IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 167 OF 2015

Jackie Kukubhai Shroff ...Petitioner
vs.
Ratnam Sudesh Iyer ...Respondent

Mr.Arif Bookwala, Senior Advocate, a/w. Mr.Shyam Dewani, Ms.Nivedita Kundaji and Mr.Chirag Chanani, i/b. Dewani and Associates, for the Petitioner.
Mr.Rahul Narichania, Senior Advocate, a/w. Ms.Ankita Singhania and Mr.Vishal Gandhi and Ms.Jinal Mehta, i/b. Gandhi and Associates, for the Respondent.

CORAM : S.C. GUPTE, J.

DATE : 19 MAY 2020

JUDGMENT :

This arbitration petition challenges an award passed by a sole arbitrator in a reference between the parties.

2 The short facts of the case may be stated as follows :

2.1 The Petitioner and the Respondent were shareholders of an Indian company by the name of Atlas Equipfin Pvt. Ltd. ("Atlas"). It is the Petitioner's case that he, along with others, including the wife of the Respondent (as the Respondent's nominee), on 31 December 1994, entered into a joint venture and shareholders' agreement to carry on business of an investment holding company through Atlas to collaborate with Sony for production, acquisition and export of television software, in which Atlas would own 25% equity. In terms of this joint venture agreement, the parties subscribed to shareholding in Atlas. The Petitioner claims to have

subscribed to 10% shares.

2.2 Around the year 1995, Atlas entered into a joint venture with Sony group for setting up Sony TV channel in India. The joint venture company was named Sony Entertainment Television India Pvt.Ltd. ("SET India"), later renamed as Multi Screen Media Pvt. Ltd. ("MSM"). Between 1995 and 1997, the Petitioner claims to have participated in promotion efforts for the new channel and in developing programmes for it.

2.3 Sometime in 2002, the shareholders of Atlas were looking for an exit opportunity from MSM and decided to sell the shares held by Atlas in MSM. Sometime around 2005, at the request of the Respondent, the Petitioner and others claimed to have visited the office of the Respondent at Inhouse Productions Pvt. Ltd. in Andheri. A request was made by the Respondent over telephone to the Petitioner for signing of a document giving mandate to Standard Chartered Bank ("SCB") for sale of shares of MSM held by Atlas along with an authority to apply such sale proceeds for repayment of a loan of USD 93 million taken by a company called Grandway Global Holdings Limited ("Grandway"). The Petitioner refused to sign the document as he had no direct or indirect interest in Grandway. The Petitioner claims to have received several phone calls from the Respondent, repeatedly requesting him to sign the mandate document, but no such document was signed by the Petitioner.

2.4 In 2005-2006, upon disputes and differences arising between the parties concerning irregularities in day to day management and affairs of Atlas, the Petitioner filed a company petition (Company Petition No.108 of 2006) in the Company Law Board ("CLB") under Sections 397 and 398 of

the Companies Act, 1956. In course of time, this petition came to be withdrawn by the Petitioner, purportedly on an assurance from some shareholders of Atlas that his interest in Atlas would be protected.

2.5 On 3/4 April 2010, the Petitioner claimed to have received a notice from one Clifford Chance Pte. Ltd. together with an attachment of placement Instruction dated 15 November 2005. The Placement Instruction purported to bear the signature of the Petitioner. It was the Petitioner's case that he had not signed the document. The Placement Instruction referred to a Bridge Facility Agreement executed on 10 June 2005 between Grandway and SCB.

2.6 Within a few days (i.e. on 19 April 2010), the Petitioner filed a complaint with Economic Offences Wings ('EOW') against the Respondent and others complaining about forgery and requesting for an investigation into the matter. Subsequently, the Respondent approached the Petitioner's chartered accountant with a proposal to settle the disputes.

2.7 On 3 January 2011, a deed of settlement was drawn and executed between the parties. Clause 4.1 of the deed of settlement provided for keeping of a sum of USD 1,500,000 in escrow so as to be released to the Petitioner upon closure/withdrawal of the EOW complaint of 19 April 2010. Clause 4.2 of the deed provided for an additional sum of USD 2,000,000 to be held in escrow and to be released in favour of the Petitioner within seven days of receipt of sale proceeds by Grandway and/or Atlas in respect of sale of their shares in MSM.

2.8 On or about 10 January 2011, pursuant to this deed of settlement,

the escrow arrangement was acknowledged by Anil Harish of M/s. D.M. Harish & Co., who was the escrow agent, in a letter of escrow of the same date. On the same day, i.e. 10 January 2011, the Petitioner proceeded to perform his obligations under the deed of settlement *inter alia* (i) by ratifying Placement Instruction in terms of clause 5.1 of the deed of settlement; (ii) by writing a letter to EOW in terms of clause 2 of the deed of settlement; (iii) by executing an irrevocable power of attorney in favour of the Respondent in terms of clause 5.2 of the deed of settlement; (iv) by issuing a no objection letter to Clifford Chance Pte. Ltd. (solicitors of SCB) to act in furtherance of Placement Instruction in terms of clause 5.1(a) of the deed of settlement; (v) by issuing an irrevocable consent letter to the Board and shareholders of Atlas to sell shares of MSM held by Atlas in terms of clause 5.5 of the deed of settlement; (vi) by writing a letter to the board of Atlas resigning as a director in terms of clause 5.4 of the deed of settlement; and (vii) by releasing all claims in Grandway and against the Respondent as a shareholder or otherwise in terms of clause 5.3 of the deed of settlement.

2.9 In pursuance of the Petitioner's letter dated 10 January 2011 to EOW, requesting for unconditional withdrawal of the complaint, on 13 January 2011 EOW addressed a communication to the Petitioner informing him that the enquiry had been closed. Upon receipt of EOW letter dated 13 January 2011, the escrow agent released unto the Petitioner the first escrow cheque held by him in the sum of USD 1,500,000. The escrow agent continued to hold the other undated cheque in the sum of USD 2,000,000 pending sale of shares of MSM by Atlas.

2.10 By their letter dated 30 June 2011, the advocates of the Petitioner

called upon the Respondent to complete the sale of shares of MSM. By his letter dated 8 July 2011, the Respondent claimed that the Petitioner had committed a breach of the deed of settlement by sending an e-mail on 15 June 2011. (By this e-mail, the Petitioner's wife had called the Respondent a 'forger'.) The Respondent, however, stood by his obligation to pay the Petitioner's dues under the settlement deed upon completion of sale of MSM shares held by Atlas and/or Grandway.

2.11 Around the beginning of 2012, one of the shareholders of Atlas informed the Petitioner that Sony was interested in purchasing the shareholding of Atlas in MSM. On 9 May 2012, the Petitioner was requested by shareholders of Atlas to personally sign the share purchase agreement for sale of Atlas' shares in MSM. On the same day, he also received telephonic instructions from the Respondent to sign the share purchase agreement personally.

2.12 On or about 24 May 2012, the Petitioner personally signed the said agreement, by which Atlas sold its shareholding in MSM to Sony in terms of clause 5.1(b) of the deed of settlement.

2.13 Whilst the Petitioner was awaiting release of the second escrow cheque of USD 2,000,000 upon completion of the sale of shares held by Grandway and Atlas in MSM and receipt of sale consideration by Grandway / Atlas, the Respondent proceeded to file an arbitration petition, being Arbitration Petition No.853 of 2012, in this Court, invoking Section 9 of the Arbitration and Conciliation Act, 1996 ("Act"). The Respondent prayed for an interim injunction against release of the undated escrow cheque of USD 2,000,000 by the escrow agent.

2.14 On 6 August 2012, a consent order was passed in that arbitration petition, referring the parties to arbitration of a sole arbitrator and making the authority of the escrow agent for release of the escrow amount of USD 2,000,000 subject to directions of the Court or, in alternative, of the arbitrator. (At that stage, the sale of shares held by Grandway and Atlas in MSM was not complete.)

2.15 During the pendency of the arbitration proceedings, the sale of shares held by Grandway and Atlas in MSM was completed, followed by receipt of full sale consideration by Atlas.

2.16 On 10 November 2014, the learned arbitrator passed his award. In his award, which is impugned in the present petition, the learned arbitrator held that the Petitioner had committed breach of the deed of settlement, and though the deed of settlement was not terminated and continued to be valid and subsisting between the parties, the arbitrator awarded damages of USD 3.5 million to the Respondent by, firstly, directing the Petitioner to return the sum of USD 1.5 Million and, secondly, declaring that the Petitioner was not entitled to USD 2,000,000 lying in escrow and thirdly, directing the escrow agent to return the escrow cheque in the sum of USD 2,000,000 to the Respondent.

3 The impugned award of the learned arbitrator essentially proceeds on the following footing :

(i) Firstly, the learned arbitrator held that the emails dated 9 June 2011 and 15 June 2011 addressed by the Petitioner's wife constituted

a breach of clause 3 of the deed of settlement, since clause 3 *inter alia* forbade the Petitioner from writing any letter or communication to any person or entity complaining about the subject matter of the deed of settlement, and the said emails calling the Respondent a "forger" amounted to such forbidden communication. The learned arbitrator treated the Petitioner's wife as his agent and the emails as having been sent with knowledge, consent, authority, and on behalf, of the Petitioner;

(ii) Secondly, the learned arbitrator held that the sum of USD 3,500,000 referred to in the deed of settlement was a sum named by the parties as liquidated damages for its breach; and

(iii) Thirdly, the Respondent, as a party aggrieved by the breach, referred to above, was entitled to receive the whole of the aforesaid sum of liquidated damages on account of the breach.

4 Each of the above conclusions is not just plainly wrong, but exhibits an unmitigated perversity and is shocking to the conscience of the court, to say the least, as I shall presently explain.

5 Let us first take up the so-called breach, without even considering whether the Petitioner was in any way responsible for it. The breach is said to consist in the two communications, namely, the emails of 9 June 2011 and 15 June 2011, addressed by the Petitioner's wife. The emails are quoted below :

“Thu, Jun 9, 2011 at 3.05 PM

Hi Sudesh,

I've just been informed that a deal term sheet has been signed between Providence and Stanchart. Am most surprised you did not mention this when we last spoke. I must say, that once again you are not being straight with us, and I'm concerned about this.

Kindly update us asap

thank you and best regards,

Ayesha"

"Wed, Jun 15, 2011 at 11.59 PM

As is everyone else mr iyer. I have no wish to continue to fraternize with a forger. And you may kindly refer to the settlement document between us where it is clearly mentioned you are bound to give us updates. For the record, you never mentioned a term sheet had been signed. Its only now when I brought it up, did you talk about it.

Sent on my BlackBerry@ from Vodafone Essar"

These two emails, in the first place, were addressed to the Respondent. If the Respondent was the only addressee and recipient of the emails, there is no way the emails could be considered as a breach of the relevant clause. "Any person or entity" referred to therein as a prohibited recipient could never include the Respondent himself. But then the emails were also copied to the other persons, who were said to be in the know of the original EOW complaint filed by the Petitioner and the deed of settlement which followed. The emails, no doubt, refer to incidents or events which could

very well be said to be arising out of the same transaction which the deed of settlement was concerned with, but the so-called complaint made therein does not refer to the subject matter of the deed of settlement. The subject matter of the deed referred to in clause 3 could only mean and include the complaint made by the Petitioner to EOW regarding the alleged forgery of the Placement Instruction dated 15 November 2005 on the part of the Respondent. The emails were not complaining about forgery of the Placement Instruction at all; that was a matter which was duly settled between the parties. What the emails complained about was the Respondent's subsequent conduct in the matter of sale of shares of MSM held by Atlas. There is no way the complaint itself could be termed as a complaint about the subject matter of the deed of settlement. What the clause (clause 3 of the deed of settlement) ensured was a restriction on the Petitioner in complaining about the alleged forgery of Placement Instruction of 15 November 2005; it did not make any stipulation *vis-a-vis* complaint, if any, about any future conduct of the Respondent. The email of 9 June 2011 complains about non-mentioning of the deal term sheet signed between one Providence and SCB; the allegation is that the Respondent was not being straight in this. The email of 15 June 2011 complains about the same event, namely, non-mentioning of the term sheet in the context of the deed of settlement under which there was said to be a duty on the part of the Respondent for giving updates.

6 The emails, however, do use the expressions "once again you are not being straight with us" (email of 9 June 2011) and "I have no wish to continue, to fraternize with a forger" (email of 15 June 2011). In other words, they insinuate (i) that there was an earlier occasion, when the Respondent was not straight; and (ii) that the Respondent was a forger.

What we have to see is whether is there a complaint here to any person or entity of forgery by the Respondent of signature of the Petitioner in the Placement Instruction of 15 November 2005.

7 Let us, for the sake of clarity, note the particular stipulation of clause 3 which we are concerned with here :

> "3. Jackie has represented and assured that he has not filed any other complaint or proceedings against Sudesh or any other person, in respect of the Agreement or the shares in Atlas before the police authority / ies and / or any other judicial, quasi judicial authority or intimated / addressed any letter to any other statutory authority, save and except the complaint mentioned in clause 2 above. However Jackie has written letters and emails to various persons and authorities and in the event that Sudesh requires Jackie to inform any other person that Jackie has withdrawn his complaint, Jackie agrees to do so within a period of seven days. It is further agreed that in future Jackie shall not write any letter or communication or complain to any police authority / ies / and / or any other judicial, quasi judicial authority or statutory authority or any person or entity complaining about the subject matter of the present Deed."

The above clause makes it very clear that the complaint referred to in it is in respect of the act of forgery complained of in the Petitioner's complaint to EOW (which, as we have noted above, was in respect of the alleged forgery of the Petitioner's signature by the Respondent in the Placement Instruction of 15 November 2005). Can it be said by any reasonable man, duly instructed in law, that there is any complaint in any of the aforesaid two emails about the forgery of the Placement Instruction of 15 November 2005 by the Respondent. The only answer should be a resounding "no".

8 In plain terms, the expression "forger" used by the Petitioner's

wife is by way of calling names; it may even be defamatory and actionable as such, though the sole arbitrator has himself held that he did not have jurisdiction to deal with any case of defamation. But, surely, it does not offend the mandate of clause 3, which restricts the Petitioner from writing "any letter or communication or complain to any police authority/ies and/or any other judicial, quasi-judicial authority or statutory authority or any person or entity complaining about the subject matter of the present deed" (i.e. the deed of settlement). No such conclusion is either possible or reasonable.

9 Coming now to the culpability of the Petitioner in the communication made by his wife, assuming without admitting the same to be in breach of clause 3, there was indeed no material before the sole arbitrator to hold the Petitioner responsible for that communication. There is nothing on record to show either that the Petitioner had authorised his wife to make any complaint of forgery against the Respondent to any person or entity or that the emails of 9 June 2011 or 15 June 2011 were sent with knowledge, consent, authority, or on behalf, of the Petitioner. The Petitioner, in his reply to the statement of claim, had denied that his wife was his authorized representative. In his oral evidence (paras 27 to 32 of his affidavit of evidence), the Petitioner had deposed that he had not authorized his wife to act on his behalf or take any decision in relation to the shareholdings or directorship in Atlas or to act in pursuance of the deed of settlement. There was no cross-examination of the Petitioner on this point by the Respondent. No evidence was led by the Respondent to prove that the Petitioner's wife was his authorized representative in addressing the emails of 9 June 2011 and 15 June 2011. The reasons of the learned arbitrator for concluding so are, at best, speculative, as pointed out below.

10 The reasons, which appear to have weighed with the learned arbitrator, for holding that the Petitioner's wife was his authorized representative, are the following:

(i) The learned arbitrator noted that she had made inquiries from 2008 to 2010 about the transfer of shares, whilst the Petitioner showed no interest. (The learned arbitrator found this circumstance to be strange, that is to say, difficult to believe without she having any authority.)

(ii) Her presence was recorded as an invitee in Minutes of Meeting of the shareholders (Exhibit C-26).

(iii) The words used in the email dated 26 March 2010 (Exhibit C-2 (Colly.) addressed by the Petitioner's wife were "we should try to get whatever we possibly can at this point".

(iv) The Petitioner's wife had attended the board meeting held on 12 August 2010 and signed the attendance sheet (Exhibit C-4) as an "invitee".

(v) The draft of the deed of settlement was sent by the chartered accountant to the Petitioner's wife for approval and not to the Petitioner.

(vi) Parties such as Shailendra Patkar (the chartered accountant of the Petitioner) and M/s. D.M.Harish and Company (the then

advocates of the Petitioner) dealt with her in the matter.

(vii) The use of the word "us" in letter of 7 January 2008 addressed by the Petitioner's wife indicated her involvement.

These materials do not at all indicate that when the Petitioner's wife addressed the two subject emails (i.e. of 9 June 2011 and 15 June 2011), she was doing so as an authorized representative of the Petitioner.

11 Section 182 of the Contract Act defines an "agent" as a person employed to do any act for another or to represent another in dealings with a third person. The authority of the agent, as Section 186 provides, may be express or implied. Section 187 defines express and implied authorities. An authority is said to be express when it is given by words spoken or written. It is implied when it is to be inferred from the circumstances of the case. Things spoken or written or the ordinary course of dealing may be considered as these circumstances. So far as the extent of the agent's authority is concerned, Section 188 provides that the agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act. If the agent has done any act on behalf of his principal, without the latter's authority, under Section 196, the latter may elect to ratify or disown such act; if he ratifies the act, the same effects follow as if it had been performed by his authority. Ratification, as provided in section 197, may itself be express or may be implied by the conduct of the person on whose behalf the act is done. The ratifier must, however, have knowledge of the facts of the case, without which, as Section 198 provides, no valid ratification is possible. These provisions give rise to a whole lot of questions, particularly in the light of the facts of our case

where the Petitioner's wife is claimed to have acted as his agent so as to make him responsible for her acts, which questions appear to have escaped the arbitrator's attention altogether. Was the Petitioner's wife acting for him in the particular act, namely, addressing of the two subject mails, or was she generally representing him in his dealings with the Respondent or involving the others to whom the emails were copied? Was her authority to do so express or was it to be implied from the circumstances of the case (including words spoken or written by the Petitioner)? Was calling the Respondent a "forger", which may be a criminal act involving an offence under Section 499 of IPC, a matter within or without her authority? If without her authority, did the Petitioner ratify the act? Did he do so expressly or by implication? If he might be said to have ratified it, did he have the full knowledge so as to make the ratification valid? These and other pertinent questions either appear to have escaped the arbitrator's attention altogether or to have been considered by him only in an unacceptably tentative manner, as I shall presently point out.

12 It was nobody's case that the Petitioner's wife had his express authority (i.e. by spoken or written words) to act on his behalf when she wrote the two subject emails. Though the arbitrator appears to have skirted this issue in terms, it is possible to say that in effect he considered the authority to be an implied authority, since he went by what he termed as the circumstances of the case. The fact that she made inquiries from 2008 and till 2010 is neither here nor there. She may have assumed an authority; she may be doing so as an anxious wife's bit; she may be using her good offices for the sake of her husband. There is nothing to suggest what really was the case. But what is more important is that all these inquiries had preceded the deed of settlement which was of 3 January

2011. So how do these inquiries suggest that she had the authority to either act on his behalf in pursuance of the deed of settlement or in matters arising out of the same? There is no answer. The minutes of meeting of 22 April 2010 (Exhibit C-26) as well as the email of 26 March 2010 (Exhibit C-2 (colly.)) and the attendance sheet of 12 August 2010 (Exhibit C-44) also equally pre-date the settlement. It is unfathomable how the attendances referred to therein lend or confer any authority to or on the Petitioner's wife to represent her husband whilst acting in pursuance of the settlement or in matters arising out of it. The facts that the draft settlement was sent by the Petitioner's chartered accountant to her (and not to the Petitioner) or that he (the Petitioner's chartered accountant) or M/s. D.M.Harish and Company (the Petitioner's advocate) dealt with her, may at best indicate that she had the authority to receive those communications or act on her husband's behalf *vis-a-vis* them (i.e. the chartered accountant and the advocate). How does that give her authority to deal with the Respondent and that in pursuance of or in matters arising out of the settlement or involving others to whom the two subject emails were copied. Further, assuming that she had the authority to deal with the Respondent in the matter of the subject of settlement generally or, particularly, in connection with the sale of shares of MSM or the term sheet signed between Providence and SCB, it was nobody's case that she had the authority to breach the settlement (clause 3 thereof) or call the Respondent a "forger" which can well be termed as a penal wrong. The question then is of ratification - and a valid ratification at that - by the Petitioner of her calling the Respondent a "forger". The only circumstance, which the arbitrator appears to have considered in this behalf, is that the Petitioner, despite knowledge of the email of 15 June 2011, did not repudiate his wife's statement or clarify that it was not his opinion. The law does not put

the burden of repudiation on the principal, when the agent acts beyond his authority. The law requires a positive act of ratification on his part so as to fasten him with the consequences of that act. Once again, the arbitrator appears to have missed the plot, resulting into a complete miscarriage of justice.

13 Coming now to the damages awarded for the alleged breach, even more weighty and profound questions of law arise in the matter, which are conspicuous by their absence from the discussion in the award. It is noteworthy that what the arbitrator has awarded here is practically returning of the whole consideration of the Petitioner for the deed of settlement. It could have been ordered only on the footing either that the so-called breach had resulted into failure of consideration so far the promisee is concerned or that the breach was so fundamental that it invited award of damages in full measure of the consideration paid, which has been termed by the arbitrator as liquidated damages. Let us now consider what was the consideration of the deed of settlement which the Respondent was to receive. Such consideration is contained in clause 5 of the deed of settlement, which is quoted below for felicity of reference :

> "5 Jackie :
>
> 5.1 hereby ratifies the Agreement in his capacity as the shareholder & Director of Atlas, and for the purpose thereof shall on execution hereof do the following :
>
> a. Issue letter to Clifford Chance Pte. Ltd., Solicitors of Standard Chartered Bank, Singapore as well as to Standard Chartered Bank Singapore (Bank) withdrawing the letter of Legasis Partners, and request the Standard Chartered Bank to go ahead with the transaction under the Placement Mandate dated November 15, 2005. A copy of the said letter duly signed by Jackie is annexed hereto as

Annexure 'D' and Annexure 'E' respectively.

b. adhere to all terms and conditions contained in the Agreement, including but not limited to executing such further and other writings as may be reasonably required, as and when called upon by Standard Chartered Bank or their Solicitors in furtherance of the Placement Mandate, dated November 15, 2005.

5.2 agrees that in the event Standard Chartered Bank or any other party / investment bank requires a fresh Placement Mandate, Jackie shall agree as a shareholder in Atlas, to all terms and conditions contained in the fresh Placement Mandate and execute the same without any delay, for sale of Shares of MSM held by Atlas. Simultaneously Jackie has given to Sudesh an irreversible POA, appointing Sudesh to execute all documentations required by SCB or any / other party / investment bank, with regards to the sale of shares of Atlas. A copy of the said Power of Attorney is annexed hereto, as Annexure 'F'.

5.3 has on execution hereof released all his claims in Grandway and any claims on Sudesh either as a Shareholder of otherwise of Grandway, in consideration of the amounts paid and/or agreed to be paid by Sudesh in these presents, and confirms that neither he nor his wife and/or his family or his wife's extended family members, heirs, executors, administrators or assigns shall even claim any rights of any nature whatsoever in Grandway and any claims on Sudesh either as Shareholder or beneficial owner or otherwise howsoever.

5.4 hereby resigns as a director from the Board of Atlas Equifin Private Limited, and for the purpose thereof has on execution hereof submitted his resignation to Atlas which resignation has been accepted by Atlas. A copy of his resignation letter is attached herein as Annexure 'G'.

5.5 hereby agrees with the Board of Atlas and the other Atlas shareholders for sale and disposal of shares of Atlas and has addressed a letter to the Board of Atlas giving irrevocable consent for sale and disposal of shares of Atlas; a copy whereof is annexed hereto as Annexure 'H'.

5.6 hereby agrees to Dividend distribution of winding up of Atlas after disposal of shares as may be called upon by the Board of Atlas

and/or other Shareholders of Atlas, such that Jackie also receives his proportionate share therein.

5.7 hereby agrees that save and except what is stated herein he or any person claiming through or under him or any of his or his wife's family member has no claim of any nature whatsoever; either against Sudesh and his family members or Atlas, or Grandway or any shareholders or directors of Atlas or Grandway.

It is nobody's case that the Petitioner has not duly fulfilled any of these commitments. He has, without exception, complied with all. In other words, so far as the reciprocal promise made by the Petitioner to the Respondent is concerned, the promise was completely fulfilled. The Petitioner thereby completed his part of the contract. There was no case of failure of consideration.

14 The arbitrator's justification for award of damages of USD 3,500,000 to the Respondent was his assessment of this sum as liquidated damages for breach of the agreement (i.e. the deed of settlement). The learned arbitrator, as we have noted above, treated the two emails of 9 June 2011 and 15 June 2011 of the Petitioner's wife as a breach of the deed of settlement and, holding the sum of USD 3,500,000 named in the deed as liquidated damages for such breach, passed the award of damages. There is a fundamental fallacy in this assessment and the award based thereon as explained below.

15 The sum of USD 3,500,000 named in the deed of settlement was a consideration for the settlement arrived at between the parties and recorded in the deed. As we have noted above, this consideration was to come to the Petitioner against his reciprocal promises provided for in clause

5 of the deed, and which, as we have noted above, were fulfilled by him. Clause 6 provided for the consequence of termination of the contract of settlement on account of a breach of its terms or conditions or obligation of the Petitioner thereunder or falsehood of any of the representations or assurances made by him thereunder. In any such case, the deed of settlement was to stand terminated, in which case the Petitioner was bound to return the amount of USD 1,500,000, if the same was already paid to him by release of the bankers' cheque by the escrow agent, and the latter was forbidden from releasing the further cheque of USD 2,000,000 and obliged to return the same to the Respondent. What is at once clear is that this clause provides for the promisee's right to put an end to the contract. The breach referred to therein, since it provides for the consequence of cessation of the contract, must be a breach of a fundamental or essential term of the contract. First of all, this right can be availed of by the promisee only so long as the contract remains "executory" and not when the contract is "executed". So long as the promisor is yet to perform any of his obligations under the contract or make good his representation or assurance given in the contract, the promisee retains his right to terminate the contract or treat it as having come to an end; and this right he can exercise only when the failure of the promisor is in respect of either performance of an essential obligation or making good of an essential representation or assurance. In the present case, the promisor, i.e. the Petitioner, had fully performed his obligations under the contract; he had carried out and fulfilled each of his commitments made in clause 5 of the deed. No doubt, as we have noted above, there was a further assurance on his part (clause 3) that he would not in future "*write any letter or communication or complaint to any police authority/ies and/or any other judicial, quasi-judicial authority or statutory authority or any person or*

entity complainant about the subject matter of the present deed." The essence of this term was that the matter of the Petitioner's original complaint before EOW regarding the alleged forgery by the Respondent of the former's signature on the Placement Instruction of 15 November 2005 was finally closed and not reopened. It can, in the first place, be hardly said that this matter was reopened when the emails insinuating the Respondent's earlier 'not so straight' dealing or calling him a "forger" were addressed by the Petitioner's wife. This was, assuming that it could at all be called a breach of the settlement, no fundamental breach or failure to perform an essential obligation or make good an essential representation or assurance, entitling the Respondent to treat the contract of settlement as having come to an end.

16 Indeed the Respondent did not treat either of the two emails as a breach which could result into an *ipso facto* termination, or entitle him to cause termination, of the contract of settlement. So far as the email of 9 June 2011 is concerned, there was not even a suggestion on the Respondent's part at any time before the reference was made that it amounted to a breach or as result, the deed of settlement had stood terminated. As for the other email, i.e. the email of 15 June 2011, though the Respondent in his correspondence did refer to it as a breach, he nevertheless offered to complete his reciprocal promise, namely, payment of the second tranche of USD 2,000,000 against completion of transfer of shares of Atlas in MSM and realization of its sale proceeds (see, the Respondent's letter dated 8 July 2011). What is more is that relying on that assurance, on 24 May 2012, the Petitioner signed the share purchase agreement for sale of Atlas' shares in MSM, which was his commitment under clause 5.2 of the deed of settlement (which provided for execution of

all documentation for sale of Atlas' shares). If that be so, after the Petitioner fulfilled all his commitments including execution of transfer documents for sale of Atlas' shares, the Respondent could in no event have gone back on his assurance and treated the so-called breach (emails of 9 June 2011 and 15 Jun 2011) as a fundamental breach or essential failure on the part of the Petitioner to perform his promise and treat the deed of settlement as having come to an end.

17 What is interesting to note is that neither did the Respondent treat the agreement (i.e. the deed of settlement) as having come to an end nor did the learned arbitrator make his award on that footing. The learned arbitrator, in fact, has come to a categorical finding that the Respondent had not treated the deed of settlement as having been terminated. The arbitrator nevertheless proceeded to award damages under clause 6, treating it as a stipulation of liquidated damages for breach of the contract and without treating the contract as having come to an end. That was plainly against the express language and tenor of clause 6.

18 As I have explained above, the clause could only be invoked in a case where the breach was so fundamental as to cause cessation of the contract and only in the event of the contract so coming to an end that the Respondent, as the promisee, would have been entitled to refund of the whole consideration of USD 3,500,000 under the contract. Treating the clause as a stipulation of liquidated damages is, thus, a fundamental error which goes to the root of the matter and undermines the whole basis of the award.

19 One of the important reasons suggested by the arbitrator for

holding the clause as a stipulation of liquidated damages is that the Petitioner himself has averred that (i) the remedy under clause 6 of the deed of settlement was in the nature of liquidated damages; and (ii) the amount mentioned in clause 6 was a pre-estimate of the damages that may be suffered by the Respondent by reason of the breach. Nothing can be farther from the truth. In the first place, it is to be noted that what the Respondent had claimed in the reference was (i) refund of consideration received/to be received by the Petitioner (under clauses 4.1 and 4.2 of the deed of settlement) and (ii) additionally, Rs.40 crores towards damage to reputation and Rs.10 crores for mental agony and harassment. So far as the Respondent's case for refund of consideration is concerned, the Petitioner had submitted that (i) the deed of settlement was entered into between the parties not to protect the reputation of the Respondent, but to withdraw the complaint filed by the Petitioner before EOW and to ratify the Placement Instruction so as to enable the Respondent and other shareholders of Grandway to honour their obligations under the Bridge Facility Agreement with SCB and it was for this consideration that the Respondent had undertaken to pay USD 3,500,000 set out in clauses 4.1 and 4.2 of the deed of settlement (para 2.e of the Reply to the Statement of Claim); (ii) clause 6 clearly stipulated that in order to disentitle the Petitioner to the consideration, there had to be a termination of the deed of settlement (para 2.n of the Reply), which, admittedly, there was not; (iii) the claim of the Respondent that there was a breach of the settlement and consequently, the Petitioner was not entitled to receive/retain the consideration was, thus, not maintainable in law or facts (para 2.p of the Reply); and (iv) the Petitioner did not admit that USD 3,500,000 was the pre-determined value of the Respondent's reputation or that in consideration of that amount, the Petitioner had agreed to protect the

Respondent's reputation or not to communicate complaining about the subject matter of the deed of settlement (Para 12 of the Reply). In reply to the Respondent's case of damages of Rs.40 crores and Rs.10 crores, respectively, for loss of reputation and mental agony, the Petitioner had submitted that (i) Assuming without admitting that there was injury to his reputation and mental agony, even then, on the Respondent's own say so, the refund of the consideration as contemplated under clause 6 of the deed of settlement, was the only remedy available to the Respondent as the same would be in the nature of liquidated damages, disentitling him from claiming any further relief (Para 2.u of the Reply); and (ii) If, according to the Respondent himself, 3.5 million USD was the pre-determined value of his reputation, which the Petitioner did not admit, the Respondent could not have founded a claim of Rs.40 crores as alleged damage caused to him due to injury to his reputation (Para 12 of the Reply). It is clear that there was no admission at all on the part of the Petitioner in these pleadings that the amount of USD 3,500,000 was either liquidated damages or that it was a genuine pre-estimate of such damages. No fair or judiciously minded person could have concluded from the above pleadings, as the learned arbitrator has done (Para 14 of the impugned award), that "*clearly the Respondent* (i.e. the present Petitioner) *has understood the claim for US $ 3.5 million, is by way of liquidated damages being the pre-determined /estimated amount to be paid on default".*

20 In fact, it is interesting to note that in the whole narration of his statement of claim, even the Respondent had not referred to the sum of USD 3,500,000 either as "liquidated damages" or "genuine pre-estimate of liquidated damages". He had in fact referred to this amount as something "*in consideration of which the Respondent* (i.e. the Petitioner herein)

agreed to protect the very high reputation of the Claimant (i.e. the Respondent herein) *and for which the Respondent* (i.e. the Petitioner herein) *agreed not to communicate about the subject matter of the Deed to any person or entity as stated in clause 4.2 of the said Deed*." What the Respondent had thus sought before the arbitrator was damages of Rs.40 crores, i.e. approximately 50% of the value of his reputation on a conservative basis on account of loss of reputation resulting from the two emails referred to above. The claim of USD 3,500,000 was "*in any event and without prejudice to the above"* and as "*the bare minimum value of the reputation*" of the Respondent. The amount, as noted above, was the consideration for which the Petitioner was claimed to have agreed to protect the Respondent's reputation. That was the basis of the Respondent's claim and not that the amount was either liquidated damages or a genuine pre-estimate of such damages. It can, accordingly, be hardly said that it was the Respondent's case either that clause 6 was a stipulation of liquidated damages.

21 Lastly, even if we were to treat clause 6 as a stipulation of liquidated damages, the award still cannot be sustained, since the arbitrator has completely misapplied the principles of the law of liquidated damages and that in a manner in which no reasonable person duly instructed in law could have. This court has, in **Punj Lloyd Ltd. vs. IOT Infrastructure and Energy Services Ltd.**[1]**,** after considering the leading authorities on the point, explained the law thus :

> "13. The cases, which are discussed above, indicate an established policy of law so far as India is concerned of only reasonable damages to be awarded in case of breach of

1 **Arbitration Petition No.1332 of 2012 decided on 14.12.2018.**

contract. In the first place, it important to note that damages are awarded by Indian courts as a compensatory measure and never as a punitive measure. The rationale behind such award is that the party who suffers from a breach of contract must be put in the same position that it would have been in had the contract not been broken. This is universally accepted in India both as a correct rationale and measure of damages. Section 73 of the Contract Act contains a general principle for award of such damages, and Section 74 is merely an extension of it, to be applied, as we have seen above, to particular cases where either a sum is mentioned in the contract as payable in case of a breach or a penalty is stipulated. Section 74, as we have seen above, has to be read along with Section 73. It does not confer any special benefit upon any party; it merely provides for award of reasonable compensation not exceeding the amount of liquidated damages or penalty stipulated in the contract, whether or not actual damage or loss is proved to have been caused by breach of contract. It does not follow that because it so provides, it dispenses with loss or damage by itself. Obviously, when no loss is suffered, it cannot be said that the amount stipulated as liquidated damages should still be awarded. The very clause of liquidated damages operates when loss is suffered. As the Supreme Court has reiterated in **Kailash Nath Associates** (supra), damage or loss caused is a sine qua non for the applicability of Section 74. What the expression "whether or not actual damage or loss is proved to have been caused thereby" means is that where it is possible to prove actual damage or loss, it is only such damage or loss that may be compensated for as reasonable damages; and in cases where such damage or loss is difficult or impossible to prove, then the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, may be awarded. That merely reflects on the court's discretion in the matter and its exercise. The liquidated sum named in the contract, in other words, is to be taken into account for ascertaining reasonableness of compensation and not as a dispensation of proof of loss or damage. In sum, even in a case the contract provides for liquidated damages and the court is of the view that what is provided for is in fact a genuine pre-estimate of damages, it is imperative for the party who has suffered breach of contract to plead and make out a case of having suffered a loss. There may be cases where the factum of such

> loss may be obvious, but its actual measure may not be capable of proof or may be difficult to prove. In that case, if the court finds that the liquidated amount named in the contract is a genuine pre-estimate of damage or loss contractually made by the parties, the court may award such amount as reasonable damage in its discretion. The statement of law to be found in paragraph 43.1 of **Kailash Nath Associates** in this behalf only means that it will be legitimate for the court to award the liquidated sum named in the contract as reasonable compensation wherever such sum is a genuine pre-estimate of damages fixed by both parties and found to be such by the court; it does not imply that in all cases when it is so, the court is bound to award such liquidated sum. The award of such liquidated sum, or any compensation for that matter, is within the discretion of the court and such discretion must be exercised on sound principles applicable under Section 73 with particular reference to the injury or loss resulting from the breach of contract complained of. Wherever it is possible to prove actual damage or loss, the party complaining of breach must tender its proof. If such proof is impossible or difficult to produce, the aggrieved party must make out such case and thereafter, call upon the court to award the liquidated amount named in the contract as reasonable damages, and the court may do so in exercise of its discretion."

22 There is no proof here whatsoever that the Respondent has suffered any loss or damage as a result of the alleged breach. It may, however, be possible for the tribunal, in the facts of the present case, to hold that the loss of reputation, which the two subject emails had caused, would be obvious and its actual measure could be said to be either incapable of proof or difficult to prove. Could it, however, be said that USD 3,500,000 mentioned in the contract was a genuine pre-estimate of such loss of reputation contractually made between the parties? We have already noted above that the consideration of the deed coming to the Respondent was as follows : (i) withdrawal of the complaint of forgery made to EOW

by the Petitioner (clause 2); (ii) ratification by the Petitioner of the original Placement Instruction (clause 5.1); (iii) execution by the Petitioner of irrevocable power of attorney for sale of shares of Atlas in MSM in favour of the Respondent (clause 5.2); (iv) release of all his claims in Grandway and all other claims on the Respondent by the Petitioner either as a shareholder or otherwise (clause 5.3); (v) Resignation by the Petitioner as a director of Atlas (clause 5.4); (vi) agreement of the Petitioner with the Board of Atlas and other shareholders of Atlas for sale of shares of Atlas and an irrevocable consent for such sale and transfer (clause 5.5); (vii) agreement of the Petitioner for dividend distribution and winding up of Atlas at the bidding of the Board and other shareholders of Atlas (clause 5.6); and (viii) confirmation by the Petitioner of his having no other claim either against the Respondent or his family members or Atlas or Grandway or any of their shareholders (clause 5.7); and (ix) an agreement from the Petitioner not to complain again about the alleged forgery which formed the subject matter of the EOW complaint made earlier (clause 3). The consideration of USD 3,500,000 was to go to the Petitioner against the whole of the above consideration (i.e. the reciprocal promises noted above). In this backdrop, can it ever be suggested in all fairness, assuming without admitting that return of this whole consideration was a measure of liquidated damages in case of breach of contract by the Petitioner, that a privately made reference to the subject matter of the original complaint to EOW, assuming that there was any, was meant to invite a claim of damages for which the entire amount of USD 3,500,000 was a genuine pre-estimate determined by the parties. The stipulation of not making of any further complaint was only a part of the bargain so far as the Petitioner's obligations were concerned. And even there, the idea was not to rake up the original controversy of the alleged forgery of Placement Instruction of

15 November 2005 before any police, judicial, quasi-judicial or other authority. No doubt, it did take within its fold even a restriction against writing anything to any private person or entity about the subject matter of EOW complaint. But that was at best an insignificant part of the bargain. It could never be suggested, at least by the standards of a reasonable man the law expects in a judicial scrutiny of an award, that return of whole consideration of USD 3,500,000 was a genuine pre-estimate of damages flowing from a reference to the original subject matter of the EOW compliant in a communication made to a couple of private parties. It is too much to say that what the parties contemplated was that any such private communication would entail a loss of reputation and the measure of damages of USD 3,500,000 was a genuine pre-estimate made towards such loss of reputation.

23 When we see the bizarre outcome it has brought about in the matter, the extent of the fallacy can be realized better. The Respondent got practically everything that he wanted from the Petitioner in return for payment of USD 3,500,000 to the latter. He got the EOW complaint withdrawn; he got the Petitioner to ratify the original Placement Instruction to SCB for sale of Atlas shares and for making over of the consideration to Grandway; he got an irrevocable power of attorney in his name for sale of shares of Atlas from the Petitioner; he got all the Petitioner's claims against him, his wife and Atlas and Grandway and their shareholders released; he got the Petitioner's resignation from the Board of Atlas; he got an agreement and irrevocable consent from the Petitioner for sale and transfer of Atlas shares; he got an agreement or consent from the Petitioner for dividend distribution and winding up of Atlas in a manner as the Board and the other shareholders might deem fit; and he got a

confirmation of no claim against him or his family member or Atlas or Grandway or their shareholders by the Petitioner. And after all that is done, he even gets back his entire money of USD 3,500,000. And that because the Petitioner's wife calls him a 'forger' in a private communication made to a couple of acquaintances or associates. Can such award be ever sustained as something a fair and judiciously minded person could have made. In my humble opinion, it is the very opposite of justice; it would be a travesty of justice to uphold such award.

24 The impugned award, thus, does not measure up to the minimal judicial scrutiny even within the parameters of Section 34 of the Act. It is completely unreasonable, impossible, and I dare say, perverse. It is partly based on no evidence, partly on non-application of mind, and partly, by a wholesale misapplication of law resulting into miscarriage of justice. All in all, it shocks the conscience of the court.

25 The Respondent has referred to in his written submissions Supreme Court judgments leading to the case of **Ssangyong Construction and Engineering Co. Ltd. vs. National Highways Authority of India**[2]**.** Relying on these cases, it is submitted that the only grounds left for the interference with arbitral awards by courts, are those comprised within the fundamental policy of Indian law. It is submitted that after the 2015 amendment of the Act, as observed by the Supreme Court in **Ssangyong Construction and Engineering Co.**'s case, the ground of patent illegality is no longer available for challenging an award passed in an international commercial arbitration, such as the present award. Leaving aside the question of applicability of 2015 amendment to the present award which

2 **(2019) SCC ONLINE SC 677**

was both rendered and challenged under the unamended Act (i.e. the Act as it stood prior to the 2015 amendment), it is clear that the impugned award is being interfered with, as noted above, on the grounds that it is an impossible award; it is an award based on conclusions which no fair or judiciously minded person could have arrived at; and it shocks the conscience of the court. Each of these grounds bears on the fundamental policy of Indian law in making of an award. And in resisting these grounds, none of the judgments referred to by the Respondent (i.e. the cases of **ONGC vs. Saw Pipes Ltd.**[3], **Ultratech Cement Ltd. vs. Sunfield Resources Pty Ltd.**[4], **Kailash Nath Associates vs. Delhi Development Authority**[5], **Construction and Design Services vs. Delhi Development Authority**[6]) assists him.

26 The petition, thus, succeeds. The impugned award is set aside.

27 In accordance with the statement made by learned Counsel for the Escrow Agent before this court on 6 August 2012 in Arbitration Petition No.853 of 2012, the Escrow Agent may now handover the cheque held by him in escrow to the Petitioner but not before six weeks from today. Since I have already given time of six weeks to the Escrow Agent to hand over the cheque, there is no need for a separate stay order. In the meantime, during these six weeks, the interim attachment ordered by this court on 16 April 2018 of the shares held by the Petitioner shall continue to operate.

(S.C. GUPTE, J.)

3 **(2003) 5 SCC 705**
4 **(2016) SCC ONLINE BOM 10023**
5 **(2015) 4 SC 136**
6 **(2015) 14 SCC 263**