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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **OMP (COMM) 154/2016**

Reserved on : December 7, 2017
Date of decision: February 9, 2017

SHAKTI NATH AND ORS. ..... Petitioners
Through: Muhammad Ali Khan with Mr. Omar Huda, Advocates.

versus

ALPHA TIGER CYPRUS INVESTMENTS NO. 3 LTD AND ORS. ..... Respondents
Through: Mr. Sanjeev Puri, Senior Advocate with Mr. Ruchin Midha, Advocate.

**CORAM: JUSTICE S. MURALIDHAR**

**J U D G M E NT**

**% 09.02.2017**

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') filed by Mr. Shakti Nath, Mrs. Meena Nath and Mr. Vikram Nath (Petitioner Nos. 1 to 3 respectively) and Logix Soft-Tel Private Limited (Petitioner No. 4) is to a majority Award dated 20th January, 2015 passed by the Chairman of the Arbitral Tribunal ('AT') and one of its Members in the disputes between the parties.

***Background facts***

2. The backgrounds facts are that M/s. Sarv Mangal Real Tech Pvt. Ltd.

('Sarv Mangal') was allotted a plot of land admeasuring 1,00,450 sq.mts. by New Okhla Industrial Development Authority ('Noida Authority') being Plot No. 1, Sector-140A, Noida, Uttar Pradesh by virtue of a lease deed dated 14th January, 2008. IT Infrastructure Park Private Limited ('ITIPPL') i.e., Respondent No. 3 having its registered office at D-922, New Friends Colony, New Delhi had a co-development agreement with Sarv Mangal for co-development of an SEZ for Information Technology/Information Technology Enabled Services in respect of the allotted land in the ratio of 45:55. Sarv Mangal executed a sub-lease deed dated 4th March, 2008 in favour of ITIPPL in respect of a portion of the allotted land i.e., land admeasuring 45,202 sq.mts. or thereabouts ('Galaxia Project Land').

3. Respondent Nos. 1 and 2 are corporate entities incorporated under the laws of Cyprus engaged in the business of investment in the real estate sector. In relation to the Galaxia Project Land, a Share Holders Agreement ('SHA') and a Share Subscription and Purchase Agreement ('SSPA'), both dated 21st March, 2008 were executed between the Petitioners and the Respondents. Admittedly, as on 16th September 2008, Respondent Nos. 1 and 2 ('Investors') and the Petitioners ('Promoters') held 50% shareholding each in Respondent No. 3.

4. The Respondents are stated to have been desirous of entering into a business and commercial relationship with the Petitioners for the development of the proposed SEZ for Information Technology / Information Technology Enabled Services. They had also entered into agreements with

the Petitioners for the development of other projects viz., the Technika Project and the Technova Project. However, the Respondents are stated to have exited from the agreements in respect of the above two projects in January and May, 2010. According to the Petitioners, however, the present disputes arising out of the implementation of the Galaxia Agreements are tied inextricably to the conduct of the Respondents *vis-a-vis* the Technika and Technova Projects.

***Relevant clauses of the Restated SHA and SSPA***

5. There was a termination agreement dated 11th July 2009 in terms of which the SHA and SSPA were brought to an end. On 2nd July, 2009, the parties entered into a Restated Share Holders Agreement ('RSHA') and a Restated Share Subscription and Purchase Agreement ('RSSPA') which substituted the earlier SHA and SSPA. These are referred to as the 'Amended Galaxia Agreements'. The RSHA envisaged *inter alia* that the first stage of the Galaxia Project would be completed no later than two years from the closing date; the Petitioners would have two nominee directors on the Board of Directors of Respondent No. 3; and that the decisions in respect of any of the items listed in Clause 15.15.1 of the RSHA were to require an affirmative vote of either the Petitioners' representative or of at least one of the Petitioners' nominee directors in order for such decisions to be effective (known as 'major decisions').

6. In terms of Clauses 4.1 and 4.2 of the RSHA, the Promoters i.e., Petitioner Nos. 1 to 4 acknowledged and agreed that they were under an

obligation to arrange for a Term Loan Facility of at least Rs. 113.50 crores ('Term Loan Facility') for Respondent No. 3 from any of the nationalized banks or other lenders as was agreed by the Investors. They acknowledged that a sum of Rs. 13.47 crores would be paid by Respondent No. 3 to Noida Authority towards the remaining cost of the project land and the balance would be utilized to part finance the construction of the first stage of the project. The terms and conditions of the Term Loan Facility were to be subject to the written approval of the Investors i.e., Respondent Nos. 1 and 2.

7. Further, under Clause 4.2 of the RSHA the Promoters were, on the date of payment of the share subscription money by the Investors (Respondent Nos. 1 and 2) to Respondent No. 3, to provide a bank guarantee issued by a bank approved by the Investors (Respondent Nos. 1 and 2) to Respondent No. 3 in the format given in Schedule VII of the Agreement for Rs. 13.47 crores. This amount was equivalent to the remaining cost of the project land payable by Respondent No. 3 to Noida Authority i.e., guaranteeing thereby that in case the Petitioners failed to ensure execution of the Facility Agreement and disbursal of the first instalment of a sum not less than Rs. 13.47 crores of the Term Loan Facility on or before 31st August, 2009 (Long Stop Date) or such later date as may have been agreed to by Respondent Nos. 1 and 2 in their sole discretion, then the bank would pay the aforesaid amount to Respondent No. 3 on demand. The Petitioners acknowledged and agreed that the execution and delivery of the bank guarantee was a material inducement to Respondent Nos. 1 and 2 in executing the agreement with the

Petitioners.

8. Under Clause 5.1.1 of the RSHA, two conditions were to be fulfilled and completed by the Petitioners and Respondent No. 3 to the satisfaction of Respondent Nos. 1 and 2 on or before the Long Stop Date. One was the execution of the Facility Agreement; the other was the disbursal of the first instalment of the Term Loan Facility of an amount not less than Rs. 13.47 crores by the lender to Respondent No. 3 on the terms and conditions set forth in the Facility Agreement and the sanction letter. The parties confirmed that the time frames specified in Clause 5.1.1 were hard timelines and that "time is of the essence under this agreement." The conditions would not be subject to delays due to force majeure (Clause 23.20) or any delays or time taken to obtain any government approvals and would not be extended for any reason whatsoever.

9. Under Clause 5.2 of the RSHA, there were Put Option Rights. Clause 5.2.1 stated that in the event the conditions subsequent were not fulfilled by the Long Stop Date, the Investors (Respondent Nos. 1 and 2) "shall have the right, though not the obligation, to require the Promoters, to acquire all but not less than all of the shares held by the Investors (put option shares) and the Promoters shall be required to purchase such put option shares within 30 (thirty) business days of being required to do so by the Investors through notice in writing (Put Option Notice)." The price at which the Investors would sell the put option shares to the Promoters "shall be equal to the Investors Capital plus a post tax IRR of 19% on the Investors Capital ("Put

Option Price") and the Promoters shall be bound and obligated to pay the Put Option Price to the Investors." It further stated that upon exercise of the put option as set out in the clause, the Promoters "shall have the irrevocable obligation" to purchase the put option shares held by the Investors and pay the put option price within 30 business days of the put option notice ('Put Option Settlement Period').

10. In the event the Promoters were unable to remit the put option price to the Investors for any regulatory reason, the entire put option price "shall be paid by the Promoters to such other person as may be nominated or designated by the Investors to receive such Put Option Price." Upon receipt of such put option price, the Investors "shall hand over the share certificates pertaining to the Put Option Shares to the Promoters." Under Clause 2.4 of the RSHA, the Investors were obliged to repay the remaining amount of the Investors' share subscription money to Respondent No. 3 and the Investors' purchase consideration to the Promoters within 10 days from the date of receipt by the Investors of all documents evidencing the fulfilment of the conditions precedent to closing to the complete satisfaction of the Investors.

11. Clause 15 of the RSHA stipulated that the board of directors would have four directors, two each appointed by the Investors and Promoters respectively. Further, the Investors were entitled to appoint the Chairman of the Board as well as the Chief Financial Officer whereas one of the promoter's nominee directors would be appointed as the Managing Director.

12. Under Clause 3.3 of the RSSPA, the Investors were to remit an amount of Rs. 11 crores to the Petitioners to acquire 10,000 Class A share held by Respondent No.3 (Promoters Sale Shares). In terms of Clause 3.4 of the RSSPA, the Investors were to pay Rs. 34 crores for the subscribed shares to Respondent No. 3. Both the RSHA and the RSSPA stipulated that upon purchase and subscription of further shares, the ratio of the shareholding of the Investors and the Promoters would continue to be 50:50.

13. It is pointed out that the grant of Term Loan Facility and the execution of the Facility Agreement being a major decision required an affirmative vote of at least one nominee director of the Investors. According to the Petitioners, the Respondents failed to take steps to execute the Facility Agreement. It is further stated that the Respondents willingly extended the Long Stop Date from 31st August, 2009 to 10th October, 2009. Even thereafter, the Respondents took no steps to act in furtherance of the sanction letters "to enable the execution of the Facility Agreement or further extend the Long Stop Date after 10th October, 2009". By the time the Respondents brought in the Investors' Share Subscription Money (in mid December), the Long Stop Date had long expired.

14. By an Agreement dated 31st August, 2009, the parties agreed to "extend the period for the fulfilment of the Conditions Precedent in the [RSHA] and the [RSSPA] for a further period of 25 (Twenty Five) days and accordingly the Conditions Precedent to Closing shall be fulfilled by the' Promoters, to the complete satisfaction of the Investors, on or before 25 September 2009.

The Parties have also hereby extended the Long Stop Date under the [RSHAl] for a further period of40 (forty) days and accordingly the extended Long Stop Date shall be 10 October 2009".

***The Supplemental Agreement***

15. In December 2009, amendments were carried out to the RSHA by executing a Supplemental Agreement ('SA') dated 8th December, 2009. The Petitioners contend that they were coerced into giving their assent to entering into the SA as the payment of the Investors' Purchase Consideration and the Investors' Share Subscription Money was made a condition precedent thereto. The SA, according to the Petitioners, substantially varied and modified the RSHA.

16. Under Clause 5.1 of the SA, the Investors (Respondent Nos. 1 and 2) were bound to remit the Investors' share subscription money into an Escrow Bank Account which would be operated by the authorized representatives of the Investors (Respondent Nos. 1 and 2). According to the Petitioners, this was a significant departure and variation from the mode and manner of operation of the Designated Bank Account contemplated by RSHA. Clause 5.2 of the SA provided that the Designated Bank account would be operated by two joint signatories, one nominated by the Investors/Respondents and the other by the Promoters.

17. The SA is also stated to have dispensed with the requirement of the Petitioners having to provide a bank guarantee to ensure payment of lease

rentals of Rs. 13.47 crores under Clause 4.1 of the RSHA. Clause 3.4 read with Clause 5.2 of the SA obliged only Respondent No. 3 to secure the Term Loan Facility. Under the SA, Respondent Nos. 1 to 2 were to be the sole signatories of the bank account of Respondent No. 3, referred to by the parties as the HSBC account.

***Sums invested by the Respondent Investors***

18. It is stated that thereafter the Investors paid a sum aggregating to Rs. 11 crores to Petitioner Nos. 1 to 4 towards Investors Purchase Consideration as referred in Clause 3.3 of RSSPA. The Respondents also paid a sum of Rs. 34,00,27,747 towards Investors Share Subscription Money for issue and allotment of the shares of Respondent No. 3 in terms of Clause 3.4 of RSSPA. Thus, a sum of Rs. 34,00,27,747 was paid to the bank account of Respondent No. 3 which is stated to be under control of Respondent No. 3 and being operated by their authorized representatives.

19. According to the Respondents/Investors, a total sum of Rs. 45,00,27,747 was brought in by the Investors towards the Galaxia Project and the payments were made as under:

(a) Rs. 55 lakhs to Respondent No. 3;
(b) Rs. 4.73 crores to Petitioner No.2
(c) Rs. 5.72 crores to Petitioner No. 4; and
(d) Rs. 34,00,27,747 (Rupees thirty four crores twenty seven hundred and forty seven only) to Respondent No. 3.

20. On 17th December, 2009, Petitioner Nos. 1 to 4 received confirmation that Rs. 4.50 crores had been transferred from the designated bank account

to Petitioner No. 4 in partial repayment of the Promoters' Loan. Shortly thereafter, on 17th December, 2009 itself, counsel for the Petitioner sent an email to the Investors purporting to terminate *inter alia* the SHA, SSPA, RSHA, RSSPA, the termination agreement and any and all documents to or flowing from the aforementioned agreements.

***Constitution of the AT***

21. On 6th February, 2010, the Respondents sent their notice of invocation of arbitration to the Petitioners nominating a former Chief Justice of India ('M1') as their Arbitrator. On 18th February, 2010, the Respondents sent a request to the International Chamber of Commerce ('ICC Court') for commencement of arbitration. The Petitioners informed that they proposed another former Chief Justice of India ('M2') as their nominated arbitrator. By its letter dated 26th February, 2010, the ICC confirmed receiving the request for arbitration. The ICC Secretariat wrote to the Respondents noting that their nomination of M1 as arbitrator and that he would be invited to complete a statement of acceptance, availability and independence. A copy of this letter was marked to the Petitioners. Another similar letter was written by the ICC Secretariat on the same day to the Petitioners.

22. On 15th March, 2010, counsel for the Petitioners wrote to the Secretariat of the ICC Court on the specific issue of constitution of the AT. The Petitioners noted in their letter that the Respondents had by their letter dated 6th February, 2010 informed the Petitioners of their decision to appoint M1 as their nominee Arbitrator. The Petitioners informed their selection of M2

(along with contact details) as the arbitrator by their letter dated 12th February, 2010 to the counsel for the Respondents. They noted that the two arbitrators were yet to confer about the appointment of the Presiding Arbitrator. In other words, the Petitioners at the above stage did not raise any issue regarding appointment of M1 as Arbitrator on behalf of the Respondents.

23. On 1st April, 2010, ICC wrote to the parties reminding them of the time limit for the coordinators to jointly nominate the Chairman of the AT. On 14th April, 2010, counsel for the Petitioners wrote to the ICC for grant of extension of time to file a reply. Here again, there was no objection raised as regards the nomination of M1 as an Arbitrator by the Respondents. One more reminder was sent to the parties by the ICC for two nominated Arbitrators to appoint a third Arbitrator.

24. At that stage, on 28th May, 2010, a Settlement Agreement was entered into between the Respondents and the Petitioners, Clause 2.3 of which reads as under:

> "2.3 Notwithstanding anything to the contrary as may be contained in this Agreement or as may be otherwise agreed between the parties herein, it is clearly agreed and understood between the parties that in the event that all the entire Galaxia Consideration or any part thereof is not received by the Investors within the timelines stipulated hereinabove, for any reason whatsoever, or in the event any of the Promoters have failed to fulfil any of their obligations herein or if the Promoters have committed a breach of the terms of this Agreement or if any other act or omissions that has such effect is committed or omitted, then without prejudice to any other rights of the Investors

> under the Galaxia Agreements, the Investors shall have the right, to be exercised in their sole and absolute discretion, to recommence the Galaxia Arbitration in accordance with the provisions of the Galaxia Agreements.
>
> It is jointly and severally, agreed and acknowledged by the Promoters that in such an event, as stated above, the Investors shall be entitled to all rights that ensue in their favour under this Agreement or otherwise including the right to claim and to forthwith receive the entire outstanding amount of or any such otherwise payable to and claimed by the Investors. The Promoters unambiguously and unequivocally acknowledge and declare that the amounts agreed to be paid to the Investors, i.e., the entire Galaxia Consideration, in terms of this Agreement are undisputed and payable to the Investors."

25. This was to be read with Clause 1.1.8 which stated that either Rs. 45 crores had to be paid to the Investors under Sections 1.1.6 (i) and 1.16 (ii), or the sum of Rs. 50 crores which was required to be paid under Section 1.1.6 (iii) and Section 1.1.7 would be referred to as the Galaxia Consideration. Following this, on 15th June, 2010, a joint letter was addressed to the ICC by which the parties agreed to suspend the ICC administered arbitration in terms of the SA.

26. On 1st February, 2011, ICC wrote to both the parties stating *inter alia* that it would confirm M1 and M2 as co-arbitrators. A reminder was sent on 21st February, 2011 stating that ICC would decide upon the confirmation of the above two arbitrators. On 21st February, 2011, the Petitioners wrote to the ICC reiterating that the arbitration proceedings should be kept abeyance. On 11th March, 2011, ICC confirmed the appointment of the above two arbitrators. On 21st April, 2011, the Chairman of the AT was appointed.

***Failed challenges by the Petitioners to M1 and the Chairman of the AT***

27. On 19th May, 2011, an application was filed by the Petitioners for the first time challenging M1 on the ground that he did not possess the special qualification required to act as Arbitrator. The Respondents pointed out that the said challenge was time barred since M1 was appointed as an Arbitrator on 6th February, 2010.

28. The above challenge was rejected by the ICC on 30th June, 2011. An application was filed by the Petitioners under Section 9 of the Act in which an order was passed directing the Petitioners to continue paying Noida Authority the lease rentals till such time the order was modified by the AT.

29. More than a year later on 13th August, 2012, an application was filed by the Petitioners before the AT challenging the appointment of both M1 as well as the Chairman of the AT on the same ground as earlier. This application was rejected by the AT on 23rd January, 2013 on the ground that the appropriate forum to deal with this application was the ICC Court. It was pointed out that the arbitration clause envisages that the ICC Rules shall govern the procedure of arbitration.

30. Not resting with the above two failed challenges, the Petitioners filed a third application on 16th February, 2013 challenging the appointment of M1 and the Chairman of the AT. This was rejected by the ICC Court on 14th March, 2013.

***Was the AT right in rejecting the challenge?***

31. One of the first grounds of challenge in the present petition is whether the negation of the challenge by the AT was valid.

32. The submission of the Petitioners is that as per Clause 23.22.2 (b) of the RSHA read with Clause 18.2 (b) of the RSSPA, the parties had agreed upon the arbitrators nominated having (i) "the requisite experience, knowledge and understanding of Indian real estate laws, regulations, and conventions and practices"; and (ii) each Arbitrator would have at least five years' experience with construction and/or management of the projects similar to the Galaxia Project.

33. According to the Petitioners, neither the Chairman nor M1 possessed the requisite qualifications. It is further submitted that while M2 disclosed to the ICC that he did not possess the requisite qualification, M1 made no such disclosure despite evidently being unable to satisfy the requirements. However, it is stated that since there was no objection to the nominee arbitrator of the Petitioner, his appointed stood confirmed. It is further submitted that M1 failed to answer in his email dated 1st April, 2011 as to whether he had the requisite qualification, choosing instead to rely on the fact that he had only presided over cases relating to construction projects.

34. Further, the Petitioners on 8th April, 2011 wrote to M1 stating that the disclosure did not amount to a satisfaction of the terms agreed upon in the arbitration agreement. M1 by letters communication dated 6th May, 2011

and 9th May, 2011 objected to the "unsavoury language" and refused to respond to the emails/letters of Petitioner No. 1. According to the Petitioners, it was only after receiving the final email dated 9th May, 2011 from M1 that the Petitioners were able to readily infer for the first time that M1 did not possess the requisite qualification. By letter dated 19th May, 2011, they challenged his nomination.

35. As far as the Chairman of the AT was concerned, the Petitioners stated that he never gave any disclosure about possessing the requisite qualifications. It is further stated that the Petitioners' objections were heard by the AT on 21st and 22nd January, 2013. The AT referred the matter to the ICC Court. Thereafter, by a separate application filed on 16th February, 2013, the Petitioners raised the challenge before the ICC Court regarding appointment of the Chairperson of the AT as well as M1. By its letter dated 14th March, 2013, the ICC Court rejected the challenge but did not disclose the reasons therefor.

36. The Petitioners submit that the ICC Court failed to appreciate Clause 23.22.2 (b) of the RSHA which provides that to the extent the provisions of the clause are inconsistent with the ICC Rules, the former will prevail. Further, according to the Petitioners, Section 16 (5) of the Act mandatorily provides that challenges to the competence and jurisdiction must be heard by the AT itself. Reliance is placed on the decision in ***Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited (2008) 10 SCC 240, Supriya Kumar Saha v. Union of***

***India 2013 SCC Online Cal 22685, Alcove Industries Limited v. Oriental Structural Engineers Limited 2007 SCC Online Del 1709*** and ***Union of India v. M.P. Gupta (2004) 10 SCC 504.*** It is further submitted that the waiver by the Respondents to the lack of qualifications to M2 would not extend to the Petitioners, who were well within their rights to challenge the nomination and appointment of M1.

37. Mr. Sanjeev Puri, learned Senior counsel appearing for the Respondents referred to the ICC rules, regulations and procedures which the parties had expressly agreed to. Mr. Puri pointed out that the correspondence exchanged with the ICC Secretariat for a period of one year prior to the Settlement Agreement entered into between the parties on 28th May, 2010 and even thereafter. Mr. Puri submitted unless the decision of the ICC Court can be shown to be perverse, it does not call for any interference. According to Mr. Puri, there cannot be differing no yardsticks - one for the Petitioners' nominees and another for that of the Respondents. In this regard he relied on the decision in ***Rail India Technical and Economic Services Limited v. Ravi Constructions 2002 (1) Kar LJ 419***.

38. The above submissions have been considered. To begin with, a reference requires to be made to the rules of arbitration of the ICC which have been in force since 1st January, 1998. The arbitration clause in the instant case clearly states that the law governing the arbitration would be the rules of the ICC. They have in that sense got incorporated into the agreement by reference. In terms of Article 7 (3) of the ICC Rules, an Arbitrator "shall

immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration" that are of such a nature as to call into question the arbitrator's independence in the eyes of the parties. Under Article 7 (4), "the decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated."

39. It is thus clear that with the parties having agreed to the ICC Rules governing the arbitration, they are equally bound by Article 7 (4) which precludes disclosure of the reasons for the decisions of the ICC Court in relation to a challenge to an Arbitrator.

40. Article 11 (2) states that the challenge by a party to an Arbitrator has to be made "either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification."

41. One more rule that requires to be noticed in this connection is Article 33 which talks of waiver and reads as under:

> "A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of these Rules, or of any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal, or any requirement under the arbitration agreement relating to the constitution of the Arbitral Tribunal, or to the conduct of the proceedings, shall be deemed to have waived its

right to object."

42. The facts relevant to the present case are that the Respondents nominated their Arbitrator on 6th February, 2010. A challenge to him was made for the first time by the Petitioner on 19th May, 2011 i.e., far beyond the period of 30 days of the receipt by the Petitioners of the notification of the appointment of M1. ICC confirmed the appointment of both M1 and M2 by a letter dated 11th March, 2011. Even reckoned by this date, the application under Article 11(2) of the ICC Rules challenging M1 was time barred since it was filed only on 19th May, 2011.

43. There is also merit in the contention that the qualification of M1 is no different from that of M2, the Respondents' nominee. Although the arbitration clause in the agreement between the parties required the Arbitrator to have the requisite experience, knowledge and understanding of Indian real estate laws, regulations, conventions and practices and at least five years' experience with construction and/or management of the projects similar to the Galaxia Project, clearly the parties themselves by nominating M1 and M2 as their respective Arbitrators decided to waive the tsrict adherence to the above qualifications. Additionally, as far as the Petitioners are concerned, having nominated M2 an Arbitrator whose qualifications were no different from that of M1, not only did not object to his continuation after receiving his declaration given to the ICC on 13th April, 2010 but selectively chose to raise a challenge only vis-a-vis the Respondents' nominee M1. The challenge to M1, therefore, does not appear to be *bona*

*fide*.

44. The Petitioners not only challenged M1 but Chairman of the AT as well. The challenge in terms of the ICC Rules had to be decided only by the ICC Court. The challenge was negatived by the ICC Court. There was no requirement on the ICC court to furnish reasons. In fact, Article 7 (4) is explicit that the ICC Court need not give the reasons for its decisions. The Petitioners having opted for arbitration being governed by the ICC Rules cannot possibly now be heard to question the decision of the ICC Court rejecting their challenge to both M1 and the Chairman of the AT. That decision of the ICC Court was, in terms of the agreement between the parties which incorporates the ICC Rules, final and binding on the parties notwithstanding that the reasons for such decision may not have been given.

45. The parties are bound by what was agreed between them. In terms of Section 13(4) read with Section 13 (5) of the Act where a challenge to the Arbitrator fails, then the arbitration continues. The aggrieved party has to wait for the pronouncement of the Award. If it is adverse to such party, then in the petition under Section 34 of the Act such party can also question the rejection of its challenge to the Arbitrator. While it may be disadvantageous to such party if the reasons for the rejection of the challenge are not made known, such party is nevertheless bound also by the rules governing the arbitration which too has been agreed between the parties. In the present case, with the parties have agreed that the arbitration will be governed by the ICC Rules. They are bound by the relevant clause in the ICC Rules that

dispense with the ICC Court having to give reasons for rejection of their challenge to M1 and the Chairman of the AT.

46. The Court is not satisfied with the submission of the Petitioners that under clause 23.22 of the RSHA, to the extent the provisions of the clause are inconsistent with ICC Rules, the said clause would prevail and that in terms of Section 16 (5) of the Act, the challenge to the competence and jurisdiction of the AT must be decided by the AT itself. Apart from the fact that that does not appear to be a point raised before the AT or the ICC Court, the Petitioners appear to be under a misconception as to the applicable law governing arbitration on which the parties agreed. It was explicit that the ICC Rules that would apply. Clause 23.22 of the RSHA is in a very different context of the law governing the subject matter of the said agreement and does not affect the challenge procedure which continues to be governed by the ICC Rules.

47. In ***Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited*** (*supra*), it was explained that due regard had to be given to the qualifications in the agreement. However, that was not a case where the parties themselves waived such a requirement as in the present case. With the Petitioners having themselves nominated M1 whose qualifications were no different from M2, it is plain that neither party chose to adhere to what the agreement required as regards the qualification of the Arbitrator. Likewise, the decisions in ***Supriya Kumar Saha v. Union of India*** (*supra*) and ***Alcove Industries Limited v. Oriental Structural***

***Engineers Limited*** (*supra*) are clearly distinguishable on facts. In ***Union of India v. M.P. Gupta*** (*supra*), the question was whether a sole Arbitrator could have been appointed when the provision required two gazetted Railway officers to be appointed as arbitrators. The facts here are different inasmuch as the Petitioners have themselves nominated M2 who did not strictly fulfil the qualifications and did not raise an objection on that score even after receiving his declaration which made it clear that he did not possess the requisite qualification.

48. The Petitioners would be barred in terms of Article 33 of the ICC Rules from raising any objection as to the constitution of the AT since they chose not to adhere to that requirement in respect of their own nominee i.e. M2. In ***Rail India Technical and Economic Services Limited v. Ravi Constructions*** (*supra*), the Supreme Court explained the consequences of such waiver. It was observed there that:

> "even if there is any violation or irregularity, by subjecting itself to the jurisdiction of Arbitrator, without challenging his appointment, RITES is also barred under the principles of estoppel and waiver from challenging the award of the Arbitrator on the ground that the Arbitrator was not appointed in terms of the appointment procedure."

49. Consequently, this Court rejects the submission of the Petitioners that the AT was improperly constituted thereby vitiating the impugned Award.

***Challenge on merits***

50. Turning to the merits, it is submitted that the Respondents failed to act in a *bona fide* manner to give effect to the Galaxia Agreements. According to

the Petitioners, the funds brought in by the Respondents for the Galaxia Project were utilised for the ostensible purchase of the Technova Project and thereby a sum of Rs. 25 crores was remitted back into the account of the Respondents. According to the Petitioners, in December 2009, the Respondents transferred Rs.34,00,27,747 into an escrow bank account opened for the purposes of funding the Galaxia Project. This escrow account remained under the control of the Respondents. It is further stated that a sum of Rs. 25 crores was transferred by the Respondents from the above escrow account to M/s. V.C. Solutions, an affiliate of the Petitioners, which was the developer of the Technova Project pursuant to an agreement signed between the parties on the record. The Petitioners allege that the Respondents coerced them into buying back the Respondents' shares in the Technova Project and as a result a sum of Rs. 25 crores was remitted back into the account of the Respondents. It is claimed that the Respondents "wilfully drained a substantial portion of funds from the Galaxia Project, rendering the development and performance of the Galaxia Project impossible" and subsequently, the Respondents terminated the Galaxia Agreements.

51. In this regard, it is required to be noticed that according to the Petitioners a sum of Rs.45,00,27,747 was indeed brought in by the Respondents for the various projects. The Petitioners themselves do not dispute that the following amounts were paid:

| S.No. | AMOUNT | PAID TO |
|---|---|---|
| 1. | INR 55,00,000/- | Respondent No. 3 (The Company) and |

| | | |
|---|---|---|
| | | transferred into an Escrow Account controlled by the Respondents. |
| 2. | INR 4,73,00,000/- | Petitioner No. 2 |
| 3. | INR 5,72,00,000/- | Petitioner No. 4 |
| 4. | INR 34,00,27,747/- | The Company |
| Total | INR 45,00,27,747/- | |

52. The Petitioners have also not disputed that out of the above Rs. 45 crores a sum of Rs. 11 crores was transferred on 17th December, 2009 into the accounts of the Petitioners directly and on the same date the Petitioners terminated the RSHA and the RSPSA leading to invocation of the arbitration clause and also seeking interim reliefs under Section 9 of the Act. The fact remains, therefore, that notwithstanding the amount that may have been utilised by the Petitioners, they did owe to the Respondents the amount transferred to Respondent No. 3 company upon failure to meet the obligations under the Galaxia Agreements. The findings of the AT in this regard are consistent with the various clauses of the agreement.

53. The contention of learned counsel for the Petitioners that the Award was an attempt by the Respondents to enforce the put option rights under Clause 5.2 of the RSHA is contrary to the facts on record. It is plain that it was not the put option that was exercised by the Respondents. It requires to be noticed in this context that the right available to the Respondents under Clause 18.3.2 of the RSHA i.e., claiming damages for breach of contract

under Section 73 of the Indian Contract Act ('ICA') was "in addition to and not in substitution for" any remedy available to the Respondents in respect of an event as set out in Clause 18.3 of the RSHA. In fact, before the AT, the Respondents had made it clear that the relief they were seeking was not pursuant to the exercise of the put option but damages for breach of contract.

54. As regards Clause 23.18.1 of the RSHA it is the Petitioners who benefitted from the said clause in the agreement and, therefore, cannot now be heard to question its validity. Even assuming it is invalid, it is severable and the remaining agreement would continue to bind the parties.

***Award not an attempt to enforce the put option***

55. It is next contended that the AT has failed to appreciate the impact of RBI Circular No. 4 of 2014 dated 15th July, 2014 and the Gazette Notification in respect of Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) (12th Amendment) Regulations, 2014 dated 10th July, 2014. It is pointed out that RBI Circular No. 4 of 2014 dated 15th July, 2014 concerns the transfer of shares and enforcement of "put option". In terms thereof, the transfer of shares shall be at prices worked out as per internationally accepted methodology. The governing principle is that a non-resident investor is not guaranteed any assured exit price and shall exit at the fair price as may be computed.

56. As regards the amount invested by the Respondents, it is submitted by the Petitioners that the selling of the Galaxia Project land was the only

method by which the investment could be returned as was ordered by this Court in OMP No.99/2011 in ***Alpha Tiger Cyprus Investments No. 3 v. Shakti Nath*** and that the auction has been arranged on 11th April, 2017.

57. The Respondents on the other hand point out that they were not exercising the put option. They were exercising their right to recover damages. Clause 18.3.2 of the RSHA makes it explicit that it is open to the Respondents to either enforce the "put option" under clause 18.3 of the RSHA or claim damages for breach of contract under Section 73 of the ICA.

58. There is no merit in the contention that the impugned Award is an attempt by the Respondents to enforce the put option rights under Clause 5.2 of RSHA. The pleadings make it clear that the Respondents did not choose to enforce the "put option." The Petitioners were bound by the clauses of the contract. In the decision of ***State of Haryana v. Jage Ram AIR 1980 SC 2018***, the Supreme Court observed that "those who contract with open eyes must accept the burdens of the contract along with its benefits."

59. The AT examined the Respondents' claim as one for damages. The directions issued by the AT did not touch on the aspect of exercise of put option by the Respondents. With the Respondents not exercising the option of the "put option" but claiming damages for breach of the contract under Section 73 of the ICA, the question of any violation of RBI Circular No. 4 of 2014 in relation to exercise of "put option" did not arise. There is, therefore, no merit in the contention of the Petitioner that the impugned Award, if

implemented, would lead to violation of FEMA/RBI guidelines or any of the circulars thereunder.

60. It is then submitted that the AT had re-written the Galaxia Agreements since it had ignored the inviolable and non-derogable binding terms of the contract documents operating between the parties. The submissions of the Petitioner in this regard are vague. It has not been pointed out in what manner the majority of the AT has re-written the contract. On the other hand, the majority Award has commented on the breach of the agreements by the Petitioners.

61. The award of interest appears to be in consonance with the RSHA and the Act. Given the long history of litigation and the several attempts of the Petitioners to frustrate the arbitration proceedings, the costs had to follow the Award and that is what has been done by the majority Award.

62. No ground has been made out by the Petitioners to demonstrate that the impugned majority Award suffers from any legal infirmity attracting Section 34 of the Act. In terms of law explained in the decisions of ***State Trading Corporation of India Limited v. Toepfer International Asia PTE Limited 2014 (3) Arb. LR 105 (Delhi); Delhi State Industrial & Infrastructure Development Corporation Limited v. Rama Construction Company 2014 (3) Arb. LR 116 (Delhi)*** and ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 49***, the threshold for a successful challenge to an Award in a petition under Section 34 of the Act is indeed very high and

unless the reasoning in the impugned Award is so perverse as to shock the judicial conscience or lead to violation of Section 28 (3) of the Act the Court, the Court would not like to interfere. In the present petition, none of the grounds under Section 34 of the Act stand attracted.

***Conclusion***

63. The impugned Award is, accordingly, upheld and the petition is dismissed with costs of Rs. 50,000 which would be paid by the Petitioner to the Respondents within four weeks from today.

**S. MURALIDHAR, J**

**FEBRUARY 09, 2017**
*Rm/dn/b'nesh*