn. v. Balli Trading, (1999) 24 Yearbook Commercial Arbitration pp. 732-738) (UK No. 52)] A court may also take the view that the violation is not such as to prevent enforcement of the award in international relations. [Albert Jan van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, 1981, Kluwer Law and Taxation Publishers at p. 265.]”

69. In *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd.*³⁰, the Supreme Court while dealing with enforcement actions pertinently observed that the Act which is modelled on the New York Convention must be construed and implemented bearing in mind the “pro-enforcement bias” and which stands indicted only if a party is able to show that its challenge clearly falls within the ambit of Sections 48 (1) or 48(2) of the Act. The Court deems it apposite to extract paragraph 41 of the report hereunder:—

“41. It is important to remember that the New York Convention, which our Act has adopted, has a pro-enforcement bias, and unless a party is able to show that its case comes clearly within Sections 48 (1) or 48(2), the foreign award must be enforced. Also, the grounds contained in Sections 48(1)(a) to (e) are not to be construed expansively but narrowly. Thus, in *Ssangyong Engg. & Construction Co. Ltd. v. NHA1* [*Ssangyong Engg. & Construction Co. Ltd. v. NHA1*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] [*-Ssangyong*], it was held : (SCC pp. 172-74, para 45)

“45. After referring to the New York Convention, this Court delineated the scope of enquiry of grounds under Sections 34/48 (equivalent to the grounds under Section 7 of the Foreign Awards Act, which was considered by the Court), and held : (*Renusagar case* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644], SCC pp. 671-72 & 681-82, paras 34-37 & 65-66)

‘34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (a) to (e) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the court was satisfied in respect of matters mentioned in clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (See Dicey & Morris, *The Conflict of Laws*, 11th Edn., Vol. I, p. 578.) It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of

disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (a) to (e) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) and (b) of clause (2) of Article V. *None of the grounds set out in sub-clauses (a) to (e) of clause (1) and sub-clauses (a) and (b) of clause (2) of Article V postulates a challenge to the award on merits.*

35. Albert Jan van den Berg in his treatise *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, has expressed the view:

"It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement Judge is a limited one. The control exercised by him is limited to verifying whether an objection of a the respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration." (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

"The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted." (Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2nd Edn., p. 461.)

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the

Act and does not enable a party to the said proceedings to impeach the award on merits.

* * *

65. *This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly.* In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression “public policy” covers the field not covered by the words “and the law of India” which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression “public policy” in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that “public policy” in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”

70. *Cruz City*, a decision rendered by a learned Judge of this Court,

has upon noticing the previous precedents rendered on the subject elaborately explained the concept of “*public policy*” and “*fundamental policy of Indian law*”. The Court in *Cruz City* had pertinently observed that the mere infringement of a statutory provision would not be synonymous to a contravention of fundamental policy of Indian law. It had explained the concept underlying Section 48(2)(b)(ii) of the Act to mean the “*basic and substratal rationale*” or to put it differently, values and principles which form the very bedrock of the laws of our country. *Cruz City* also noticed the 2015 amendments and which were correctly recognised to have narrowed down the scope of the “*public policy*” challenge when raised in the context of an enforcement action. It went on to significantly observe that unless a foundational principle of Indian law is found to have been contravened or violated, the enforcement action cannot be resisted. It is the aforesaid precepts on the anvil of which the submissions addressed on behalf of Educomp are liable to be evaluated.

71. All that need be additionally observed with respect to “public policy” and “fundamental policy of Indian law” is that an objection based on the aforesaid must travel beyond a mere violation of a statutory enactment or a piece of subordinate legislation. That objection must establish a patent violation of a foundational precept, an inviolable principle adopted by our courts and one which can neither be ignored nor condoned. Fundamental policy of Indian law must be a rule or a principle which forms part of the core values of our jurisprudence itself and a violation of which would be considered abhorrent and shocking to the conscience of the court. A challenge to an Award on the grounds of violation of “*public policy*” or “*fundamental policy of Indian law*” would be liable to be countenanced provided it is established that its enforcement would run contrary to well established legal tenets which brook of no exception. Public policy would thus be liable to be recognised as referring to that broad set of overarching principles which are considered inviolable and form the very soul of the legal principles which courts in India enforce and uphold. These would be the threads which hold together the fabric constituting our legal philosophy.

72. As was noticed hereinbefore, one of the principal arguments which was addressed by Ms. Trivedi was that the SPA which essentially envisaged the takeover of the affairs of a charitable society was itself illegal and would thus fall within the ambit of Section 48(2)(b)(ii) of the Act. The aforesaid submission must however be evaluated bearing in mind the following undisputed facts.

73. Admittedly, Mr. Shantanu Prakash had himself, upon infusion of funds in JRRES, inducted various members in the General Body of the society as well as on its Governing Body. The Arbitral Tribunal has in fact found that the expression “*colleagues*”, a word which was used by

Mr. Shantanu Prakash to describe those members, was a mere euphemism for affiliates/nominees of Educomp. At the time when funding was provided by ERHEL to JRRES, it appears to have followed a path laid down by Educomp itself and Raffles, the other constituent of the Joint Venture, obtaining the appointment of its nominees as members of the society as well as on its Governing Body. The infusion of funds by ERHEL also appears to have triggered the amendments which were introduced in its Articles of Association and a position of Chairman being created in 2014. It was the aforesaid amendments which saw Mr. Shantanu Prakash becoming the President of JRRES in January 2013 and Mr. Chew becoming the Chairman on 26 April 2014.

74. The 2014 amendments to the Articles of Association of JRRES also provided that the General Body of that society would comprise of sixteen individuals. Pursuant to steps which came to be taken by both Raffles and Educomp post 2014, their nominees and affiliates did in fact come to constitute the General Body of JRRES as would be evident from the following details which can be gleaned from pages 2014 - 2015 of the record of these proceedings:—

“Representatives of Raffles and Educomp

RAFFLES		EDUCOMP	
S. No.	NAME	S. No.	NAME
1.	Mr. Chew Hua Seng	1.	Mr. Shantanu Prakash
2.	Ms. Doris Chung	2.	Mr. Jagdish Prakash
3.	Mr. Lim Hock Leong Edmund	3.	Mr. Pramod Thatoi
4.	Mr. Keong Chee Yam	4.	Mr. Ashok Mehta
5.	Mr. Ho Kah Chuan Kenneth	5.	Mr. Harpreet Singh
6.	Ms. Xuan Wei Chew	6.	Ms. Soumya Kanti
7.	Ms. Gim Ean Chung	7.	Mr. Mohan Krishna Lakhamraju
8.	Mr. Han Wei Chew	8.	Dr. Bindu Rana

75. On a more fundamental level and upon a reading of the various provisions of the SRA, this Court finds no provision which may be construed as either restricting or hindering the right of a for profit entity being involved or engaged in the affairs of a society or nominating or inducting its affiliates on that not-for-profit body. Indian

law does not prohibit a for profit entity setting up a society or trust which may be entrusted with implementation of charitable or philanthropic measures. It could always be open for a for profit entity to incorporate a trust or a society for pursuing charitable objectives. In fact, the for-profit entity may well be justified in incorporating such an entity and thus ensure effective administration and implementation of philanthropic schemes by an independent entity. In any case, such a course if adopted would not fall foul of any fundamental principle of laws prevalent in India. This Court is thus of the firm view that the incorporation of such a society or trust cannot be recognised to be violative of any basic or foundational legal principle.

76. The submission of the SPA being illegal was also advocated on the ground of the SRA not contemplating foreign entities or persons becoming members of a charitable society. As was rightly contended before the Arbitral Tribunal, there does not appear to be any express prohibition in the SRA which may disqualify foreign nationals from acting as members of a society. The Court was also not shown any provision existing in any other statute which may have tended to frown upon the involvement of foreign nationals in societies or trusts. Quite apart from there being no statutory bar, Educomp has woefully failed to establish how the involvement of a foreign national in the affairs of a charitable society would be contrary to public policy. The Tribunal also appears to be justified in refusing to place any credence on the Expert Group Report which had suggested certain amendments to be introduced in the SRA. This, as the Arbitral Tribunal correctly observed, remained merely a recommendation and, in any case, could not have been accepted as an iteration of the fundamental policy of Indian law. The recommendations of the Expert Group were in any case in favour of representation of foreign nationals in societies and thus yet another indicator of the involvement of such individuals not being abhorrent to public policy.

77. The argument of a foreign entity obtaining membership of JRRES was equally meritless since no corporate entity came to become a member of that society. The induction of a corporate entity in any case would have been contrary to the Articles of Association of JRRES itself. In fact, this Court is of the opinion that in light of the above, the question of whether the SRA sanctions incorporated entities becoming members of a society did not even arise. In any case and in the absence of any statutory injunct embodied in the SRA and which may have disqualified foreign nationals from being members of a society, the Court finds itself unable to sustain the submissions addressed on this score.

78. It must also be observed that the exclusion of foreign nationals from membership of a society also cannot possibly be recognised as

being part of the core or fundamental legal principles prevalent in India. It becomes pertinent to note that various statutes in India exclude or restrict the extension of protection and rights of foreign nationals in specific terms. For instance, the Army Act, 1950 places a mandatory citizenship requirement. A similar restriction is found in Section 16 of the Representation of Peoples Act, 1951, Rule 12 of the Board of Trust Regulations and Rule 17 of the Rules, both framed under the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. Similar restrictions are placed under the Foreigners (Protected Areas) Order, 1958. Section 24 of the Advocates Act, 1961 while not completely ousting foreign nationals from seeking enrolment as an advocate, adopts a reciprocity principle to be adhered to by nations. In fact, foreign nationals are also not totally deprived of some of the constitutional protections which appear in Part III of the Constitution and more particularly Articles 14 and 21 thereof. Those two Articles are distinct from Articles 15, 16, 18, 19, 20, 51A, 58, 84, 102, 157, 191 and 217 all of which speak of citizens. What the Court seeks to emphasise is that wherever statutes or the Legislature has sought to restrict the coverage of legal provisions to citizens only, it has done so in explicit terms. The SRA, on the other hand, does not voice an intent to deprive a foreign national from becoming a member of a charitable society. The aforesaid discussion clearly leads the Court to conclude that the argument of the Award being violative of fundamental policy of Indian law on that score must fail.

79. The Court finds itself equally unable to accept the resistance to the enforcement action which rests on the “*players in the shadows*” doctrine as was advocated. Regard must be had to the fact that the management and administration of a charitable society is regulated by the various provisions of the SRA. Notwithstanding the members thereof being nominees or affiliates of a corporate entity, they remain bound to administer the affairs of the society strictly in accordance with the SRA. This is evident from the SRA clearly requiring societies which are registered thereunder to be those which are engaged in literary, scientific or charitable purposes. The members of JRRES notwithstanding them being nominees or affiliates of Raffles and Educomp are thus bound to conduct the affairs of the society in accordance with the principles underlying the SRA and would be obliged in law to administer the affairs of the society in accordance with its avowed charitable objectives. What needs to be emphasised is that while members may have owed their initial nomination in the society to their affiliation with either Raffles or Educomp, they as well as JRRES would still be bound by the MoA and the charitable objectives enshrined therein.

80. Additionally, one cannot lose sight of the fact that the Noida College is engaged in technical education and thus bound by both the Regulations framed by the AICTE as well as the various statutory enactments prevalent in the State of Uttar Pradesh. The 2012 Regulations make appropriate provisions dealing with the regulation of fee that may be charged by technical institutions as well as the manner in which their assets may be utilised. Even with respect to a situation where a technical institution is established by a Section 25 company, various restraints stand imposed as would be evident from a reading of Clause 4.35 thereof. These aspects are then reiterated in the AICTE Handbook. What needs to be emphasised is that the JRRES though manned by the affiliates of Raffles and Educomp would still be bound to ensure that the technical institution conducts its affairs strictly in accordance with the statutory regime constructed by the AICTE. This has been rightly noticed by the Tribunal to be an adequate mitigating factor and safeguard.

81. The Court further notes that the field of education has itself undergone a paradigm shift in the past few decades. While it is true that an educational institution cannot indulge in commercialisation or profiteering, its efforts to generate a reasonable surplus and the utilisation thereof for augmenting the quality of education and the institution itself is one which is no longer frowned upon. The Court deems it apposite to extract the following passages from *Islamic Academy of Education v. State of Karnataka*³¹ to illustrate and drive home the aforesaid point:—

“Question 1

7. So far as the first question is concerned, in our view the majority judgment is very clear. There can be no fixing of a rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. *They must also be able to generate surplus which must be used for the betterment and growth of that educational institution.* In paragraph 56 of the judgment it has been categorically laid down that the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the Government. Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc. Of course there can be no profiteering and capitation fees cannot be charged. It thus needs to be emphasized that as per the majority

judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise. As, at present, there are statutes/regulations which govern the fixation of fees and as this Court has not yet considered the validity of those statutes/regulations, we direct that in order to give effect to the judgment in *T.M.A. Pai case* [(2002) 8 SCC 481] the respective State Governments/concerned authority shall set up, in each State, a committee headed by a retired High Court Judge who shall be nominated by the Chief Justice of that State. The other member, who shall be nominated by the Judge, should be a Chartered Accountant of repute. A representative of the Medical Council of India (in short "MCI") or the All India Council for Technical Education (in short "AICTE"), depending on the type of institution, shall also be a member. The Secretary of the State Government in charge of Medical Education or Technical Education, as the case may be, shall be a member and Secretary of the Committee. The Committee should be free to nominate/coopt another independent person of repute, so that the total number of members of the Committee shall not exceed five. Each educational institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of accounts must also be produced before the Committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations, the same would amount to charging of capitation fee. The Governments/appropriate authorities should consider framing appropriate regulations, if not already framed, whereunder if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalised and also face the prospect of losing its recognition/affiliation.

82. The aforesaid precept finds resonance in the following passages in *P.A. Inamdar v. State of Maharashtra*³²:—

“147. In our considered view, on the basis of judgment in *Pai Foundation* [(2002) 8 SCC 481] and various previous judgments of this Court which have been taken into consideration in that case, the scheme evolved out of setting up the two Committees for regulating admissions and determining fee structure by the judgment in *Islamic Academy* [(2003) 6 SCC 697] cannot be faulted either on the ground of alleged infringement of Article 19(1)(g) in case of unaided professional educational institutions of both categories and Article 19(1)(g) read with Article 30 in case of unaided professional institutions of minorities.

148. A fortiori, we do not see any impediment to the constitution of the Committees as a stopgap or ad hoc arrangement made in exercise of the power conferred on this Court by Article 142 of the Constitution until a suitable legislation or regulation framed by the State steps in. Such Committees cannot be equated with Unni Krishnan [(1993) 1 SCC 645] Committees which were supposed to be permanent in nature.

149. However, we would like to sound a note of caution to such Committees. The learned counsel appearing for the petitioners have severely criticised the functioning of some of the Committees so constituted. It was pointed out by citing concrete examples that some of the Committees have indulged in assuming such powers and performing such functions as were never given or intended to be given to them by *Islamic Academy* [(2003) 6 SCC 697]. Certain decisions of some of the Committees were subjected to serious criticism by pointing out that the fee structure approved by them was abysmally low which has rendered the functioning of the institutions almost impossible or made the institutions run into losses. In some of the institutions, the teachers have left their jobs and migrated to other institutions as it was not possible for the management to retain talented and highly qualified teachers against the salary permitted by the Committees. Retired High Court Judges heading the Committees are assisted by experts in accounts and management. They also have the benefit of hearing the contending parties. We expect the Committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with due regard for realities. They should refrain from generalising fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

150. We make it clear that in case of any individual institution, if any of the Committees is found to have exceeded its powers by unduly interfering in the administrative and financial matters of the

unaided private professional institutions, the decision of the Committee being quasi-judicial in nature, would always be subject to judicial review.

151 [Ed. : Paras 151 and 153 corrected vide letter dated 5-9-2005.]. On Question 4, our conclusion, therefore, is that the judgment in *Islamic Academy* [(2003) 6 SCC 697] insofar as it evolves the scheme of the two Committees, one each for admission and fee structure, does not go beyond the law laid down in *Pai Foundation* [(2002) 8 SCC 481] and earlier decisions of this Court, which have been approved in that case. The challenge to setting up of the two Committees in accordance with the decision in *Islamic Academy* [(2003) 6 SCC 697] therefore, fails. However, the observation by way of clarification, contained in the latter part of para 19 of *Islamic Academy* [(2003) 6 SCC 697] which speaks of quota and fixation of percentage by the State Government is rendered redundant and must go in view of what has been already held by us in the earlier part of this judgment while dealing with Question 1.

83. In a more recent decision rendered by the Supreme Court in *Indian School v. State of Rajasthan*³³ the following pertinent observations came to be made:—

“20. Indeed, a Constitution Bench of this Court in *T.M.A. Pai Foundation* [*T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481, paras 60 and 61 : 2 SCEC 1] has expounded that the private unaided school management must have absolute autonomy to determine the school fees. But at the same time the consistent view of this Court has been restated and enunciated by the Constitution Bench in *Modern Dental College & Research Centre* [*Modern Dental College & Research Centre v. State of M.P.*, (2016) 7 SCC 353 : 7 SCEC 1 (5-Judge Bench)] in para 75 of the reported decision. In that, though the fee can be fixed by the educational institutions and it may vary from institution to institution depending upon the quality of education provided by each of such institutions, commercialisation is not permissible; and in order to ensure that the educational institutions are not indulging in commercialisation and exploitation, the Government is equipped with necessary powers to take regulatory measures and to ensure that the private unaided schools keep playing vital and pivotal role to spread education and not to make money. The Court further noted that when it comes to the notice of the Government that the institution was charging fee or other charges which are excessive, it has complete authority coupled with its duty to issue directions to such an institution to reduce the same so as to avoid profiteering and commercialisation.

21. In para 76 of the same decision in *Modern Dental College &*

Research Centre [Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353 : 7 SCEC 1 (5-Judge Bench)], the Court then proceeded to consider the next question as to how a regulatory framework for ensuring that no excessive fee is charged by the educational institutions, can be put in place. For that, the Court adverted to the decision in *T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, paras 60 and 61 : 2 SCEC 1]*, *Islamic Academy of Education [Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697 : 2 SCEC 339 (5-Judge Bench)]*, *Modern School [Modern School v. Union of India, (2004) 5 SCC 583 : 2 SCEC 577 (3-Judge Bench)]* and *P.A. Inamdar [P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537 : 2 SCEC 745 (7-Judge Bench)]* and noted that primary education is a fundamental right, but it was not an absolute right as private schools cannot be allowed to receive capitation fee or indulge in profiteering in the guise of autonomy to determine the school fees itself. The Court plainly noted that every school management of private unaided school is free to devise its own fee structure, but the same can be regulated by the Government in the interests of general public for preventing profiteering and/or charging of capitation fee. Further, fixation of fees needs to be regulated and controlled at the initial stage itself.

22. the Constitution Bench in *Modern Dental College and Research Centre [Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353 : 7 SCEC 1 (5-Judge Bench)]* noted with approval the exposition in *Assn. of Private Dental & Medical Colleges v. State of M.P. [Assn. of Private Dental & Medical Colleges v. State of M.P., 2009 SCC OnLine MP 760]*, which reads thus : (*Assn. of Private Dental & Medical Colleges case [Assn. of Private Dental & Medical Colleges v. State of M.P., 2009 SCC OnLine MP 760]*, SCC OnLine MP para 42)

“42. We are of the view that Sections 4(1) and 4(8) of the 2007 Act have to be read with Section 9(1) of the 2007 Act, which deals with factors which have to be taken into consideration by the Committee while determining the fee to be charged by a private unaided professional educational institution. A reading of sub-section (1) of Section 9 of the 2007 Act would show that the location of private unaided professional educational institution, the nature of the professional course, the cost of land and building, the available infrastructure, teaching, non-teaching staff and equipment, the expenditure on administration and maintenance, a reasonable surplus required for growth and development of the professional institution and any other relevant factor, have to be taken into consideration by the Committee

while determining the fees to be charged by a private unaided professional educational institution. Thus, all the cost components of the particular private unaided professional educational institution as well as the reasonable surplus required for growth and development of the institution and all other factors relevant for imparting professional education have to be considered by the Committee while determining the fee. Section 4(8) of the 2007 Act further provides that the Committee may require a private aided or unaided professional educational institution to furnish information that may be necessary for enabling the Committee to determine the fees that may be charged by the institution in respect of each professional course. Each professional educational institution, therefore, can furnish information with regard to the fees that it proposes to charge from the candidates seeking admission taking into account all the cost components, the reasonable surplus required for growth and development and other factors relevant to impart professional education as mentioned in Section 9(1) of the 2007 Act and the function of the Committee is only to find out, after giving due opportunity of being heard to the institution as provided in Section 9(2) of the 2007 Act whether the fees proposed by the institution to be charged to the student are based on the factors mentioned in Section 9(1) of the 2007 Act and did not amount to profiteering and commercialisation of the education. The word “determination” has been defined in *Black’s Law Dictionary*, Eighth Edn., to mean a final decision by the Court or an administrative agency. The Committee, therefore, while determining the fee only gives the final approval to the proposed fee to be charged after being satisfied that it was based on the factors mentioned in Section 9(1) of the 2007 Act and there was no profiteering or commercialisation of education. The expression “fixation of fees” in Section 4(1) of the 2007 Act means that the fee to be charged from candidates seeking admission in the private professional educational institution did not vary from student to student and also remained fixed for a certain period as mentioned in Section 4(8) of the 2007 Act. As has been held by the Supreme Court in *Peerless General Finance & Investment Co. Ltd. v. RBI* [*Peerless General Finance & Investment Co. Ltd. v. RBI*, (1992) 2 SCC 343], the Court has to examine the substance of the provisions of the law to find out whether provisions of the law impose reasonable restrictions in the interest of the general public. The provisions in Sections 4(1), 4(8) and 9 of the 2007 Act in substance empower the Committee to be only satisfied that the fee proposed by a private professional educational institution did not amount to

profiteering or commercialisation of education and was based on the factors mentioned in Section 9(1) of the 2007 Act. The provisions of the 2007 Act do not therefore, violate the right of private professional educational institution to charge its own fee.”

23. After having quoted the above exposition with approval in para 81, the Court in *Modern Dental College and Research Centre [Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353 : 7 SCEC 1 (5-Judge Bench)]* then proceeded to examine the need for a regulatory mechanism. It noted that the regulatory measures are felt necessary to promote basic well-being for individuals in need. In paras 90 to 92 in *Modern Dental College & Research Centre [Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353 : 7 SCEC 1 (5-Judge Bench)]*, this Court noted as follows : (SCC pp. 426-27)

“90. Thus, it is felt that in any welfare economy, even for private industries, there is a need for regulatory body and such a regulatory framework for education sector becomes all the more necessary. It would be more so when, unlike other industries, commercialisation of education is not permitted as mandated by the Constitution of India, backed by various judgments of this Court to the effect that profiteering in the education is to be avoided.

91. Thus, when there can be regulators which can fix the charges for telecom companies in respect of various services that such companies provide to the consumers; when regulators can fix the premium and other charges which the insurance companies are supposed to receive from the persons who are insured; when regulators can fix the rates at which the producer of electricity is to supply the electricity to the distributors; we fail to understand as to why there cannot be a regulatory mechanism when it comes to education which is not treated as purely economic activity but welfare activity aimed at achieving more egalitarian and prosperous society by empowering the people of this country by educating them. In the field of education, therefore, this constitutional goal remains pivotal which makes it distinct and special in contradistinction with other economic activities as the purpose of education is to bring about social transformation and thereby a better society as it aims at creating better human resource which would contribute to the socio-economic and political upliftment of the nation. The concept of welfare of the society would apply more vigorously in the field of education. Even otherwise, for economist, education as an economic activity, favourably compared to those of other economic concerns like agriculture and industry, has its own

inputs and outputs; and is thus analysed in terms of the basic economic tools like the laws of return, principle of equimarginal utility and the public finance. Guided by these principles, the State is supposed to invest in education up to a point where the socio-economic returns to education equal to those from other State expenditures, whereas the individual is guided in his decision to pay for a type of education by the possibility of returns accruable to him. All these considerations make out a case for setting up of a stable regulatory mechanism.

92. In this sense, when imparting of quality education to cross-section of the society, particularly, the weaker section and when such private educational institutions are to rub shoulders with the State managed educational institution to meet the challenge of the implementing ambitious constitutional promises, the matter is to be examined in a different hue. It is this spirit which we have kept in mind while balancing the right of these educational institutions given to them under Article 19(1)(g) on the one hand and reasonableness of the restrictions which have been imposed by the impugned legislation. The right to admission or right to fix the fee guaranteed to these appellants is not taken away completely, as feared. *T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, paras 60 and 61 : 2 SCEC 1]* gives autonomy to such institutions which remains intact. Holding of CET under the control of the State does not impinge on this autonomy. Admission is still in the hands of these institutions. Once it is even conceded by the appellants that in admission of students “triple test” is to be met, the impugned legislation aims at that. After all, the sole purpose of holding CET is to adjudge merit and to ensure that admissions which are done by the educational institutions, are strictly on merit. This is again to ensure larger public interest. It is beyond comprehension that merely by assuming the power to hold CET, fundamental right of the appellants to admit the students is taken away. Likewise, when it comes to fixation of fee, as already dealt with in detail, the main purpose is that the State acts as a regulator and satisfies itself that the fee which is proposed by the educational institution does not have the element of profiteering and also that no capitation fee, etc. is charged. In fact, this dual function of regulatory nature is going to advance the public interest inasmuch as those students who are otherwise meritorious but are not in a position to meet unreasonable demands of capitation fee, etc. are not deprived of getting admissions. The impugned provisions, therefore, are aimed at seeking laudable objectives in larger public interest. Law is not static, it has to change with changing

times and changing social/societal conditions.”

34. At the end, what is relevant is that the institution is entitled to fix its own fee structure, which may include reasonable revenue surplus for the purpose of development of education and expansion of the institution, as long as it does not entail in profiteering and commercialisation. Whether fee structure evolved by the school concerned results in profiteering or otherwise is a matter which eventually would become final with the determination/adjudication by the statutory regulatory committees constituted under Sections 7 and 10 of the 2016 Act, namely, Divisional Fee Regulatory Committee (DFRC) and Revision Committee respectively, as the case may be. That adjudication, however, becomes necessary only if SLFC were to disapprove the proposal of the school management regarding fee structure determined by the school. Whereas, if SLFC were to accept the proposal of the school management regarding fee structure as it is, that would be the fees under the 2016 Act for the relevant period and then there would be no need for the DFRC to adjudicate upon the fixation of fee in the school concerned.

84. The aforesaid decisions also notice the origin of the Constitution of statutory committees which oversee the fixation of fee that may be charged by educational institutions. Insofar as the State of Uttar Pradesh is concerned, the fee that may be charged by educational institutions is regulated by the Uttar Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006. Section 4 of the said enactment which provides for constitution of a committee reads as follows:—

“THE COMMITTEE

Composition, disqualification and functions

4. (1) There shall be a Committee for admission and fee regulation to be constituted in such manner as may be prescribed. The Committee shall be presided over by a person who is or who has been a Senior Administrative Officer of the State or Vice-Chancellor of a Central University or a State University or a deemed to be University; who shall be called the Chairman of the Committee and shall include two other Members having experience in matters of finance or administration.

(2) The State Government shall appoint the Chairman and the Members of the Committee mentioned in sub-section(1)

(3) The term of the Chairman and every Member of the Committee shall be three years from the date of its notification; and, in case of any vacancy arising earlier, for any reason, the State Government shall fill such vacancy for the remainder of the term.

(4) No act or proceedings of the Committee shall be deemed to be

invalid by reason merely of any vacancy or any defect in the constitution of the Committee.

(5) No person who is associated with a private aided or unaided institution shall be eligible for being a Member of the Committee.

(6) The Chairman or any Member of the Committee shall be removed, if he performs any act, which in the opinion of the State Government is unbecoming of Chairman or Member of the Committee.

Provided that, no such Chairman or any Member shall be removed by the state Government without giving him an opportunity of being heard.

(7) The Committee may frame its own procedure in such manner as may be prescribed.

(8) The Committee may require a private aided or unaided professional educational institution or, a deemed to be University or a private University to furnish, by a prescribed date, information as may be necessary for enabling the Committee to determine the fee as prescribed under section 10 of this Act that may be fixed by the institution in respect of each professional course, and the fee so determined shall be valid for such period as notified by the State Government.

(9) The State Government or the Committee may, if satisfied that a professional educational institution has violated any provisions of this Act or is charging more fee, than as determined under section 10 of this Act there it will recommend to the appropriate statutory body for the withdrawal of the affiliation or recognition of such institution.”

85. The subject of determination of fee to be charged by private aided or unaided professional educational institutions is provided for in Section 10 which reads thus:—

“FIXATION OF FEE

Factors

10.(1) The Committee shall determine, the fee to be charged by a private aided or unaided professional educational institution having regard to:—

- (i) the nature of the professional course,
- (ii) the available infrastructure,
- (iii) a reasonable surplus required for growth and development of the professional institution,
- (iv) the expenditure on administration and maintenance,
- (v) the expenditure on teaching and non teaching employees of the institution,
- (vi) any other relevant factor.

(2) The Committee, shall give the institution an opportunity of being heard before fixing any fee:—

Provided that no such fee, as may be fixed by the Committee, shall amount to profiteering or commercialization of education.

86. The fee that is liable to be charged by pre-primary, primary, upper primary schools, high schools and intermediate colleges is also duly regulated in that State in terms of the Uttar Pradesh Self-Financed Independent Schools (Fee Regulation) Act, 2018. The said statute while dealing with the subject of fee that may be charged by a recognised school makes the following provisions:—

“Fee and fund

3. (1) A recognised School shall determine its fee structure under sub-sections (1) and (2) of section 4 for different classes/grades/school levels commensurate to, *inter alia*, meeting its operational expenses, providing for augmentation of facilities and expansion of infrastructure and for providing facilities to the students, to generate reasonable surplus to be utilised for development of educational purposes including establishment of a new branch or a new school under the management of the same eligible educational entity;

(2) The procedure for collecting fees in a school shall be open, transparent and accountable;

(3) The fees to be charged shall be classified as:—

(a) Possible Fee Components : - The school may fix any combination of one or all of the following fee components:—

(i) Prospectus and Registration fee : - It shall be payable only at the time of registration by the student;

(ii) Admission fee : - At the first time of new admission to the school;

(iii) Examination fee : - shall be payable for examinations;

(iv) Composite Annual Fee : - Single head annual recurring fee payable each year:

Provided that, upon commencement of this Act, any recognised school charging recurring fee under different heads, shall, from the ensuing academic year, be required to club all such heads into a single head recurring fee as provided.

(b) Optional Fee Components : - Various fee payable for optional activities and facilities provided by the school, including:—

(i) transport;

(ii) boarding;

(iii) mess or dining;

(iv) excursions;

(v) any other similar activity:

(c) Refundable Charge-Security money/caution money shall be returned to the students on clearing all applicable dues at the time of leaving the school by the student, provided that the amount of such Security/Caution Money shall not be more than fifty percent of composite annual fee. Security money/caution money will be refunded with interest for the duration of the deposit with the school, at prevalent rate of State Bank of India saving account. Security money/caution money shall be refunded by the school within thirty days from the issuing date of transfer certificate through e-payment.

(4) Head of the school of every recognised school shall, before the commencement of each academic year, file with the appropriate authority, a full statement of the fees to be levied by such school during the ensuing academic year;

(5) Such school shall upload the statement of fee on its website sixty days prior to commencement of each academic year, and also publish on notice-board. However in the present year it shall be within thirty days of coming into force of this Act;

(6) While publishing the statement of fees, the school shall also specify whether the payment is to be made in monthly or quarterly or half-yearly instalments. Provided that no school shall solely provide that the fee be paid on annual basis;

(7) No school shall, except with the prior approval of the appropriate authority, charge, during the academic year, any fee in excess of the fee intimated to the appropriate authority under subsection (4);

(8) Every recognised school shall ensure that no capitation fee is charged;

(9) Receipt shall be issued for every fee or charge levied on the student;

(10) No student shall be compelled to purchase books, shoes, socks and uniform etc. from a particular shop:

(11) School dress shall not be changed by school within five consecutive academic years. If change is required, it can be changed with proper justification with prior approval of District

Fixation of Fee

4. (1) Permitted fee increase for existing students-A recognised school may revise its fee annually for its existing students by itself for each grade/class/level of school equivalent to average percentage per capita increase of monthly salary of teaching staff of previous year, but the fee increase shall not exceed latest available yearly percentage increase in consumer price index + five percent of the

fee realized from the student;

*Explanation:—*At the time of admission, irrespective of the grade/class in which a student is entering the school, the school shall provide to the guardian, the complete fee structure for all grade/class upto grade/class XII applicable to new students for that particular year. This fee structure shall become the base for calculating subsequent annual permitted fee increase on compounding basis for each grade/class to determine the fee applicable to the students for future grade/class:

Provided that, in case of implementation of the pay commission recommendation in any School, in that year the term “but the fee increase shall not exceed latest available yearly percentage increase in consumer price index+five percent of the fee realised from the students” shall not apply. When pay commission recommendation has been implemented in the school, that year, school may revise its fee annually for its existing students by itself for each grade/class/level of school equivalent to average percentage per capita increase of monthly salary of teaching staff of previous year. This shall be applied from year 2018-2019:

In case of the implementation of levy of any new cess, it may be charged with proper justification with prior approval of District Fee Regulatory Committee upto the level of impact of that cess:

For the previously admitted students, computation of Permitted Fee Increase for the first year 2018-2019 in accordance with subsection (1) shall be calculated taking fee structure of 2015-2016 as the base year, i.e. taking the fee structure for the year 2015-2016 the fee structure for the year 2018-2019 shall be computed as per the provision of sub-section (1). The fee to be fixed for year 2018-2019 shall be the lower of the fee computed taking base year 2015-2016 and computations of fee based on taking 2017-2018 as base year and calculated as per provision of sub-section (1):

(2) Permitted fee fixation for new student-The school shall be free to determine its fee for the new students for any class/grade/level seeking fresh admissions, in a particular academic year subject to guidelines, if any, notified by the Government. Increase in fee for subsequent years for these students shall be in accordance with sub-section (1)”

87. The aforesaid enactment also contemplates the constitution of District Fee Regulatory Committees in Section 8 which reads as under:

— “District Fee Regulatory Committee, its constitution functions and power

8. (1) There shall be constituted in every district of the State a District Fee District Fee Regulatory Committee consisting of:—

- (a) the District Magistrate-Chairperson
- (b) a chartered accountant to be nominated by the District Magistrate-Member
- (c) an engineer, not below the rank of Executive Engineer of P.W.D. nominated by the District Magistrate. -Member (ex-officio)
- (d) a senior officer of State Finance and Accounts nominated by the District Magistrate. -Member (ex-officio)
- (e) a parent of Parent Teachers' Association of a School situated in the district nominated by the District Magistrate. -Member
- (f) an eminent principal/manager/administrator of a self-financed school, nominated by the District Magistrate. -Member
- (g) the District Inspector of School. -Member Secretary (ex-officio)

(2) The jurisdiction of the District Fee Regulatory Committee shall be at the level of educational entity, situated in respective district.

(3) The term of office of members mentioned in clauses (b), (e) and (f) of sub-section (1) of the District Fee Regulatory Committee shall be two years from the date of their nomination. In case of vacancy of a member arising earlier for any reason, such vacancy shall be filled for the remaining period of the term of such member. The removal of the nominated member shall be in such manner as may be prescribed;

(4) The District Fee Regulatory Committee shall have power to:—

- (a) take decisions on proposals received from the management committee regarding the proposed fee increase beyond the permitted fee increase under sub-section (1) of section 4;
- (b) hear complaint of a student or guardian or parent teacher association of such School whose complaint remains unheard by the Head of the School within fifteen working days under this Act:—
 - (i) made for fee being charged in excess of the fee intimated to the appropriate authority under section-4;
 - (ii) made for capitation fee being charged;
 - (iii) made for revision of fee during ensuing academic year, and
 - (iv) made for increase in fee more than the permitted fee increase without obtaining approval of the appropriate authority;
- (v) made for compulsion to purchase books, shoes, socks and uniform etc. from a particular shop:

- (vi) change of school dress within five years, without prior approval of District fee regulatory committee;
- (vii) made for not making disclosure as provided under section-7;
- (viii) made for non refunding of security money/caution money after violation of provision made in clause (c) of sub-section-3 of section-3:
- (ix) made for violation of section-6.

(5) The procedure to be followed by the District Fee Regulatory Committee shall be such as may be prescribed;

(6) For the purpose of making any inquiry under this Act, the District Fee Regulatory Committee shall have powers of a civil court and appellate court under the Civil Procedure Code, 1908 (Act no. 5 of 1908) while trying a suit, in respect of the following matters, namely:—

- (a) the summoning and enforcing the attendance of any witness and examining him on oath;
- (b) the discovery and production of any document
- (c) receiving of evidence on affidavits; and
- (d) the issue of commission for the examination of the witness.

(7) The quorum of a meeting of the District Fee Regulatory Committee shall be fifty percent of the members of its total strength of members and the Chairman. No order shall be passed by the District Fee Regulatory Committee unless there is a quorum;

(8) Every recognised school, which proposes to increase its fee beyond the permitted fee increase shall, at least three months before the commencement of the academic session, submit a proposal containing the details of the proposed fee with appropriate documents, justifying the need for such increase to the District Fee Regulatory Committee;.

(9) The District Fee Regulatory Committee shall, upon considering the proposal and the reasons given by the recognised school, accept or reject the proposal or prescribe such percentage increase in fees as it may deem fit, not being less than the permitted fee increase under section-4. Such order shall be in writing and be given to the recognised school within a period of ninety days of receipt of the proposal. The order passed by the District Fee Regulatory Committee shall be binding on the recognised school for the academic year for which such proposed fee increase is sought.

(10) On receipt of complaint, if any, from a student or guardians or parents teacher association, the District Fee Regulatory Committee, after making due inquiry and after being satisfied, may impose penalties in the manner as follows:—

- (a) in case of contravention of the provisions of this Act for first time, may impose financial punishment upto Rs. one lakh, with refunding of excess fee levied, from a student to the notified fee;
- (b) contravention of the provisions of this Act for second time, may impose financial punishment of Rs. five Lakh, with refunding of excess fee levied;
- (c) contravention of the provisions of this Act for third time, may recommend for withdrawal of recognition/affiliation to concerned Board, in addition to the withdrawal of permission of developmental fund for a certain period as may be decided by it.

(11) Where the recognised school or any person is aggrieved by the decision of the District Fee Regulatory Committee, it may, within thirty days from the date of such decision, prefer an appeal, in such manner as may be prescribed to the State Self Finance Independent School Appellate Authority referred to in section-9.”

88. The aforesaid statute also creates an Appellate Authority in terms of Section 9 which is reproduced hereinbelow:—

“State Self Finance Independent School Appellate Authority

9. (1) There shall be a State Self Finance Independent School Appellate Authority.

(2) An Appellate Authority, provided in section-11 of the Uttar Pradesh Private Professional Educational Institutes (Regulation of Admission and Fixation of Fee) Act, 2006, shall function as State Self Finance Independent School Appellate Authority for the purpose of this Act unless a Separate Authority is constituted by the Government by notification in the Gazette;

(3) The Appellate Authority shall have all powers of civil court as well as appellate court provided under the Civil Procedure Code, 1908 (Act no. 5 of 1908) while hearing appeal. The decision passed by the State Self Finance Independent School Appellate Authority shall be final.”

89. The opening up of the educational sector in the country also formed subject matter of consideration and debate in the recent past. In fact, the National Education Policy 2020³⁴ while dealing with the subject of “Internationalisation” provides as under:—

“Internationalization

12.7. The various initiatives mentioned above will also help in having larger numbers of international students studying in India, and provide greater mobility to students in India who may wish to visit, study at, transfer credits to, or carry out research at institutions abroad, and vice versa. Courses and programmes in

subjects, such as Indology, Indian languages, AYUSH systems of medicine, yoga, arts, music, history, culture, and modern India, internationally relevant curricula in the sciences, social sciences, and beyond, meaningful opportunities for social engagement, quality residential facilities and on-campus support, etc. will be fostered to attain this goal of global quality standards, attract greater numbers of international students, and achieve the goal of 'internationalization at home'.

12.8. India will be promoted as a global study destination providing premium education at affordable posts thereby helping to restore its role as a Vishwa Guru. An International Students Office at each HEI hosting foreign students will be set up to coordinate all matters relating to welcoming and supporting students arriving from abroad. Research/teaching collaborations and faculty/student exchanges with high-quality foreign institutions will be facilitated, and relevant mutually beneficial MOUs with foreign countries will be signed. High performing Indian universities will be encouraged to set up campuses in other countries, and similarly, selected universities e.g., those from among the top 100 universities in the world will be facilitated to operate in India. A legislative framework facilitating such entry will be put in place, and such universities will be given special dispensation regarding regulatory, governance, and content norms on par with other autonomous institutions of India. Furthermore, research collaboration and student exchanges between Indian institutions and global institutions will be promoted through special efforts. Credits acquired in foreign universities will be permitted, where appropriate as per the requirements of each HEI, to be counted for the award of a degree.

90. While emphasising the need to curb commercialisation of education, even the NEP 2020 speaks of surpluses which may be legitimately generated by institutions to be reinvested in the educational sector. This is evident from the following passages of the policy:—

“Curbing Commercialization of Education

18.12. Multiple mechanisms with checks and balances will combat and stop the commercialization of higher education. This will be a key priority of the regulatory system. All education institutions will be held to similar standards of audit and disclosure as a 'not for profit' entity. Surpluses, if any, will be reinvested in the educational sector. There will be transparent public disclosure of all these financial matters with recourse to grievance-handling mechanisms to the general public. The accreditation system developed by NAC will provide a complementary check on this system, and NHERC will consider this as one of the key dimensions of its regulatory objective.

18.13. All HEIs public and private - shall be treated on par within this regulatory regime. The regulatory regime shall encourage private philanthropic efforts in education. There will be common national guidelines for all legislative Acts that will form private HEIs. These common minimal guidelines will enable all such Acts to establish private HEIS, thus enabling common standards for private and public HEIS. These common guidelines will cover Good Governance, Financial Stability & Security, Educational Outcomes, and Transparency of Disclosures.

18.14. Private HEIs having a philanthropic and public-spirited intent will be encouraged through a progressive regime of fees determination. Transparent mechanisms for fixing of fees with an upper limit, for different types of institutions depending on their accreditation, will be developed so that individual institutions are not adversely affected. This will empower private HEIS to set fees for their programmes independently, though within the laid-out norms and the broad applicable regulatory mechanism. Private HEIs will be encouraged to offer freeships and scholarships in significant numbers to their students. All fees and charges set by private HEIs will be transparently and fully disclosed, and there shall be no arbitrary increases in these fees/charges during the period of enrolment of any student. This fee determining mechanism will ensure reasonable recovery of cost while ensuring that HEIS discharge their social obligations.”

91. In line with the NEP 2020 and in the present year itself the Union Government published a Press Note expressing its intent to create India as a Global Study Destination. The aforesaid Press Note dated 02 August 2022 is reproduced hereinbelow:—

“Internationalisation of Higher Education

Posted On : 08 AUG 2022 4 : 57PM by PIB Delhi

To promote India as global study destination and Internationalisation NEP 2020 stipulates various measures, which inter alia includes facilitating research/teaching collaborations and faculty/student exchange with high-quality foreign HEI and signing of relevant mutually beneficial MOUs with foreign countries; encouraging high performing Indian universities to set up campuses in other countries, selected universities e.g., those from among the top 100 universities in the world will be facilitated to operate in India; setting up of International Student Office at each HEI for welcoming and supporting students arriving from abroad; counting credits acquired in foreign universities, wherever appropriate as per requirement for each HEI; and courses and programmes in subjects, such as Indology, Indian Languages, AYUSH systems of medicines, voaa. arts etc.

In line with the recommendations of National Education Policy (NEP), 2020, several measures have been initiated to strengthen Internationalization of the Higher Education, such as:

- i. Guidelines on Internationalization of Higher Education were notified by UGC in July, 2021 that includes provisions like setting up of Office for International Affairs and Alumni Connect Cell in the campus of Universities hosting foreign students.
- ii. 179 Universities have established Office for International Affairs and 158 Universities have set up Alumni Connect Cells.
- iii. In order to foster academic collaboration between Indian HEIs and foreign HEIs, "University Grants Commission (Academic Collaboration between Indian and Foreign Higher Educational Institutions to offer Twinning, Joint Degree and Dual Degree Programmes) Regulations, 2022" have been notified on 2nd May, 2022.
- iv. World-class foreign universities and institutions will be allowed in the GIFT City, Gujarat to offer courses in Financial Management, FinTech, Science, Technology, Engineering and Mathematics free from domestic regulations, except those by International Financial Services Centres Authority (IFSCA) to facilitate availability of high-end human resources for financial services and technology.
- v. UGC Institutions of Eminence Deemed to be Universities Regulations have been amended to allow Institutions of Eminence to set up Off-Shore campuses. The amendment to existing UGC institutions of Eminence Regulations delineates terms, conditions and approval process for establishment of Off-Shore campus by institutions of eminence (IoEs) deemed to be universities.

The information was given by the Minister of State for Education, Dr. Subhas Sarkar in a written reply in the Lok Sabha today."

92. The said Press Note was preceded by the University Grants Commission notifying the University Grants Commission (Promotion & Maintenance of Standards of Academic Collaboration between Indian and Foreign Educational Institutions) Regulations, 2022 and which envisages academic partnerships between Indian and Foreign Higher Educational Institutions. It would thus be wholly incorrect for this Court to accept the submission that the involvement of a foreign entity or a foreign national in the education sector is contrary to the fundamental policy of Indian law.

93. While closing the discussion on this aspect it may only be

additionally noted that the Tribunal had also taken note of the conceded stand of the respondents who had accepted the existence of an educational institution set up by various participants in the oil and gas industrial sector of the country. The involvement of a corporate or any other for-profit entity in the field of education is one which is unambiguously recognised in Appendix 3.4 of the AICTE Handbook. As is evident from the provisions made in that Appendix for a for-profit entity is entitled to establish an educational institution through a not-for profit entity. Appendix 3.4 thus clearly indicates that as long as the for-profit entity is interspaced by a not-for profit body which manages and administer the educational institution, the same would clearly be permissible. This too clearly indicates that the involvement of a for-profit entity is not abhorrent to public policy.

94. The Court also finds itself unable to ignore the fact that Mr. Shantanu Prakash and his colleagues also came to hold positions in JRRES by virtue of the investment and aid provided by the for-profit entity with which they were directly connected. It was Educomp which invited Raffles to enter into a joint venture and develop educational institutions in the country. The appointment of Raffle's affiliates in JRRES was in accordance with amendments made in its Articles to which they were a party. Educomp cannot disavow those steps taken by the joint venturers merely to avoid enforcement. The Court is thus constrained to observe that the stand taken in these proceedings by Educomp clearly answers the dishonest defence aspect which was alluded to in *Cruz City*. On balance and bearing in mind the discretion that Section 48 confers with respect to enforcement, the Court would be inclined to recognise the Award and ensure its execution in accordance with law.

95. It appears to have been additionally urged before the Arbitral Tribunal that the SPA resulted in a trading of membership. The aforesaid contention is clearly misconceived since Educomp had failed to establish that any consideration had been paid to any of the members of the society or those who formed part of its Governing Body for the purposes of either appointment or resignation. This aspect in any case remains of little significance in light of the Tribunal having refused specific performance of the SPA.

96. The Court also finds itself unable to accept the contention relating to JRRES land forming subject matter of the SPA. It must and at the outset be noted that the SPA nowhere contemplates the sale or monetisation of the leasehold asset. As has been noticed by the Arbitral Tribunal the value of the leasehold assets of the JRRES appears to have been taken into consideration solely for the purposes of evaluating the share exchange price to be paid by Raffles. The value of the shares held in the JV appears to have been arrived at after taking into consideration

the leasehold assets of JRRES. However, and undoubtedly, the SPA nowhere contemplates the sale of JRRES land or the proceeds thereof being distributed between Raffles and Educomp. This aspect has also been duly taken note of by the Arbitral Tribunal in Para 350 of the Award while dealing with the issue of monetisation. The sale of the leasehold assets is undisputedly subject to restrictions contained in the Lease Deed itself and which had made such a proposed disposition subject to prior permission and approval of GNIDA. The argument of monetisation was in any case misconceived since no sale of the land had been accomplished.

97. Insofar as the decisions which were cited by Ms. Trivedi are concerned, the Court deems it apposite to observe as follows. While it is true that *PASL Wind Solutions* alludes to public policy being an ever-evolving concept, the Court finds itself unable to find any observation or principle enunciated therein which may lead one to conclude that the Award is unenforceable on grounds as canvassed and noticed hereinabove. In fact the opening up of the educational sector and the winds of change which have been ushered in by the Union in terms of the NEP 2020 would clearly belie the submissions addressed at the behest of Educomp.

98. Insofar as *Devas Multimedia* is concerned, the Supreme Court in that decision had on facts come to a definitive conclusion that the winding up of the joint venture company was tainted by fraud. Fraud, as has been repeatedly observed, unravels the most solemn of transactions. Educomp did not even resist enforcement on the ground of fraud. *Devas Multimedia* thus fails to carry the case of Educomp any further. The judgment in *NAFED* is also clearly distinguishable for the following reasons. In *NAFED* the Supreme Court came to the conclusion that the Award was unenforceable since parties while entering into the contract for export had failed to factor in the necessity of appropriate export permission being granted by the Union Government. It was in the aforesaid context that the Supreme Court came to conclude that the contract was impossible to be performed and that Section 32 of the Contract Act, 1872 was attracted.

99. Accordingly and for all the aforesaid reasons, the Court rejects the objections raised by Educomp. The Award cannot be said to fall within the mischief of Section 48(2)(b)(ii) of the Act and is thus held to be enforceable in law.

100. The matter be now placed before the appropriate Roster Bench on 13 July 2023 for taking further steps upon the enforcement petition.

¹ Raffles

² The Act

³ Award

⁴ SIAC

⁵ Educomp

⁶ SPA

⁷ JRRES

⁸ SRA

⁹ MoA

¹⁰ GNIDA

¹¹ Educomp Infrastructure

¹² JVA

¹³ ERHEL

¹⁴ MIDL

¹⁵ AICTE

¹⁶ 2012 Regulations

¹⁷ a Section 25 company

¹⁸ (2021) 7 SCC 1

¹⁹ (2023) 1 SCC 216

²⁰ (2020) 19 SCC 260

²¹ 1994 Supp (1) SCC 644

²² (2014) 2 SCC 433

²³ 2017 SCC OnLine Del 7810

²⁴ (2002) 8 SCC 481

²⁵ FDI

²⁶ (2020) 11 SCC 1

²⁷ (2003) 5 SCC 705

²⁸ (2019) 15 SCC 131

²⁹ (2020) 10 SCC 1

³⁰ (2022) 1 SCC 753

³¹ (2003) 6 SCC 697

³² (2005) 6 SCC 537

³³ (2021) 10 SCC 517

³⁴ NEP 2020

[§] 2023:DHC:4507

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.