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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment pronounced on: 13.05.2025+ O.M.P. (COMM) 151/2021 & IA No.5479/2021

ORAVEL STAYS PRIVATE LIMITED

..... Petitioner

Through: Mr. Mukul Rohtagi, Sr. Adv. along with Ms. Anuradha Dutt, Mr. Lynn Pereira, Ms. Suman Yadav, Mr. Haaris Fazili, Mr. Kunal Dutt, Mr. Raghav Dutt, Mr. Keshav Sehgal, Mr. Avinash Singh, Ms. Seema Mehta and Ms. Prachi Pandey, Advs.

versus

ZOSTEL HOSPITALITY PRIVATE LIMITED

..... Respondent

Through: Mr. Abhishek Malhotra, Sr. Adv., Ms. Srishti Gupta, Mr. Kartikay Dutta, Mr. Raghav Shukla, Ms. Anukriti Trivedi and Ms. Sonal Chhablani, Advs.

+ O.M.P.(ENF.)(COMM) 116/2021

ZOSTEL HOSPITALITY PRIVATE LIMITED

..... Petitioner

Through: Mr. Abhishek Malhotra, Sr. Adv., Ms. Srishti Gupta, Mr. Kartikay Dutta, Mr. Raghav Shukla, Ms. Anukriti Trivedi and Ms. Sonal Chhablani, Advs.

versus

ORAVEL STAYS PRIVATE LIMITED &amp; ANR.

..... Respondents

Through: Mr. Mukul Rohtagi, Sr. Adv. along with Ms. Anuradha Dutt, Mr. Lynn Pereira, Ms. Suman Yadav, Mr. Haaris Fazili, Mr. Kunal Dutt,



Mr. Raghav Dutt, Mr. Avinash Singh,  
Ms. Seema Mehta and Ms. Prachi  
Pandey, Advs.

**CORAM:**  
**HON'BLE MR. JUSTICE SACHIN DATTA**

**JUDGMENT**

**O.M.P.(COMM) 151/2021**

1. By way of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “A&C Act”), the petitioner seeks to assail an arbitral award dated 06.03.2021 (hereinafter referred to as the “impugned award”) passed by an arbitral tribunal comprising of a Sole Arbitrator.
2. The petitioner, having its registered office at Ground Floor - 001, Mauryansh Elanza, Shyamal Cross Road, Satelite, Ahmedabad, Gujarat 380015, operates under the brand name “OYO,” and is engaged in providing technology and product solutions to the hospitality sector with focus on the budget hospitality segment, which includes hotels, homes, paying guests (PG) accommodations, co-living spaces, co-working spaces and college campuses.
3. Respondent has its registered office at A- 6-7, Sir Pratap Colony, Main Airport Road, Ratanada, Jodhpur, Rajasthan - 302011. Respondent initially focused on providing hostel accommodations for backpackers and travellers under the brand name “Zostel,” and later launched its hotel aggregation business under the brand name “Zo Rooms” as well. The disputes between the parties stem from their competitive operations within the hospitality



sector and escalated during subsequent negotiations regarding potential business acquisition.

4. The entire dispute has arisen pursuant to a term sheet dated 26.11.2015 (hereinafter referred to as the "Term Sheet"). The Term Sheet was signed between Oravel Stays Private Limited (petitioner), Zostel Hospitality Private Limited (respondent), Internet Fund III Pte. Ltd. (Tiger Global) and Orios Venture Partners, for the acquisition of the respondent's assets, including intellectual property, software, and key employees, by the petitioner. Tiger Global and Orios Venture Partners were shareholders of the respondent. While Orios Venture Partners allegedly remains a shareholder, Tiger Global has sold its entire stake and is no longer a shareholder of the respondent. The Term Sheet is reproduced as under –

**"SUMMARY OF PRINCIPAL TERMS**

*This preliminary term sheet ("Term Sheet") sets forth the current intent with regard to the acquisition of identified assets of Zostel Hospitality Private Limited ("Target") by Oravel Stays Private Limited ("Acquirer") ("Acquisition"). This Term Sheet is non-binding and is intended solely as a summary of the current terms that are proposed by the parties; provided that the paragraphs opposite the headings "Confidentiality", "Approvals", "Expenses", "Exclusivity" and "Governing Law and Arbitration" shall be legally binding provisions. The parties do not intend to be bound until they enter into Definitive Agreements regarding the subject matter of this Term Sheet, and either party may, at any time prior to Execution of such Definitive Agreements, unilaterally terminate all negotiations pursuant to this Term Sheet without any liability to the other party.*

*This term sheet unless executed by the parties herein shall expire at 23:59 IST, November 26, 2015.*

S. NO.	ITEM	DESCRIPTION
1)	Target	Zostel Hospitality Private Limited (including any subsidiaries or group companies overseas).
2)	Target	(i) Chetan Singh Chauhan; Dharam Veer Singh, Akhil



	Shareholders	<p>Malik; Paavan Nanda; Siddharth Jangu; Abhishek Bhutra; Tarun Tiwari (collectively, “Founders”);</p> <p>(ii) Internet Fund III Pvt. Ltd. (“Tiger”);</p> <p>(iii) Orios Venture Partners (“Orios”); and</p> <p>(iv) other shareholders.</p> <p>Tiger, Orios, Other Shareholders and Founders shall be collectively referred to as “Target shareholders”.</p>
3)	Acquisition	<p>The Acquirer will acquire the identified assets of the Target, which would include intellectual property rights (trademarks and domain names), software, certain key employees and other assets (“Assets”) of the Target.</p> <p>For purposes of the acquisition of Assets, the Acquirer shall pay the minimum permissible price by law to the Target.</p>
4)	Closing	<p>The closing shall be conditional upon fulfilment of the following conditions: (i) completion of limited legal and financial diligence of the Target; (ii) the Target obtaining all corporate, governmental, management, third party, exchange control and other regulatory approvals that are necessary or advisable; (iii) conditions identified under Annexure I; and (iv) any other conditions in the Definitive Agreements (“Closing”)</p> <p>It is hereby clarified that the term Closing, in case of a Merger Framework, shall mean the filing of the Scheme of Merger with the court.</p> <p>Upon Closing:</p> <p>(a) Preference shareholders of Target shall be entitled to acquire preferred securities (which may include equity with contractual rights) (“<b>Preferred Stock</b>”) in the Acquirer.</p> <p>(b) Equity shareholders of the Target shall be entitled to acquire equity shares in the Acquirer.</p> <p>The total shares issued including, Preferred Stock and equity shares shall not exceed 7% of the fully diluted shareholdings of the Acquirer. Upon completion of the post-closing obligations as set-out in Annexure II (“Post Closing Obligations”), Founders shall be entitled to a payout of US\$1 million.</p>
5)	Shareholder	Preemptive Rights:



	Rights	<p><i>If the Acquirer proposes to offer equity securities to any person, then Tiger and Orios, (pari passu with other right holders of the Acquirer) shall have a pro-rata to subscribe to such new securities to maintain their respective shareholding in the Acquirer. Exceptions and the treatment of securities not subscribed for by shareholders who have a right to do so, as mutually agreed between the parties, shall be set forth in the Definitive Agreements.</i></p> <p><i>Liquidation Preference:</i></p> <p><i>In the event of any liquidity event (as defined in the shareholders agreement dated July 25, 2015 entered by and between the Acquirer and its shareholders ("OYO SHA")), the preference shareholders of the Target will have liquidation preference on the amount actually invested by them in the Target. The proceeds will be distributed pari passu to the Series A Shares, Series A1 Shares, Series B Shares, Series C Shares and Preferred Stock, in an amount equal to the higher of (i) their pro-rata share of the proceeds and (ii) their original price plus all accrued and unpaid dividends.</i></p> <p><i>The balance of the liquidation proceeds to be paid to the holders of equity shares.</i></p> <p><i>Anti-Dilution Protection</i></p> <p><i>Subject to exceptions as provided under the OYO SHA, the conversion ratio for the Preferred Stock shall be 1:1 ("Conversion Ratio"). The Conversion Ratio shall be adjusted on a broad based weighted average basis, in the event the Acquirer raises a further round of financing at a valuation which is less than US\$ 400 million.</i></p> <p><i>Limited Information Rights</i></p> <p><i>The Acquirer shall provide limited and reasonable information (subject to confidentiality restrictions) to the Target Shareholders (in a mutually agreed format) for the purposes of facilitating a sale of their respective securities.</i></p> <p><i>Co Sale Right</i></p> <p><i>Tiger and Orios shall have a pro-rata co-sale right (pari passu with other right holders of the Acquirer).</i></p> <p><i>In the event that Tiger and/or Orios acquire any of the shares held by the Founders within 12 months of Closing, they shall be entitled to exercise Preemptive and Co-Sale</i></p>
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		<i>Rights in respect of such shares.</i>
6)	<i>Transferability</i>	<i>There shall be no transfer restrictions on the shares held by the Founders other than sale to competitors in the manner provided under the OYO SHA.</i>
7)	<i>Definitive Documents</i>	<p><i>Subject to the conditions set forth in this Term Sheet, the parties shall mutually agree, execute the following documents and such other documentation as the parties may deem necessary (hereinafter referred to as the "Definitive Agreements"):</i></p> <ul style="list-style-type: none"> <li><i>(a) Share Subscription Agreement/ Merger Framework Agreement (Acquirer);</i></li> <li><i>(b) Shareholders Agreement (Acquirer);</i></li> <li><i>(c) Asset/ Business Transfer Agreement;</i></li> <li><i>(d) Non-Compete, Non Solicitation Agreement with the Founders and</i></li> <li><i>(e) Settlement and Release Agreement executed between the Acquirer and the Target.</i></li> </ul> <p><i>The parties may pursuant to mutual discussions agree upon execution of one or more agreements to capture the entire understanding arrived at amongst them.</i></p>
8)	<i>Representations &amp; Warranties</i>	<i>The transaction shall be subject to the customary representations and warranties by the Target, Target Shareholders and the Acquirer. It is clarified that representations and warranties related to only title and issue of shares shall be given by the Acquirer, no business related warranties shall be given by the Acquirer.</i>
9)	<i>Due Diligence</i>	<i>Following execution of this Term Sheet, the Acquirer shall have the opportunity to conduct a diligence on the Target. The Target shall provide all such information, documents and material about the business and affairs of the Target as listed in the Exhibit to this Term Sheet.</i>
10)	<i>Non-Compete, &amp; Non-solicitation, Non-Disparagement Agreement</i>	<i>Founders shall enter into a non-disparagement agreement, non-compete and non-solicitation agreement with the Acquirer and the Founders agreeing not to engage directly/indirectly in any business anywhere in the world which competes with the business of the Acquirer and/ or the Target (including hostel/ apartments/ alternate accommodation business) for a period of 5 years from the date of Closing. No separate consideration shall be payable to the Founders for this non-compete and non-</i>





		<p>solicitation agreement. It is clarified that the family of Dharam Veer Singh (one of the Founders) owns hotel properties as part of a traditional hotel business. The Founders undertake to ensure that such business does not compete with the business carried on by the Acquirer.</p> <p>The Target Shareholders agree not to directly (or through an affiliate) invest in any business that is determined by the Board of the Acquirer as a competing business (in accordance with the list of such competitors) till such time as they are shareholders of the Acquirer. The parties agree that the restriction contained in this Clause shall only come into force on the date of execution of the Definitive Agreements and shall fall away on the long-stop date as agreed in the Definitive Agreements in the event the Closing has not occurred by such date. It is clarified that Tiger and Orios shall be free to invest in any business they have already invested in prior to signing of this Term Sheet.</p>
11)	Indemnification	<p>The Founders shall indemnify the Acquirer for any and all claims/liabilities suffered by the Acquirer in respect of the Target's business and operations, including employees.</p> <p>The Target Shareholders shall indemnify the Acquirer in respect of any tax liability arising out of the contemplated transaction.</p>
12)	Confidentiality	<p>The terms and conditions of this Term Sheet are confidential and the parties shall not disclose the same to any third party except as provided below. Disclosures to the Acquirer's and the Target's investors, investment bankers, accountants, legal counsel, affiliates, shareholders, employees and lenders, in each case only where such persons or entities are under appropriate non-disclosure obligations imposed by professional ethics, law or otherwise shall be permitted.</p>
13)	Expenses	<p>Each Party will meet its own expenses relating to the transactions herein contemplated.</p>
14)	Announcements	<p>The Acquirer shall be entitled to make announcements/press release in relation to the transaction post-Closing. All announcements or public statements in relation to the contemplated transaction shall be made only with the prior approval of the Acquirer and the Target, which approval shall not be unreasonably withheld.</p>



15)	<i>Exclusivity</i>	<i>The parties hereby further undertake that after signing this Term Sheet, they shall not, for a period of 15 business days, severally or jointly, directly or indirectly, approach any other person, solicit any offers, engage in any discussions, or enter into any agreements or commitments from any person with respect to sale or acquisition of any equity instruments of the Target.</i>
16)	<i>Governing Law &amp; Arbitration</i>	<i>This Term Sheet will be governed by Indian law. Any dispute between the parties arising from or relating to this Term Sheet which cannot be amicably resolved between the parties shall be referred to arbitration in New Delhi in accordance with the Arbitration and Conciliation Act, 1996. The Tribunal shall consist of 1 arbitrator to be agreed upon between the parties. The language of the arbitration shall be English and the decision of the arbitrator shall be final and binding on the parties. The law of the arbitration shall be the laws of India.</i>
17)	<i>Counterparts</i>	<i>This Term Sheet may be executed in a number of counterparts but shall only be deemed to have been concluded when each party has executed at least one counterpart. Each counterpart, when executed, shall be an original, but all counterparts together constitute the same documents.</i>

.....”

5. After the execution of the Term Sheet, significant disputes surfaced between the parties. The respondent contended that it had fully complied with all obligations outlined in the Term Sheet, fulfilling its part of the agreement. However, it is alleged that the petitioner did not take the requisite steps to finalize the acquisition process. The petitioner’s stance was that the Term Sheet was a non-binding document, intended only as a preliminary framework, and that it had already been terminated.

6. Aggrieved by the situation, the respondent, on 25.01.2018, issued a notice under Section 21 of the A&C Act, formally invoking the arbitration clause contained in the Term Sheet. However, the petitioner, in its reply





dated 13.02.2018, sought to refute the arbitrability of the dispute/s, stating that the Term Sheet was a non-binding document. Additionally, the petitioner refused to consent to the appointment of the sole Arbitrator proposed by the respondent.

7. In February 2018, the respondent filed a petition under Section 9 of the A&C Act seeking certain interim reliefs before the District Court, Gurugram, which petition was dismissed *vide* order dated 23.02.2018 on the ground that Clause 16 of the Term Sheet confers exclusive jurisdiction upon the courts of New Delhi.

8. Thereafter, Arbitration Petition No. 28 of 2018 was filed by the respondent before this Court under Section 11 of the A&C Act, seeking appointment of an arbitrator to adjudicate the disputes arising between the parties. However, the said petition was dismissed *vide* order dated 14.05.2018 on the ground that this Court did not have jurisdiction as the arbitration, contemplated under the Term Sheet, was in the nature of an ‘international commercial arbitration’.

9. In view of the above, the respondent filed Arb. Pet. No. 11 of 2018 in the Supreme Court under Section 11 of the A&C Act. On 19.09.2018, the Supreme Court issued an order formally constituting the Arbitral Tribunal. However, the Court clarified that all preliminary issues / objections raised by the petitioner must be adjudicated by the duly constituted Arbitral Tribunal.

### **ARBITRAL PROCEEDINGS**

10. Upon the commencement of the arbitral proceedings, the respondent



submitted its Statement of Claim (SoC). In the said arbitral proceedings there were 17 claimants. Claimant no. 1 being the respondent in the present petition, claimant nos. 2 to 17 were the shareholders of the claimant no. 1. Subsequently, the petitioner filed an application under Section 16 of the A&C Act, challenging the jurisdiction of the Arbitral Tribunal.

11. However, by an order dated 19.08.2019, the learned Arbitrator declined to address these objections at the threshold. The relevant portion of the said order is reproduced as under –

*“I am not inclined to defeat the claims of 2-17, particularly when claimant No.2 has been made a party as a de-facto party by the Supreme Court. It does not appear that the inclusion of the claimants 2-17 is likely to cause any prejudice to any party. That is not the case here. I am, therefore not inclined to deny their request at the threshold without examining their claim on merits. I, therefore, allow the plea of the claimants 2-17. Needful may be done within 10 days.”*

12. Subsequently, the petitioner submitted its Statement of Defence (SoD), which was met with a rejoinder from the respondent/claimant. In response, the petitioner filed a sur-rejoinder.

13. Before the learned sole Arbitrator, the respondent's/claimant's case was that the Tribunal had already settled the issue of jurisdiction in its earlier order issued while disposing of the application under Section 16 of the A&C Act. They contended that the petitioner's jurisdictional challenge lacked merit and should be dismissed outright. The respondent/claimant emphasized that claimant nos. 3-17 were directly connected to the signatories of the Term Sheet, sharing a common subject matter in their claims, and being integral to the overall transaction involving the acquisition of claimant no. 1's business by the petitioner.



14. The respondent/claimant further argued that the Term Sheet, though described as “non-binding” in its introduction, constituted a binding agreement due to the fact that the essential terms of the acquisition had been acted upon and the conduct of the parties had created enforceable obligations. It was asserted that the respondent/claimant had fulfilled all their obligations under the Term Sheet, including the transfer of employees, properties, confidential data, and customer base to the petitioner.

15. Accordingly, the respondent/claimant sought the following reliefs from the Tribunal –

*“i. Specifically perform its obligation agreed upon the Term Sheet by transferring/issuing, in the name of the Claimants, 7% of the present shareholding of the Respondent in favour of Claimant Nos. 2-17, pro rated to their respective shareholding of Claimant No.1;*

*ii. Pay the agreed contracted amount of USD 1 million to the Founders, i.e., Claimant Nos. 4-10; or*

*iii. In the alternative and without prejudice to the claims in paragraphs 7 (i) and (ii) above, pay to Claimants, jointly, in the amount equivalent to 7% of the value of Respondent company as per the last round of funding received by Respondent, along with USD 1 million to Claimant Nos. 4-10, reflecting the benefit of the bargain as promised by Respondent to the Claimants;*

*AND*

*iv. Pay interest @18% per annum from the date of execution of Term Sheet till date of payment, on the due amount of USD 1 million to Claimant Nos.4-10; AND*

*v. Pay damages for loss of goodwill and reputation as well as inconvenience caused to the Claimants, in the amount of USD 17 million; AND*

*vi. Pay for the costs of the present proceedings;”*

16. The stand of the petitioner in the arbitral proceedings, was as under:



- a. The Term Sheet, by its own admission, is non-binding and was subject to further negotiations and execution of definitive agreements
  - b. As the Term Sheet was not intended to be binding, the steps taken under its terms cannot be enforced. The claimants are attempting to convert a non-binding document into an enforceable agreement, which is contrary to the intentions of the parties.
  - c. Even otherwise the Term Sheet was determinable in nature and could be unilaterally terminated by either of the parties and was indeed terminated by the petitioner, hence the specific performance cannot be granted.
  - d. Claimant nos. 2 to 17 cannot be considered parties to the arbitral proceedings. The Tribunal lacks jurisdiction to entertain their claims, as they were not signatories to the Term Sheet nor were they directly involved in the negotiations or obligations arising from it.
  - e. Claimant No. 2 has already waived its right to raise any claims in these arbitral proceedings, having done so before the Supreme Court.
  - f. None of the claims put forward by claimant no. 1 in the Statement of Claims are arbitrable.
17. The issues for determination, as set out in the impugned award, are reproduced below:-



- “1. Whether the Arbitral Tribunal has jurisdiction to consider or entertain the claims of Claimants Nos. 3 to 17?*
- 2. Whether Claimant Nos. 2 and 3 have waived their fights to raise any claims in the present arbitration and hence their claims are not maintainable?*
- 3. In the event of Claimant Nos. 2 to 17 not being entitled to maintain their claim, whether Claimant No. 1 is entitled to claim/pray for the relief of allotment of share from the Respondent to Claimant Nos. 2 to 17 and payment of USD 1 million dollars to Claimants no. 4-10?*
- 4. Whether the term sheet dated 26.11.2015 Is non-binding as stated in it or whether it is a binding, valid and enforceable agreement in terms of the acts of the parties as alleged by the Claimants?*
- 5. Whether there was consensus ad idem between the parties on the Draft Definitive Agreements stipulated under clause 7 of the Term Sheet dated 26.11.2015?*
- 6. Whether as asserted by the Claimants they were ready and willing to perform their obligations under the Term Sheet dated 26.11.2015 and to execute the draft definitive agreements contemplated under the Term Sheet?*
- 7. Whether the transaction(s) as contemplated in the Term Sheet dated 26.11.2015 has been consummated and the Claimants have performed conditions detailed in the Term Sheet dated 26.11.2015?*
- 8. Whether the Claimants prove that there was breach of contract in terms of the Term Sheet dated 26.11.2015 by the Respondent?*
- 9. Whether the Claimants are entitled to specific performance of the Term Sheet dated 26.11.2015 by directing the Respondent to issue 7% of the present shareholding of the Respondent in favour of Claimant No.2 to 17 pro-rated to the respective shareholding of Claimant No.1?*
- 10. Whether the Claimants No.4 to 10 are entitled to the payment of USD 1 million dollars?*
- 11. Whether as an alternative to specific performance, Claimants are entitled to an amount equivalent to 7% of the value of the Respondent as per the last round of funding received by the Respondent along with USD 1 million dollars to Claimant Nos. 4 to 10?*
- 12. Whether Claimant Nos. 4 to 10 are entitled to interest on the amount of USD 1 million from the date of execution of the Term Sheet, if so for what period and at what rate?*
- 13. Whether the Claimants prove loss of goodwill and are entitled to damages to the extent of 17 million USD?*



*14. Whether the Claimant No.1 is entitled in the alternative for payment of USD8,89,22,768/- as claimed in the Replication?*

*15. Who should bear the cost and if so to what amount?*

*16.To what reliefs are parties entitled?”*

## **THE IMPUGNED AWARD**

### **Tribunal's finding with respect to issue no.1**

18. The Tribunal held that it did not have jurisdiction to consider the claims of claimant nos. 3 to 17 inasmuch as the mandatory requirement under Section 21 of the Act, which involves issuing a notice to initiate arbitration, was not fulfilled by claimant nos. 3 to 17.

### **Tribunal's finding with respect to issue no.2**

19. The Tribunal found it inappropriate to consider the claims of claimant No.3, given its findings as regards issue no. 1. Regarding claimant no. 2, while it was acknowledged as a signatory to the Term Sheet, the Tribunal noted that it had failed to issue a notice under Section 21 of the A&C Act. As a result, claimant no.2 was precluded from pressing / raising any claims before the Arbitral Tribunal.

### **Tribunal's finding with respect to issue no. 3**

20. The Tribunal reviewed the Term Sheet and found that claimant no. 1, as the “Target” defined in Clause 1, was clearly a signatory. It was held that the petitioner, having acknowledged these commitments at the time of execution, could not now argue that claimant no. 1 lacked the authority to claim or seek relief on behalf of other claimants. Accordingly, the Tribunal held that claimant no. 1 was entitled to claim reliefs under the Term Sheet, including the allotment of shares to claimant nos. 2 to 17 and the payment of





USD 1 million to claimant nos. 4 to 10. The petitioner's objections were dismissed as without merit, and the claims were deemed maintainable.

Tribunal's finding with respect to issue no.4

21. The Tribunal observed that the Term Sheet constitutes a binding document. It rejected the petitioner's argument that the Term Sheet was non-binding or merely exploratory in nature. Instead, the Tribunal emphasized the importance of interpreting the Term Sheet as a cohesive whole rather than focusing solely on its preamble.

22. The Tribunal highlighted the significance of the conditions for closing the transaction as laid out in Clause 4 and Annexure-I. It noted that these conditions were essential prerequisites for the completion of the acquisition, requiring specific actions to be taken by both parties. The Tribunal found that the claimant had taken various steps to fulfil its obligations under the Term Sheet, which included facilitating the transfer of employees, properties, and customer data. This conduct indicated that the parties were indeed acting in accordance with the Term Sheet.

23. As regards Clause 7, it was observed that the execution of Definitive Documents was 'subject to the conditions set forth in the Term Sheet'. It was further observed that "this encompasses conditions mentioned in clause 4 and buttresses the point that execution of Definitive Documents was not independent of the Term Sheet".

24. As regards Clause 9 it was observed as under –

*"Clause 9 is not a mandatory clause in view of the Preamble of the Term Sheet. However, it was only pursuant to Clause 9 and the execution of the Term Sheet that the right to conduct a diligence of Claimant No.1 accrued upon the Respondent. Had the Term Sheet been Non-Binding and obligations of the parties were meant to materialize wholly and solely upon*



*the execution of Definitive Documents, the Respondent could never have been entitled to conduct a Diligence of Claimant No.1 in the absence of any Definitive Documents to that effect. It can be safely said that at the very least, it was only pursuant to the Term Sheet, that the Respondent could conduct the Due Diligence and became privy to sensitive commercial information that would not have been shared by Claimant No.1 in ordinary course of business with a competitor.”*

25. Furthermore, the Tribunal observed that even if the parties initially intended for the Term Sheet to be non-binding, their subsequent actions demonstrated a waiver of that intent, thereby creating an enforceable contract. Additionally, the Tribunal affirmed that the petitioner’s right to conduct due diligence was derived from the Term Sheet itself, rather than from the execution of the Definitive Agreements. Thus, it was held that the Term Sheet was not merely an exploratory document but rather a binding agreement, obligating the parties to fulfil the specified conditions for the successful completion of the acquisition.

#### Tribunal’s finding with respect to issue no.5

26. The tribunal observed that there was no consensus ad idem on the Draft Definitive Agreements. It noted that the execution of these documents were significantly impacted by the objections raised by Venture Nursery, a minority shareholder of the claimant. The tribunal acknowledged that Venture Nursery’s unsupportive stance was the primary reason for the non-execution of the Definitive Documents. The tribunal emphasized that these objections disrupted the finalization process and prevented the parties from reaching a binding agreement. The tribunal considered various emails and communications exchanged between the parties. It found that while the Claimants were inclined to finalize the transaction, the necessary



amendments to the Definitive Documents were not made to address the concerns raised by Venture Nursery.

Tribunal's finding with respect to issue no.6

27. The Tribunal while recording the submission of both the parties, agreed with the claimant's submissions that they were indeed ready and willing to perform their obligations under the Term Sheet and the draft Definitive Documents.

Tribunal's finding with respect to issue no.7

28. The Tribunal reviewed the parties' submissions and found that the transaction outlined in the Term Sheet involved several steps, which were categorized as Closing and Post-Closing Obligations. The evidence showed that Claimant No.1 performed several of these obligations, such as terminating hotel contracts, transferring consumer data, and communicating with stakeholders about the acquisition, based on instructions from the respondent/petitioner.

29. However, certain obligations, like withdrawing pending lawsuits, which required simultaneous action by both parties, were not completed due to issues raised by the petitioner's minority shareholder, Venture Nursery. Additionally, some conditions remained unfulfilled because the petitioner did not provide necessary instructions to Claimant No.1.

30. The tribunal noted that Claimant No.1 carried out all actions within its control and performed its obligations under the Term Sheet as directed by the petitioner. There was no evidence that the petitioner ever asked Claimant No.1 to stop fulfilling its duties. Instead, communication/s reflected ongoing coordination between the parties. Therefore, the tribunal concluded that the Claimant could not be held responsible for unfulfilled obligations that



resulted from the petitioner's lack of instructions or complications caused by the minority shareholder dispute.

Tribunal's finding with respect to issue no.8

31. The tribunal observed that while the claimant was ready and willing to fulfil its obligations under the Term Sheet and indeed performed part of those obligations, however, the petitioner failed to do the same. The claimant requested the finalization and signing of the Definitive Documents, but the petitioner kept delaying, stating that they would act once concerns from Venture Nursery, a minority shareholder, were addressed.

32. As a result, the claimant had a legitimate expectation that the petitioner would fulfil its obligations. However, the petitioner's failure to do so was deemed a breach of its obligations under the Term Sheet.

Tribunal's finding with respect to issue no.9

33. The tribunal concluded that the claimant cannot be held responsible for the petitioner's or its shareholders' actions that prevented the fulfilment of some obligations. It was also held that Claimant No.1 is entitled to seek relief, including the allotment of shares to Claimant Nos. 2 to 17.

34. The tribunal affirmed that the Term Sheet remained binding. The petitioner breached its obligations, while the claimant fulfilled its responsibilities. Therefore, the claimant is entitled to specific performance under the Term Sheet. However, as Definitive Agreements were yet to be executed, it was observed that the Claimant is entitled to take appropriate proceedings for Specific Performance and execution of the Definitive Agreements as envisaged for itself and its shareholders under the Term Sheet.



Tribunal's finding with respect to issue no.10

35. The tribunal concluded that it could not grant this relief at this stage because the same was dependant on the fulfilment of post-closing obligations, which would only be addressed after the execution of the Definitive Agreements.

Tribunal's finding with respect to issue no. 11

36. Regarding the alternative claim for an amount equivalent to 7% of the petitioner's value, based on the last funding round, along with the USD 1 million for claimants Nos. 4 to 10, the award holds that since the claimants were entitled to specific performance, this alternative relief had become redundant.

Tribunal's finding with respect to issue no. 12

37. Since the tribunal disallowed the claim for the USD 1 million at this stage, it also concluded that the Claimants were not entitled to any interest on that amount.

Tribunal's finding with respect to issue no. 13

38. The tribunal decided not to grant any relief regarding the loss of goodwill to the claimant.

Tribunal's finding with respect to issue no. 14

39. The tribunal reviewed the principles of Quantum Meruit as outlined in Section 70 of the Indian Contract Act, 1872. It referenced the Supreme Court cases, *Mahanagar Telephone Nigam Limited v. Tata Communications Ltd*<sup>1</sup> and *Mulamchand v. State of Madhya Pradesh*<sup>2</sup>, which clarify that Section 70 applies in situations where no contractual

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<sup>1</sup>AIR2019 SC 1233

<sup>2</sup>AIR 1968 SC1218



relationship exists between the parties. In these cases, claims for compensation arise not from a contract but from a quasi-contract or restitution.

40. However, in the current matter, the tribunal found that a defined contractual relationship does exist between the parties. As a result, the principles of Quantum Meruit and Section 70 are not applicable. Given that a binding contractual relationship is established and that the claimant was held entitled to Specific Performance of the petitioner's obligations, the tribunal concluded that the alternate relief of Quantum Meruit is not maintainable.

Tribunal's finding with respect to issue no. 15

41. The tribunal observed that the claimant/ respondent is entitled to cost

Tribunal's finding with respect to issue no. 16

42. The Tribunal observed that the claimant/respondent is entitled to Specific Performance of the petitioner's obligations under the Term Sheet. However, since the Definitive Agreements have not yet been executed, the claimant/respondent is entitled to initiate appropriate proceedings to ensure the Specific Performance and execution of these agreements for itself and its shareholders, as outlined in the Term Sheet.

**SUBMISSIONS OF THE PARTIES**

43. The petitioner argues that the learned Arbitrator lacked jurisdiction because the arbitration agreement in Clause 16 of the Term Sheet applied only to its binding clauses – “confidentiality”, “expenses”, “approvals”, “exclusivity”, and “governing law and arbitration”, while the disputes raised by the respondent related to non-binding clauses. It is the petitioner's case





that the Arbitrator exceeded his jurisdiction by entertaining claims based on equitable grounds and by considering claims on behalf of non-signatories to the Term Sheet. The petitioner also submitted that it's jurisdictional objection under Section 16 of the Arbitration Act was ignored, leading to an improper assumption of jurisdiction by the Arbitrator, contrary to law. The petitioner claims that the award violates Section 34(2)(a)(iv) of the Arbitration Act, which limits the jurisdiction of arbitrators to the scope of the arbitration agreement.

44. The petitioner emphasizes that the Term Sheet was an agreement to negotiate and execute further definitive agreements, and thus, was expressly non-binding in key aspects. The petitioner argues that the Arbitrator improperly treated the Term Sheet as a binding contract, which was never the case according to either party. Any enforceable obligations were contingent upon the execution of definitive agreements, which were never finalized. The petitioner further asserts that the Arbitrator's reliance on conduct to interpret an unambiguous document makes the award liable to be set aside.

45. Further, it has been put forth on behalf of the petitioner that the Term Sheet clearly required the execution of Definitive Agreements for the proposed transaction to be binding. It has been argued that several key aspects were still under negotiation and were subject to due diligence. The Term Sheet was, at best, an agreement to agree, which is not enforceable until definitive agreements are executed. The respondent/claimant continues to own its business, and no legal ownership of assets was passed. Thus, the award directing specific performance is unjust and should be set aside.

46. It has also been submitted by the petitioner that the Term Sheet was



determinable, allowing either party to terminate negotiations before the execution of definitive agreements, without liability. The petitioner asserts that the Term Sheet was terminated in September 2016, as confirmed by email exchanges on 17.09.2016 and 19.09.2016. Therefore, the petitioner argues that no specific performance could be granted for a terminated and non-binding agreement, and the Arbitrator's failure to consider this fact violated the petitioner's right to a fair hearing.

47. The petitioner argues that the award disregards the binding effect of superior Court judgments, particularly those establishing that no specific performance can be granted for agreements that are determinable in nature, such as the Term Sheet. The petitioner while relying on various Supreme Court's decision including *Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors.*<sup>3</sup> and *Dr. C. Bhaskar Rao v. Union of India*<sup>4</sup> contends that specific performance is not a remedy available for determinable contracts that have been terminated, even if the termination was wrongful.

48. The petitioner claims that the Arbitrator failed to properly address or consider key aspects of its defense, particularly the termination of the Term Sheet and the non-binding nature of the agreement. As a result, the petitioner argues that it was denied a fair opportunity to present its case, violating the principle of *audi alteram partem* and Sections 18 and 34(2)(a)(iii) of the A&C Act.

49. As per the petitioner the respondent's claim in the Statement of Claim was primarily based on allegations of unjust enrichment, misrepresentation, and deceit, rather than any breach of contractual obligations arising from the

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<sup>3</sup>(1991) 1 SCC 533

<sup>4</sup>1998 SCC Online Del 502



Term Sheet. These claims, being equitable in nature, were outside the scope of the arbitration agreement, which was limited to specific binding clauses. The petitioner argues that the Arbitrator, by considering these equity-based claims, exceeded his jurisdiction under the A&C Act.

50. The respondent on the other hand submits that the tribunal acted within its jurisdiction. The reference under Clause 16 of the Term Sheet encompasses “any dispute between the parties arising from or relating to the Term Sheet.” The phrase “arising from or relating to” is interpreted broadly, indicating that the arbitration clause has a wide scope. Consequently, the award issued by the tribunal pertains to a dispute that emerged from and relates to the Term Sheet. One of the disputes considered by the tribunal was whether the Term Sheet was binding. Therefore, the award falls within the “scope of submission” to arbitration and is covered by the arbitration agreement. Reliance has been placed on *Vidya Drolia v. Durga Trading Corporation*<sup>5</sup>, *Ssangyong Engineering Construction v. NHAI*<sup>6</sup>, and *Renusagar Power Co. Ltd v. General Electric Co*<sup>7</sup>.

51. The respondent/claimant argues that the tribunal rightly considered the Term Sheet to be binding, contrary to the petitioner’s claim of non-binding provisions. The respondent/claimant asserts that, while the Term Sheet may have initially been non-binding, the parties’ subsequent conduct made it binding.

52. The respondent/claimant submits that the ground of patent illegality is not applicable in international commercial arbitrations. The challenge on the basis of public policy requires proof of arbitrariness or capriciousness,

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<sup>5</sup>(2021) 2 SCC 1

<sup>6</sup>(2019) 15 SCC 131

<sup>7</sup>(1984) 4 SCC 679



which the petitioner has not established. The respondent/claimant primarily argues that the challenge to the arbitral award based on contravention of public policy.

53. To bolster its view that the impugned award cannot be set aside on the ground of public policy, the respondent/claimant submits that the challenges under Section 34(2)(a) do not involve a review of the award on its merits. Courts do not act as appellate bodies for arbitral awards, reliance has been placed on *MMTC Limited v. Vedanta Limited*<sup>8</sup>. While relying on *Ssangyong Engineering Construction v. NHAI* (supra) it further submits that this ground is triggered when a party is not given an opportunity to present its case, such as when the tribunal considers materials behind a party's back, which the respondent/claimant submits has not happened in the present case.

54. It has further been submitted that the petitioner's challenge under Section 34(2)(b)(ii) of the A&C Act, based on public policy, is flawed. The respondent/claimant contends that the award is not in contravention of any public policy or statute involving public interest, and Courts do not interfere with factual findings of arbitral tribunals unless the award is perverse or irrational.

55. The Counsel for the respondent/claimant has further submitted that the award is reasoned, and the relief of specific performance was rightly granted after due consideration of key elements such as the existence of a binding contract, the respondent's/claimant's readiness and willingness to perform, and the actual performance of the respondent's/claimant's obligations.

56. The learned Counsel on behalf of the respondent/claimant has also

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<sup>8</sup>(2019) 4 SCC 163



argued that the tribunal's reasoning on the specific performance was based on well-established legal principles. Reliance has been placed on ***Kamal Kumar v. Premlata Joshi***<sup>9</sup>, as also on the respondent's fulfilment of its obligations under the Term Sheet, and the petitioner's failure to cooperate.

57. The respondent/claimant refutes the petitioner's argument that the contract was determinable. It is the case of the respondent/claimant that the Specific Relief Act, 1963 bars specific performance only for contracts that are "in their nature determinable," meaning contracts that are inherently revocable, such as licenses or partnerships at will. It does not include contracts that can be terminated under certain conditions. This is substantiated by ***Dr. Sharad Sahai v. Dio Digital Impant India Pvt Ltd***<sup>10</sup>.

58. Relying on ***KSL & Industries Ltd. v. National Textiles Corporation Ltd.***<sup>11</sup> the respondent/claimant also submits that contracts are not determinable if one party materially alters its position based on the other party's representations. The tribunal noted that the petitioner instructed the respondent/claimant to perform its obligations but failed to fulfil its own, thereby breaching the agreement. This resulted in a legitimate expectation on the respondent/claimant's part that the Petitioner would perform its obligations, and denying specific performance would be inequitable. The remedy of specific performance is designed to compel contractual compliance, especially where breach leads to unfair outcomes or unusual economic benefits for the breaching party (***Ascot Hotels and Resorts Pvt Ltd. v. Connaught Plaza Restaurants Pvt. Ltd***<sup>12</sup>).

<sup>9</sup>(2019) 3 SCC 704

<sup>10</sup>O.M.P.(I) (COMM.) 87/2021

<sup>11</sup>2012SCC Online Del 4189

<sup>12</sup>2018 SCC Online Del7940



59. At last, the respondent/claimant argues that the tribunal's failure to address every argument, if any, does not invalidate the award, as long as no prejudice was caused to the parties.

60. Thus, the respondent/claimant asserts that the award is based on a sound appreciation of the law and facts, and therefore, the petitioner's challenge should be dismissed.

### **ANALYSIS AND CONCLUSION**

61. As far as issue of jurisdiction is concerned, the petitioner's challenge is founded on two primary contentions. Firstly, it is contended that the arbitration Clause applies only to the binding provisions of terms sheet, not to the non-binding provisions thereof. As such, the Arbitral Tribunal lacks jurisdiction in respect of dispute/s pertaining to the non-binding clauses of the term-sheet. Secondly, it is contended that the learned Arbitrator failed to fully address the objections as regards jurisdiction raised by the petitioner.

62. The arbitration clause in the term-sheet viz. Clause 16, is in the following terms:

*"16) Governing Law and arbitration – This Term Sheet will be governed by Indian law.*

*Any dispute between the parties arising from or relating to this Term Sheet which cannot be amicably resolved between the parties shall be referred to arbitration in New Delhi in accordance with the Arbitration and Conciliation Act, 1996. The Tribunal shall consist of 1 arbitrator to be agreed upon between the parties. The language of the arbitration shall be English and the decision of the arbitrator shall be final and binding on the parties. The law of the arbitration shall be the laws of India."*

63. A plain reading of the aforesaid clause makes it evident that the same extends to "any dispute between the parties arising from or relating to this





term-sheet”. Thus, for the purpose of dispute resolution clause, there is no distinction made between the “binding and the non-binding clauses”. As such, *ex-facie*, it is untenable to contend that the arbitration clause is applicable only in respects of disputes arising under those clauses of term-sheet which have been expressly made binding.

64. It is also a well established principle, reiterated time and again, that an arbitration clause in an agreement is in the nature of a separate and independent agreement<sup>13</sup>.

65. As such, the scope and applicability of the arbitration agreement is not controlled or contingent upon arbitration being confined only in respect of such contractual covenants which have been designated as binding. The very issue as to the binding/non-binding nature of a contractual covenant, is an aspect which falls well within the jurisdiction of an Arbitral Tribunal.

66. Thus, the Arbitral Tribunal had jurisdiction to entertain the disputes between the parties.

67. This Court is also unpersuaded by the petitioner’s second contention that the tribunal failed to adequately address or provide reasoning regarding the jurisdictional challenge raised by the petitioner. The petitioner raised three specific contentions before the tribunal while challenging its jurisdiction –

- a. The petitioner argued that the tribunal lacked jurisdiction to entertain claims from claimant no(s). 3 to 17 (being non-signatories to the arbitration agreement).

<sup>13</sup>National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) SCC OnLine SC 800 and Today Homes & Infrastructure (P) Ltd. v. Ludhiana Improvement Trust, (2014) 5 SCC 68



- b. The petitioner contended that claimant no. 2 had waived its rights before the Supreme Court and, therefore, could not raise any claims in the present arbitral proceedings.
- c. The petitioner maintained that the Term Sheet was non-binding and, as a result, the arbitration clause could not be applied to the non-binding clauses, thereby limiting the scope of the arbitration to binding provisions only.

68. Contrary to the petitioner's assertion, this Court finds that the tribunal did, in fact deal with each of these jurisdictional challenges thoroughly in its findings.

69. The tribunal's findings in claim numbers 1, 2, 3, and 4 directly addressed the petitioner's jurisdictional objections. Given these observations, this Court finds no merit in the petitioner's argument that the tribunal failed to address the jurisdictional challenge. Therefore, the petitioner's jurisdictional challenge lacks merit.

70. As regards the substantive challenge to the findings/conclusions rendered in the impugned award, it is necessary at the outset, to take note of the scope of interference therewith in exercise of the jurisdiction under Section 34 of the A&C Act.

71. It is settled that after 2015 amendment to the A&C Act, an international award can only be set aside on the grounds set out under Section 34(2)(a) and Section 34(2)(b) of the A&C Act. Section 34(2A) clarifies that the ground of "patent illegality appearing on the face of the award" is a ground that is available only in the case of domestic award, as such, inapplicable in the present case.



72. The statute further that the arbitral award shall be considered to be in conflict with the Public Policy of India only if (i) the making of the award was induced or effected by fraud or corruption or was in violation of the Section 75 and 81 of the A&C Act; (ii) It is in contravention of the fundamental Policy of Indian law; or (iii) It is in conflict with the most basic principle of morality or justice.

73. The expression “public policy” and the “fundamental policy of Indian law” have been construed by the Supreme Court in numerous cases. The Apex Court in *Associate Builders v. DDA*<sup>14</sup>, has observed as under -

“18. In *Renusagar Power Co. Ltd. v. General Electric Co.* [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

“7. Conditions for enforcement of foreign awards.— (1) A foreign award may not be enforced under this Act—

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(b) if the Court dealing with the case is satisfied that—

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(ii) the enforcement of the award will be contrary to the public policy.”

**In construing the expression “public policy” in the context of a foreign award, the Court held that an award contrary to**

**(i) The fundamental policy of Indian law,**

**(ii) The interest of India,**

**(iii) Justice or morality,**

**would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also**

<sup>14</sup>(2015) 3 SCC 49



***be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).***

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27. Coming to each of the heads contained in *Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629]* judgment, we will first deal with the head "fundamental policy of Indian law". **It has already been seen from *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]* judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."**

(Emphasis Supplied)

74. In *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)* (supra), the Supreme Court has observed as under:

**"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]

(emphasis supplied)

75. In *OPG Power Generation Private Limited v. Enexio Power Cooling Solutions India Private Limited & Anr*<sup>15</sup>, it has been held by the Supreme Court as under:-

“52. The legal position which emerges from the aforesaid discussion is that after the ‘2015 amendments’ in Section 34 (2)(b)(ii) and Section 48(2)(b) of the 1996 Act, the phrase “in conflict with the public policy of India” must be accorded a restricted meaning in terms of Explanation 1. The expression “in contravention with the fundamental policy of Indian law” by use of the word ‘fundamental’ before the phrase ‘policy of Indian law’ makes the expression narrower in its application than the phrase “in contravention with the policy of Indian law”, which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that (a) violation of the principles of natural justice; (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law. However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in Explanation 2 to Section 34(2)(b)(ii).”

(emphasis supplied)

76. Thus, infraction of public policy as a ground for setting aside an award is attracted, *inter-alia*, where (i) there have been violation of principles of natural justice. (ii) disregard of orders of superior courts in India and/or binding effects of the judgments of a superior court. (iii) violation of laws linked to public good or public interest ; (iv) violation of

<sup>15</sup>2024 INSC 711



fundamental principles that constitute the basis for administration of justice and enforcement of law and contracts in the country.

77. The aforesaid is the narrow conspectus in which the validity of the impugned award is to be adjudged.

78. For the purpose of testing the impugned award on the touchstone of the aforesaid principles, three fundamental issues arise for consideration of this Court :

- (i) Whether the findings rendered in the impugned award as to the binding nature of the term-sheet, are sustainable and/or vulnerable to challenge on the ground of being in conflict with the public policy of India?
- (ii) Whether the arbitral award deals with or adjudicates all the disputes which fell within the scope of arbitration or whether there has been any omission to decide/adjudicate matters which directly arose for consideration of the Arbitral Tribunal?
- (iii) Whether the finding in the impugned award to the effect that the claimants are entitled to specific performance, is in conflict with the public policy of India in the given factual conspectus?

**(i) Whether the findings rendered in the impugned award as to the binding nature of the term-sheet, are sustainable and/or vulnerable to challenge on the ground of being in conflict with the public policy of India?**

79. The Arbitral Tribunal framed a specific issue “as to whether the term-sheet dated 26.11.2015 is non-binding as stated in it or whether it is binding, valid and enforceable agreement in terms of the acts of the parties as alleged by the claimants”.





80. The issue is answered by the learned Arbitrator as under: -

*“Therefore, it is evident that the Term Sheet demanded Claimant No.1 to fulfill many conditions as closing obligations and it is not the case that Claimant No.1 was to fulfill only the conditions mentioned in the Definitive Documents to act towards Closing the Transaction. Clause 4 read with Annexure-1 shows that the Term Sheet was not a mere exploratory document. It is duly executed by Claimant No.1 and the Respondent and binds Claimant No.1 to fulfill several obligations, apart from those listed in the Definitive Documents. Therefore, a complete reading of the Term Sheet does not support the stand taken by the Respondent.*

*Clause 7 stipulates that the execution of Definitive Documents was 'subject to the conditions set forth in the Term Sheet'. This encompasses conditions mentioned in clause 4 and buttresses the point that execution of Definitive Documents was not independent of the Term Sheet.*

*Clause 9 is not a mandatory clause in view of the Preamble of the Term Sheet. However, it was only pursuant to Clause 9 and the execution of the Term Sheet that the right to conduct a diligence of Claimant No.1 accrued upon the Respondent. Had the Term Sheet been Non-Binding and obligations of the parties were meant to materialize wholly and solely upon the execution of Definitive Documents, the Respondent could never have been entitled to conduct a Diligence of Claimant No.1 in the absence of any Definitive Documents to that effect. It can be safely said that at the very least, it was only pursuant to the Term Sheet, that the Respondent could conduct the Due Diligence and became privy to sensitive commercial information that would not have been shared by Claimant No.1 in ordinary course of business with a competitor. A perusal of the Limited Diligence Checklist annexed with the Term Sheet shows that it sought detailed information about Corporate Documents, Share & Shareholder Information, Financial Diligence, Intellectual Property Rights, Assets, Human Resource, Litigation and Information Technology. Ex. C-40 is the Preliminary Requisition List shared by Respondent No.1 prepared pursuant to the documents received from Claimant No.1 by the Respondent in response to the Limited Diligence Checklist.*

*The Term Sheet did contain a basic framework regarding acquisition, subject to which the Definitive Documents were to be executed. Therefore, even if it is assumed that at the time of execution of the Term Sheet the parties had intended that the Term Sheet be Non-Binding and exploratory, by conduct, parties waived the non-binding preamble of the Term Sheet and created a binding & enforceable contract.*



*In the considered opinion of this Tribunal, a plain reading of the Term Sheet as a whole does not support the case set-up by the Respondent. The Term Sheet is a binding document. Without expressing any opinion on the consequences of the acts listed below (which is the subject matter of other issues), it is observed that the Claimant did take various steps in order to fulfill the obligations listed in Annexure-I of the Term Sheet such as:*

- 1. Facilitating transfer of Claimant No.1's employees [Ex. C-19 (Colly) relied upon]*
- 2. Facilitating transfer of properties in Claimant No.1's network to Respondent's Network. [Ex.C-21 relied upon]*
- 3. Facilitating the process of Consumer Migration [Ex. C-1 (Colly) relied upon]*
- 4. Facilitating the process of transferring of future bookings w.e.f. 31.12.2015*
- 5. Providing consumer data of Claimant No.1 to the Respondent [Ex. C-2 relied upon]*

*Had the Term Sheet been non-binding and meaningless, there was no reason for the Respondent to have entertained or shown interest in any communication in respect of transfer of employees/ properties/consumer migration etc.*

*Hence, this Tribunal holds that the parties were acting upon the Term Sheet and the Term Sheet is a binding document."*

81. Thus, the Arbitral Tribunal holds that:

- (i) The term-sheet was not a mere exploratory document.
- (ii) It binds the respondent/claimant to fulfill several obligations, apart from those listed in the definitive documents (contemplated to be executed at a later stage).
- (iii) The extensive due diligence of the respondent/claimant was conducted only on the basis of the term-sheet as a result of which vital



information about the respondent/claimant was shared with the petitioner, and various steps were taken to fulfill the obligations listed in Annexure-1 of the term-sheet which essentially resulted in transfer of business of the respondent/claimant to the petitioner.

(iv) Thus, the term-sheet contains a basic framework regarding acquisition and even if it was assumed at the time of execution thereof that the same would be non-binding and exploratory, by conduct, the parties waived of the non-binding nature thereof and created a binding and enforceable contract.

82. Arguably, the above conclusions in the impugned award are in the face of the express language of the term-sheet. It is noted that the term-sheet contains the following express stipulations:

*“This Term Sheet is non-binding and is intended solely as a summary of the current terms that are proposed by the parties; provided that the paragraphs opposite the headings "Confidentiality", "Approvals", "Expenses", "Exclusivity" and "Governing Law and Arbitration" shall be legally binding provisions. The parties do not intend to be bound until they enter into Definitive Agreements regarding the subject matter of this Term Sheet, and either party may, at any time prior to Execution of such Definitive Agreements, unilaterally terminate all negotiations pursuant to this Term Sheet without any liability to the other party”.*

83. Thus, the term-sheet expressly and unequivocally states that it is ‘non-binding’. It further goes on to prescribe that only 5 clauses thereof are to be treated as binding. Had the parties intended that all the provisions of the term-sheet be made binding, there would have been no occasion to incorporate an express stipulation to the contrary.

84. The Arbitral Tribunal does not hold that any implied term must be read into the term-sheet so as to render it to be binding, instead, the



impugned award holds that the term-sheet has been rendered binding on account of the conduct of the parties.

85. The Supreme Court in ***Bank of India v. K. Mohandas***<sup>16</sup>, has observed as under:

*“The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. **Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract.** The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.”*

86. The avowed purpose of the term-sheet was to provide a broad framework for acquisition of the identified assets of the respondent/claimant. It expressly prescribes the circumstances in which the acquisition would be ‘closed’. The same is predicated not only on the satisfaction of the conditions referred to in Annexure-1 of the term-sheet, but also any other condition/s that would be incorporated by the parties in the “definitive agreements”, that would eventually be executed.

87. In a recent judgment, ***M/S. Azeem Infinite Dwelling v. M/S. Patel Engineering Ltd.***<sup>17</sup>, a Division Bench of the Karnataka High Court held that a Term Sheet cannot be considered a binding agreement if it explicitly requires the execution of a definitive agreement. The Court emphasized that unless the Term Sheet itself is intended to create binding obligations, it remains a preliminary document, contingent upon the execution of a final, definitive contract. The relevant portion of the said judgment is reproduced hereunder:

<sup>16</sup> (2009) 5 SCC 313

<sup>17</sup> MANU/KA/1320/2024



*“10. From a reading of the Termsheet for Buyout dated 08.12.2022, it is clear that the said document is only in the nature of an offer, which is valid till Definitive agreement is entered into or for a period of 90 days from the date of execution, whichever is earlier. It is not in dispute before us that no Definitive Agreements had been entered into within a period of 60 days from the date of execution of the Termsheet for Buyout. It is also not in dispute that no amount has changed hands on the basis of the Termsheet for Buyout between the parties to the same.”*

88. Thus, the conclusion in the impugned award to the effect that the term-sheet became a binding document by virtue of the conduct of the parties is somewhat tenuous. Even so, this Court is conscious of the fact that in these proceedings under Section 34 of the A&C Act, particularly, in the context of an international award, a merit based review is impermissible.

89. As such, despite the reservation of this Court on the findings rendered by the learned Arbitrator as to the ‘binding’ nature of the term sheet, this Court finds that the same is not liable to be interfered with in these proceedings under Section 34 of the A&C Act.

**(ii) Whether the arbitral award deals with or adjudicate all the disputes which fell within the scope of arbitration or whether there has been any omission to decide/adjudicate matters which directly arose for consideration of the Arbitral Tribunal?**

90. One of the central issues arose for consideration before the learned Arbitrator, was whether the respondent/claimant is entitled to specific performance by way of issuance of 7% of the shareholding of the petitioner in favour of the shareholders of the respondent/claimant, *pro-rated* to their respective shareholding, or whether in the alternative, damages were liable to be awarded in the amount equivalent to 7% of the value of the petitioner



company as per the last round of funding received by the petitioner along with the sum of USD 1 Million.

91. As noticed hereinabove, the prayers/ relief, as framed in the statement of claim filed on behalf of the respondent/claimant are as under: -

*“i. Specifically perform its obligation agreed upon the Term Sheet by transferring/issuing, in the name of the Claimants, 7% of the present shareholding of the Respondent in favour of Claimant Nos. 2-17, pro rated to their respective shareholding of Claimant No.1;*

*ii. Pay the agreed contracted amount of USD 1 million to the Founders, i.e., Claimant Nos. 4-10; or*

*iii. In the alternative and without prejudice to the claims in paragraphs 7 (i) and (ii) above, pay to Claimants, jointly, in the amount equivalent to 7% of the value of Respondent company as per the last round of funding received by Respondent, along with USD 1 million to Claimant Nos. 4-10, reflecting the benefit of the bargain as promised by Respondent to the Claimants;*

*AND*

*iv. Pay interest @18% per annum from the date of execution of Term Sheet till date of payment, on the due amount of USD 1 million to Claimant Nos.4-10; AND*

*v. Pay damages for loss of goodwill and reputation as well as inconvenience caused to the Claimants, in the amount of USD 17 million; AND*

*vi. Pay for the costs of the present proceedings;”*

92. Having decided issue no. 4 by holding that the term-sheet is in the nature of a binding document which creates binding obligations, it was incumbent on the Arbitral Tribunal to consider whether on that basis, the primary prayer of the respondent/claimant viz. specific performance by way of issuance of requisite number of shares could be granted to the respondent/claimant.





93. Necessarily, the said prayer was required to be adjudged on the basis of the provisions of the term-sheet, which is the only agreement between the parties.

94. However, the impugned award, did not take the adjudication on this vital aspect to its logical conclusion by either granting or refusing specific performance.

95. The impugned award itself notes that there was no consensus *ad idem* between the parties as regards execution of any “definitive agreements” as contemplated under the term-sheet. Having already held that the term sheet had become “binding” on account of the conduct of the parties [despite the express stipulation to the contrary in the term sheet], it was open to the learned arbitrator to give further directions for execution of definitive agreements (if permissible under law) and thereby grant specific performance, as sought by the respondent/ claimant. Instead, the learned Arbitrator sought to relegate the respondent/claimant to take “appropriate proceedings for specific performance and execution of definitive agreement”.

96. It was not the case of the respondent/ claimant that the learned arbitrator lacked jurisdiction to comprehensively adjudicate and pass all necessary directions, in respect of the prayer for specific performance. The preceding portion of the award itself finds that the arbitral tribunal had jurisdiction to adjudge upon all aspects of the term sheet and the relationship/obligations arising therefrom<sup>18</sup>. It was held that the arbitration clause was wide enough to include adjudication of all the disputes/claims

<sup>18</sup> This Tribunal holds that Claimant No.1 is entitled to claim/pray for the relief of allotment of shares from the Respondent to Claimant Nos. 2 to 17 and the payment of USD 1 Million Dollars to Claimants No. 4 to 10.



raised before the learned arbitrator. The respondent/claimant had made a cogent, self-contained prayer that its shareholders were entitled to 7% of the shareholding of the petitioner herein. However, as noted, the impugned award does not adjudicate this prayer.

97. It was open to the arbitral tribunal to either grant or refuse specific performance. Considering that the respondent/ claimant has been held “entitled” to specific performance, it was incumbent on the arbitral tribunal itself to issue all consequential directions in this regard. Inexplicably however, the impugned award seeks to relegate the respondent/claimant to “appropriate proceedings for specific performance” for execution of definitive agreements.

98. The above conclusion of the learned arbitrator is quite incongruous. The same tantamounts to an omission to fully adjudicate the most central issue that arose before it, and virtually sets at nought the entire adjudication exercise before the arbitral tribunal.

99. Apart from the above, it has also been rightly pointed out by the petitioner that the impugned award also omits to consider or adjudicate upon the petitioner’s objection regarding the determinable nature of the Term Sheet. It has brought to the notice of this Court that the respondent/claimant itself, in its notice of invocation of arbitration dated 25.01.2018, acknowledged the termination<sup>19</sup>.

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<sup>19</sup> 8. In view of the unilateral, illegal and arbitrary termination of the Term Sheet by you, it is clear beyond any iota of doubt that you have terminated the agreement only to cause prejudice and loss to our Client and to unjustly enrich itself”

xxx

10. Our Client is entitled to claim reliefs in arbitration for the wrong that has been caused by you due to your illegal, arbitrary and wrongful termination of the binding Term Sheet....



100. A perusal of the Statement of Defence clearly establishes that the petitioner did, in fact, raise a categorical objection that the Term Sheet was, determinable. The relevant portion of the SoD is reproduced below:

*"In addition to the above, even if it is assumed, though not admitted, for the sake of argument, that the Term Sheet was somehow a binding contract then also as the Term Sheet by its very nature was a determinable contract and the specific performance of such a contract cannot be granted in terms of the provisions of Section 14 of the Specific Relief Act. It is a settled position of law that specific performance of determinable contracts cannot be granted and only damages, being an adequate remedy, can be awarded in favour of the party claiming breach of such an agreement."*

101. Furthermore, in its post-hearing written submissions dated 20.10.2020, the petitioner reiterated this position. The relevant excerpts thereof are as follows -

*"7.21 Not only is the NBTS determinable in nature (which by itself is sufficient to deny specific performance of the NBTS), the NBTS was in fact actually determined by the parties.*

*7.22 The NBTS was in fact terminated between the parties vide emails dated 17. 09.2016 and 19.09.2016 [pg. nos. 226-231, Statement of Claim, Annexure C-22, Exhibit C- 14/, more specifically at the behest of the Claimant No. 1.*

*7.23 Vide email dated 17.09.2016, a new proposal and understanding was circulated by the advisor of Claimant No. 1, which proposal contemplated the execution of a new term sheet and drafting of various definitive agreement to capture the new construct. The said understanding was also confirmed by the Respondent vide email dated 19.09.2016. Thus, by way of the said communications, the NBTS was determined by the parties."*

102. However, a perusal of the arbitral award reveals that the learned Arbitrator has failed to deal with or render any findings on the said issue.



103. In the above circumstances, the conclusion is irresistible that the impugned award omits to decide/adjudicate material issue/s which fell within the scope of the submission to arbitrate.

104. It has been held by the Supreme Court in *Vijay Karia vs. Prysmian Cavi e Sistemi SRL & Others*, (2020) 11 SCC 1 that if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counterclaim in its entirety, the award is vulnerable to challenge. The relevant observations in *Vijay Karai* (supra) is as under:-

*“83. Having said this, however, if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counterclaim in its entirety, the award may shock the conscience of the Court and may not be enforced, as was done by the Delhi High Court in Campos Bros. Farms vs. Matru Bhumi Supply Chain (P) Ltd., 2019 SCC OnLine Del 8350, on the ground of violation of the public policy of India, in that it would then offend a most basic notion of justice in this country.....”*

105. As such, the impugned award is vulnerable to challenge on account of omission to decide material issue/s which fell within the submission to arbitrate.

**(iii) Whether the finding in the impugned award to the effect that the claimants are “entitled” to specific performance is in conflict with the public policy of India in the given factual conspectus?**

106. Quite apart from the aspect that the impugned award omits to decide the complete controversy between the parties [in particular, omission to decide prayer (a) as canvassed in the statement of claims], even the findings in the impugned award to the effect that the respondent/claimant is “entitled” to specific performance is fraught with difficulties.



107. While deciding issue No. 5, the learned Arbitrator gives a categorical finding that there was no consensus *ad idem* between the parties on the “definitive agreements” stipulated under Clause 7 of the term-sheet dated 26.11.2015. Clause 7 of the term-sheet is in the following terms:

*“Subject to the conditions set forth in this Term Sheet, the parties shall mutually agree, execute the following documents and such other documentation as the parties may deem necessary (hereinafter referred to as the “Definitive Agreements”):*

- (a) Share Subscription Agreement/ Merger Framework Agreement (Acquirer);*
- (b) Shareholders Agreement (Acquirer);*
- (c) Asset/ Business Transfer Agreement;*
- (d) Non-Compete, Non Solicitation Agreement with the Founders and*
- (e) Settlement and Release Agreement executed between the Acquirer and the Target.*

*The parties may pursuant to mutual discussions agree upon execution of one or more agreements to capture the entire understanding arrived at amongst them”.*

108. Thus, the award itself acknowledges that in respect of vital aspects, on which the parties were required to agree upon [which are in the nature of *conditions precedent* to specific performance], there was no *consensus ad idem* between the parties. The relevant aspects with regard to which, in terms of the award itself, there was no *consensus ad idem*, are quite fundamental. Thus, for instance, as per the award itself, there was no *consensus ad idem* as regards the terms of the share subscription agreement and/ or the merger framework agreement. This is a basic requirement / pre-condition to effectuate the transaction for issuance of any shares.



109. Clearly, for the purpose of entering into the agreements contemplated in Clause 7 of the term-sheet, the parties were required to mutually agree on innumerable minute aspects, such as -

- a. the manner in which the corporate structuring/re-structuring would be done to effectuate the proposed transaction; the total paid up capital of the combined entity etc. [Clause 7(a) of the term sheet]
- b. the terms of asset/ business transfer agreement; the valuation to be accorded to the acquired assets etc. [Clause 7 (c) of the term sheet]
- c. the terms of the agreement between the shareholders, *inter-alia* setting out their mutual rights and obligations [Clause 7 (b) of the term sheet];
- d. the terms of the envisaged non-compete/non-solicitation agreement [Clause 7 (d) of the term sheet].

110. In the absence of any agreement between the parties on the aforesaid basic aspects, it is inconceivable as to how the Respondent/ Claimant could be held “entitled” to specific performance. Evidently, it was on account of this difficulty that the learned arbitrator, instead of frontally dealing with the same, seeks to adopt the circuitous route of relegating the parties to another round of litigation for “specific performance and execution of definitive agreements”.

111. Having itself noticed that there was no *consensus ad idem* in respect of crucial aspects of the transaction, there was no occasion to hold that the respondent/ claimant is “entitled to specific performance”. It is trite that there can be no specific performance in a situation where there is no agreement between the parties as to the most material terms.





112. The findings in the impugned award are virtually to the effect that the respondent/claimant is “entitled to specific performance” notwithstanding absence of *consensus ad idem* on vital material terms. The same tantamounts to granting specific performance in the absence of a complete agreement between the parties. The same is contrary to the basic tenets of Indian law of contract and specific performance.

113. The Supreme Court in *Mayawanti v. Kaushalya Devi*<sup>20</sup>, has observed as under -

*“18. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement. Negotiations thereafter would also be material if the agreement is rescinded.”*

114. This Court in *Usha Aggarwal v. The Punjabi Bagh Co-Operative Housing Society Ltd. and Anr*<sup>21</sup>, while relying on *Mayawanti* (supra) has observed as under –

*“30. Supreme Court, in Mayawanti v. Kaushalya Devi, (1990) 3 SCC 1, has held (i) that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract; where a valid and enforceable contract has not been made, the Court will not make a contract*

<sup>20</sup> (1990) 3 SCC 1

<sup>21</sup> 2018 SCC OnLine Del 8905



*for the parties; it is therefore necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it; it is settled law that if a contract is to be made, the intention of the offeree to accept the offer must be expressed without leaving room for doubt as to the fact of acceptance or to the coincidence of the terms of acceptance with those of the offer; (ii) the rule is that the acceptance must be absolute and must correspond with the terms of the offer; if the two minds were not ad idem in respect of the property to be sold, there cannot be said to have been a contract for specific performance; if the parties themselves were not ad idem the Court cannot order specific performance; (iii) specific performance of a contract is the actual execution of the contract according to its stipulations and terms and the Courts direct the party in default to do the very thing which he contracted to do; the stipulations and terms of the contract have therefore to be certain and the parties must have been consensus ad idem; if the stipulations and terms are uncertain and the parties are not ad idem, there can be no specific performance for there was no contract at all; and, (iv) Section 9 of the Specific Relief Act says that except as otherwise provided in that Act, where any relief is claimed under Chapter II of the Act in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts; the defence of there having not been a contract for lack of consensus ad idem is thus available to the defendant.”*

115. There can be no quarrel with the proposition that upholding the “entitlement” of a party to seek specific performance notwithstanding absence of an agreement on material terms, is a violation of ‘fundamental principles that constitute the basis for administration of justice and enforcement of law and contracts in India’.

116. The impugned award also permits/ directs the respondent/claimant to take “appropriate proceedings for specific performance and execution of definitive agreements”. It has been found in the award itself that there is no *consensus ad idem* in respect of the terms of the envisaged “definitive agreements”. Thus, the impugned award, in effect, permits/ sanctions proceedings for specific performance, of an agreement of which the material terms have not been agreed upon. Again, the same is contrary to



‘fundamental principles that constitute the basis for administration of justice and enforcement of law and contracts in India’.

117. For the above reasons, the impugned award is in conflict with the “public policy of India” and is, consequently, liable to be set aside under Section 34(2)(b)(ii) of the A & C Act, 1996.

### **CONCLUSION**

118. In the circumstances, for all the above reasons, the impugned award is set aside. Accordingly, O.M.P.(COMM) 151/2021 stands allowed. The pending application also stands disposed of.

### **O.M.P.(ENF.)(COMM) 116/2021**

119. In view of the above, O.M.P.(ENF.)(COMM) 116/2021 filed by the respondent/claimant is dismissed.

**SACHIN DATTA, J**

**MAY 13, 2025/sv, at**