FUTURE RETAIL

21st December, 2020

To,
Dept. of Corporate Services (CRD)
BSE Limited
Phiroze Jeejeebhoy Towers,
Dalal Street,
Mumbai - 400 001

Listing Department
National Stock Exchange of India Limited
Bandra Kurla Complex,
Bandra East,
Mumbai - 400 051

Scrip Code: 540064
Scrip Code of Debt: 958809, 958810 & 959518

Symbol: FRETAIL

Ref. : Scheme update and Disclosure under Regulation 30 and other applicable regulations of the SEBI (Listing and other Disclosure Requirements) Regulations, 2015

Sub. : Order pronounced Hon'ble Ms. Justice Mukta Gupta (under Order XXXIX Rule 1 and 2 CPC) in Suit filed by the Company in Delhi High Court bearing reference no. CS(COMM) 493/2020

Dear Sir,

Further to our letter dated 07th November, 2020 and in relation to the composite scheme of arrangement ("Transaction") and ongoing dispute in connection with the Transaction wherein the Company had informed about filing of suit in the Hon'ble Delhi High Court on 07th November, 2020 in relation to seeking necessary reliefs against Amazon.com NV Investment Holdings LLC ("Amazon").

Please note that in the matter of suit filed by the Company in Delhi High Court, an order has been pronounced today i.e. on 21st December, 2020 by Hon'ble Ms. Justice Mukta Gupta (under Order XXXIX Rule 1 and 2 CPC). Copy of the order is enclosed herewith for you reference and record. We are in process of reviewing the same and shall submit a brief summary after consultation with legal advisors.

The above is for your information and record please. This may be treated as disclosure under applicable provisions of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Thanking you,

Yours faithfully,
For **Future Retail Limited**

C. P. Toshniwal
Chief Financial Officer

CC:

Singapore Exchange Securities Trading Limited
2, Shenton Way, #02-02, SGX Centre 1.
Singapore - 068 804

Encl: as above

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

% Reserved on: 20th November, 2020
Decided on: 21st December, 2020

\+ **CS(COMM) 493/2020**

FUTURE RETAIL LTD. ..... Plaintiff

Represented by: Mr.Harish Salve and Mr.Darius J. Khambata, Sr.Advocates with Mr.Somasekhar Sundaresan, Mr.Raghav Shankar, Mr.Ameet Naik, Mr.Aditya Mehta, Mr.Tushar Hathiramani, Mr.Abhishek Kale, Ms.Madhu Gadodia, Mr.Harshvardhan Jha and Mr.Darshan Furia, Advocates.

versus

AMAZON.COM INVESTMENT HOLDINGS LLC & ORS. ..... Defendants

Represented by: Mr.Gopal Subramanium, Mr.Gourab Banerji, Mr.Rajiv Nayar, and Mr.Amit Sibal, Sr.Advocates with Mr.Anand S.Pathak, Mr.Amit K. Mishra, Mr.Shashank Gautam, Ms.Sreemoyee Deb, Mr.Mohit Singh, Mr.Harshad Pathak, Ms.Promit Chaterjee, Mr.Shivam Pandey, Ms.Kanika Singhal, Ms.Saloni Agarwal, Ms.Didon Misri, Advocates, Mr.Vijayendra Pratap Singh, Mr.Rachit Bahl, Ms.Roopali Singh, Mr.Abhijnan Jha, Mr.Priyank Ladoia, Mr.Aman Sharma, Mr.Tanmay Sharma, Mr.Arnab Ray, Mr.Vedant Kapur, Advocates, Mr.Pawan Bhushan, Ms.Hima Lawrence, Ms.Ujwala Uppaluri,

Mr.Mohit Pandey, Ms.Raka Chatterji, Ms.Manjira Dasgupta, Mr.Aishvary Vikram, Mr.Ambar Bhushan and Mr.Vinay Tripathi, Advocates for defendant No.1.

Mr.Mukul Rohtagi and Mr.Vikram Nankani, Sr.Advocates with Mr.Mahesh Agarwal, Mr.Rishi Agarwala, Mr.Karan Luthra, Mr.Pranjit Bhattacharya and Mr.Ankit Banati, Advocates for defendant Nos.2 to 13.

Dr.Abhishek Manu Singhvi, Sr.Advocate with Mr.Avishkar Singhvi, Ms.Madhavi Khanna, Mr.K.R.Sasiprabhu and Mr.Aditya Swarup, Advocates for defendant Nos.14 and 15.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

I.A.10376/2020 (under Order XXXIX Rule 1 and 2 CPC)

Brief Facts

1.1 The plaintiff-Future Retail Ltd. (in short 'FRL') has filed the present suit impleading Amazon.com NV Investment Holdings LLC (in short 'Amazon') as defendant No.1; Future Coupons Pvt. Ltd. (in short 'FCPL') as defendant Nos.2; the promoters of the plaintiff (in short 'Biyanis') as defendant Nos.3 to 11, Future Corporate Resources Private Limited (in short 'FCRPL'), Akar Estate and Finance Private Limited (in short 'AEFPL') as defendants No.12 and 13 respectively, and Reliance Retail Ventures Limited (in short 'RRVL') and Reliance Retail and Fashion Lifestyle Limited (in short 'RRFLL' as defendant Nos.14 and 15 respectively (together referred as

Reliance) with the following prayers:

(a) Restrain by an order of permanent injunction the Defendant No. 1 (Amazon), their officers, servants, agents, assigns, affiliates, representatives, or any person claiming through or under them, jointly and severally, from interfering in any manner with the Disputed Transaction, including by way of injuncting the initiation or continuation by the Defendant No. 1 (Amazon), their officers, servants, agents, assigns, affiliates, representatives, or any person claiming through or under them, jointly and severally, of proceedings before any court, arbitral tribunal, regulator, statutory authority or otherwise seeking to stay, injunct or in any other manner interdict consideration of Disputed Transaction by the jurisdictional authorities in accordance with law.

(b) Restrain by an order of permanent injunction the Defendant No. 1 (Amazon), their officers, servants, agents, assigns, affiliates, representatives, or any person claiming through or under them, jointly and severally, from taking any steps that would constitute an interference with the steps being taken by the plaintiff to secure the requisite sanctions and permissions for giving effect to the scheme of arrangement and honouring its contractual rights on its contract with Defendant Nos. 14 and 15 including steps by way of relying upon/acting in furtherance of the purported Interim Order dated October 25, 2020 passed by the Emergency Arbitrator;

(c) Restrain by an order of permanent injunction the Defendant No. 1 (Amazon), their officers, servants, agents, assigns, affiliates, representatives, or any person claiming through or under them, jointly and severally, from in any manner seeking any relief or remedy from any court, arbitral tribunal, regulator, statutory authority or otherwise, on the basis that the FCPL SHA, FCPL SSA and the FRL SHA constitute a single integrated agreement/composite transaction;

(d) Pass an order for damages against Defendant No. 1, in addition to the above, to the extent of ₹100 crores for

drawing the Plaintiff (FRL) into unnecessary, frivolous and oppressive litigation alongwith pendente lite and future interest at the rate of 18% per annum;

(e) An order for costs of the suit and the proceedings;

(f) Pass such other orders in favour of the Plaintiff and against the Defendant, which this Hon'ble Court may deem fit and proper in the facts and circumstance of the case and in the interest of justice, equity and good conscience.

1.2 Prayers in the interim application, that is, I.A.10376/2020 (under Order XXXIX Rule 1 and 2 CPC) are identical to prayers (a), (b) and (c) in the plaint.

1.3 At the outset on a query raised by this Court as to whether the parties agree that this application can be finally decided based on the arguments on behalf of the parties without formal counter affidavits, learned counsels for the parties stated that the application be finally decided without formal affidavits based on oral arguments on behalf of the parties. Mr.Harish Salve, learned Senior Counsel appearing for the plaintiff further stated that in the interim application, he is not seeking any anti arbitration injunction or any anti suit injunction but only an interim restraint on Amazon to not interfere before the authorities such as SEBI etc. in relation to the lawful 'transaction' between FRL and Amazon pending consideration before the Regulators and statutory authorities.

1.4 Though not challenging the Emergency Award order (in short 'EA order') dated 25th August, 2020 on merits before this Court which challenge is also not maintainable in the present suit, grievance of FRL in the present suit is to the use of EA order and the interim directions passed therein restraining FRL from proceeding further with the Resolution dated 29th

August, 2020. Thus in the present suit and application though FRL does not seek a declaration as to the invalidity of the EA order on merits, however, the legal status of the Emergency Arbitrator and the consequential EA order is an issue in the present suit and application. Argument on behalf of FRL duly supported by the defendants except Amazon is that the concept of emergency arbitration is outside the scope of Part-1 of the Arbitration and Conciliation Act, 1996 (in short the 'A&C Act'), thus the EA order passed is bereft of jurisdiction and a nullity. Therefore, the directions on the strength of which Amazon is filing representations/complaints to various statutory authorities interferes in the course of business of FRL and amounts to tortiuous interference for which FRL seeks injunction in the present suit.

1.5 Case of FRL and other defendants except Amazon is that FRL is a listed company having more than three lakhs shareholders and over 25,000 employees, operating retail chains in more than 400 cities in every State of the country through digital platforms and also through about 1534 physical stores across India. Covid-19 pandemic has had a devastating impact on the Indian retail sector including FRL which is in serious economic peril. FRL's financial condition is rapidly deteriorating with notices being received from banks, financial institutions, creditors, landlords and vendors etc. Reliance is acquiring the retail and wholesale business as also the logistic and warehousing business from the Future Group as going concerns on a slump sale basis for lumpsum aggregate consideration of INR 24,713 crores, subject to adjustments as set out in the composite scheme of arrangement (in short 'the scheme'). The transaction will address concerns of FRL's creditors as Reliance will acquire not only FRL's retail assets but also its liabilities amounting to approximately ₹12,801/- crores. Further as per the

transaction Reliance has agreed to invest a sum of ₹2,800/-crores into the merged entity which besides others will be used to pay FRL's residual liabilities. Therefore, the transaction will avert FRL's insolvency. In case the transaction falls out, FRL will go into liquidation, causing damage to the public shareholders, livelihood of the employees etc. The transaction will infact preserve the value of the Amazon's investment in FCPL whose primary asset is its shares in FRL. In case FRL becomes insolvent, the same will destroy the substratum of Amazon's investment in FCPL. It is, therefore, also claimed that de hors the invalidity of EA order, the conduct of Amazon in the interfering before the statutory authorities/Regulators amounts to tortious interference.

1.6 Since the assets of FRL are suffering deterioration at a rapid pace, it is imperative that the transaction between FRL and reliance is expeditiously concluded to stave off the prospects of the company going into liquidation. The transaction is presently at the stage of seeking various regulatory approvals from inter alia the Stock Exchanges and the Securities and Exchange Board of India (in short SEBI) Despite the fact that Amazon was in loop in respect of the transaction as is evident from the various correspondences, Amazon for the first time on 3rd October, 2020 wrote to NSE/BSE/SEBI, raising the plea that the transaction between Amazon and Reliance violated its contractual rights, that is, FCPL SHA and the authorities should decline to grant approval of the transaction. Amazon also instituted arbitration proceedings under the FCPL SHA resulting in the interim award which purports to injunct FRL from proceeding with the transaction with Reliance including by prosecuting the applications before the various authorities.

1.7 Operative portion of the EA order dated 25th October, 2020 directs FRL, FCPL, Biyanis, FCRPL and AEFPL as under:

> *285. In the result, I award, direct, and order as follows:*
> *(a) the Respondents are injuncted from taking any steps in furtherance or in aid of the Board Resolution made by the Board of Directors of FRL on 29 August 2020 in relation to the Disputed Transaction, including but not limited to filing or pursuing any application before any person, including regulatory bodies or agencies in India, or requesting for approval at any company meeting;*
> *(b) the Respondents are injuncted from taking any steps to complete the Disputed Transaction ·with entities that are part of the MDA Group;*
> *(c) without prejudice to the rights of any current Promoter Lenders, the Respondents are injuncted from directly or indirectly taking any steps to transfer/ dispose/ alienate/encumber FRL's Retail Assets or the shares held in FRL by the Promoters in any manner without the prior written consent of the Claimant;*
> *(d) the Respondents are injuncted from issuing securities of FRL or obtaining/securing any financing, directly or indirectly, from any Restricted Person that will be in any manner contrary to Section 13.3.1 of the FCPL SHA;*
> *(e) the orders in (a) to (d) above are to take effect immediately and will remain in place until further order from the Tribunal, when constituted;*

1.8 <u>Relevant list of dates and events</u>

(i) Shareholders agreement dated 12th August, 2019 executed between FCPL, FRL and persons listed in Schedule-I, being Biyanis, FCRPL and AEFPL (in short FRL SHA).

(ii) Letter dated 12th August, 2018 by FRL to Stock Exchange informing Stock Exchanges that FRL has entered into a FRL SHA dated 12th August, 2019 in terms of Regulation 30 of SEBI, (Listing Obligations and Disclosure

Requirements) Regulation, 2015;

(iii) Shareholders agreement dated 22nd August, 2019 between Amazon, FCPL and persons listed in Schedule-I, that is, Biyanis, FCRPL and AEFPL (in short FCPL SHA).

(iv) Share subscription agreement dated 22nd August, 2019 executed between Amazon, FCPL and persons listed in Schedule-I being Biyanis, FCRPL and AEFPL (in short FCPL SSA);

(v) Letter dated 22nd August, 2019 by FRL to the Stock Exchanges in relation to execution of FCPL SHA and FCPL SSA;.

(vi) An application dated 23rd September, 2019 filed before the Competition Commission of India (in short 'CCI') by Amazon (investor) for obtaining the approval of CCI for proposed acquisition of 34,02,713 Class-A voting equity shares and 63,71,678 Class-B non-voting equity shares aggregating to 49% of the total voting and non-voting equity share capital in FCPL, (a wholly owned subsidiary of FCRPL; FCPL and FCRPL being owned and controlled by the promoter group, that is, Biyanis);

(vii) Letter dated 19th December 2019 by FCPL to FRL in relation to the FRL SHA dated 12th August, 2019 notifying the "effective date" for the purposes of the FRL SHA to be the date of the said letter and that the list of restricted persons was as set out in the Annexure - I of the letter;

(viii) E-mails dated 12th March, 2020; 15th March, 2020; 19th March, 2020 and 25th March, 2020 received from FCRPL intimating Amazon about the various notices received from the banks and the financial institutions and informing about consequences of an event of default;

(ix) Letter dated 29th August, 2020 from FRL to stock exchanges intimating the outcome of the Board meeting held on 29th August, 2020

approving the proposed amalgamation of FRL along with other transferor companies;

(x) Default notices dated 3rd October, 2020 by Amazon to FCPL, FCRPL and defendant No.3.

(xi) Three separate letters dated 3rd October, 2020 by Amazon to the stock exchanges, SEBI and FRL;

(xii) Notice of arbitration dated 5th October, 2020 by Amazon invoking emergency arbitration under the SIAC Rules and on the same date filing an application for emergency interim relief;

(xiii) Interim order passed by the Emergency Arbitrator dated 25th October, 2020.

1.9 Facts pleaded by Amazon in the petition before CCI

(A) That the proposed combination required to be notified before the Commission comprises of three transactions:

(i) Proposed Transaction I relates to the issue of 91,83,754 Class A voting equity shares of FCPL to FCRPL;

(ii) Proposed Transaction II relates to the transfer of 1,36,66,287 shares of FCPL held by FCRPL (representing 2.52% of the issued subscribed and paid up equity share capital of FRL, on a fully diluted basis) to FCPL. It was also pointed out that FCPL shall be a wholly owned subsidiary of FCRPL at the time of, and immediately post the transfer of the said shares;

(iii) Proposed Transaction III relates to the acquisition of the Subscription Shares representing 49% of the total issued, subscribed and paid-up equity share capital of FCPL (on a fully diluted basis) by Amazon, by way of a preferential allotment. The remaining 1,01,83,754 Class A voting equity shares, representing 51% of the issued, subscribed and paid-up equity share

capital of FCPL will be held by FCRPL.

(B) Amazon notified under Section 5 of the Competition Act to the CCI as under:

> (i) It is submitted that neither Proposed Transaction I nor Proposed Transaction II, on a standalone basis, is notifiable to the Hon'ble Commission, as both Proposed Transaction I and Proposed Transaction II are contemplated between a parent and its subsidiary.
> (ii) It is also submitted that even Proposed Transaction III, on a standalone basis, benefits from the Target Exemption because the value of the assets and turnover of FCL (as of March 31, 2019) (which is the target for the purposes of Proposed Transaction Ill) are below the thresholds provided in the Target Exemption.
> (iii) Accordingly, it is submitted that each of the constituent transactions of the Proposed Combination, on a standalone basis, are not notifiable to the Hon'ble Commission.
> (iv) Without prejudice to the foregoing, should the Hon'ble Commission consider the Proposed Combination to be a notifiable combination, the Amazon is notifying the Proposed Combination in terms of Section 6(2) of the Competition Act read with Sub-regulation (4) of Regulation 9 of the Combination Regulations.
>
> 5.1.3. Right(s) acquired or arising out of or in connection with the transaction(s) referred to at 5.1.1 and 5.1.2 above.
>
> (v) It is clarified that the Amazon is not acquiring control over FCPL in any manner pursuant to the Proposed Transaction III. The Amazon submits that the rights to be acquired by the Amazon pursuant to the consummation of the Proposed Transaction III are mere investor protection rights, which are typically granted to minority investors with a view to protect the investment made by such investor and do not confer control.
> (vi) The rights that will be acquired by the Amazon pursuant to the consummation of the Proposed Transaction III will be exclusively governed by the terms of the SHA. In this regard, it

is also clarified that the Proposed Transaction I and Proposed Transaction II will not vest any rights on the Amazon."

(C) The rights proposed to be acquired by Amazon in terms of the SHA to protect its investment were described as:

(i) Two directors were to be nominated and appointed by Amazon as Investor Directors as long as Amazon held 49% of the equity share capital of FCPL.

(ii) Amazon may request to appoint an Investor Director as an observer on the board of the Material Entities who may attend but without voting rights in board proceedings.

(iii) Items identified in Schedule IX and Schedule X have a direct bearing on the investment of Amazon in FCPL. Items identified in Schedule IX can be considered by FCPL's Board only after procuring a prior written consent from Amazon and items identified in Schedule X can be considered by the FCPL's Board or shareholders with a prior notice of at least 15 business days to be served on Amazon and the Investor Directors.

(iv) Section 13 and 14 which are material to the present case in the FCPL SHA were notified by Amazon before CCI as under:

> Section 13: Consent and compliance in relation to Material Entity matters : Prior written consent from the Amazon would be required before: (a) FCPL decides on or implements any matter under the FRL SHA which requires FCPL's consent; (b) FCPL decides to decline, recuse itself, or not subscribe to its pro-rata entitlement in relation to issuance of securities by a Material Entity; (c) Any updates to the list of "Restricted Persons" and its communication to FRL under the FRL SHA; and (d) Assignment of the rights and obligations of FCPL and the Promoters (as defined in the SHA) under the FRL SHA.
>
> Section 14 : Transfer of Retail Assets (as defined in the SHA) : FCPL and the promoters have agreed not to undertake any sale, divestment, transfer, disposal, etc. of retail outlets across various formats operated by FRL (which is an integral part of the business conducted by

> FRL) except as mutually agreed (in writing) between the Promoters and the Investor, or contained in the FRL SHA or any commercial agreement between a Material Entity (as defined in the SHA) and an affiliate of the Amazon. FCPL and the Promoters have also agreed not to transfer, encumber, divest or dispose of these Retail Assets (as defined in the SHA), directly or indirectly, in favour of a mutually agreed list of Restricted Persons (as defined in the SHA).

(D) In Para 29 Amazon notified that the rationale of FCPL was that the Promoters have invited Amazon to invest in FCPL with a view to strengthen and augment the business of FCPL. FCPL believes that the Proposed Combination will provide an opportunity to FCPL to learn global trends in digital payments solutions and launch new products and usage of in-built payment mechanisms can lead to acquisition of customers' base and increased loyalty.

(E) In Para 30 Amazon notified the rationale for Amazon as it believes that FCPL holds a potential for long term value creation and providing returns on its investment. Amazon has decided to invest in FCPL with a view to strengthen and augment the business of FCPL (including the marketing and distribution of loyalty cards, corporate gift cards and reward cards to corporate customers) and unlock the value in the company.

1.10 Thus, the proposed combination contained of Proposed Transactions I, II and III as notified by Amazon to CCI was that Amazon would have acquisition of 49% of the share capital of FCPL and that pursuant to the proposed combination, the control of FCPL including day-to-day operational matters and policy decisions will remain with FCRPL with 51% of the share holding and that FCPL SHA and FCPL SSA will determine the rights and

obligations of Amazon and the promoters in respect of their rights and obligations as shareholders of FCPL. It was also clarified that the rights proposed to be acquired by Amazon under the FCPL SHA were for protecting its investment in FCPL, besides the rights to be exercised in relation to material entity i.e. FRL and its retail assets through FCPL provided under Clauses 13 and 14 of FCPL SHA as noted above.

1.11 On 19th December, 2019 FCPL wrote to FRL notifying the "effective date" for the purpose of FRL SHA to be the date of the letter, that is, 19th December, 2019. Para, 2, 3 4 of the letter dated 19th December, 2019 from FCPL to FRL read as under:

> *2. Pursuant to Clause 2 of the FRL SHA, we hereby designate that the 'Effective Date' for the purposes of the FRL SHA shall be the date of this letter.*
>
> *3. We also hereby inform you that the list of 'Restricted Persons' shall be as set out in Annexure 1 of this letter.*
>
> *4. Reference is also made to Clause 6.2.1 of the FRL SHA pursuant to which the Existing Shareholders (and the Existing Shareholder Affiliates), and FCL have agreed that that they shall not, Transfer or Encumber any of the Securities of the Company held by it to any Person or create any Encumbrance over the Securities of the Company held by it except pursuant to mutual written consent of FCL and the Existing Shareholders. Accordingly, FCL hereby provide its consent for any Transfer or Encumbrance over Securities of the Company, if such Transfer or Encumbrance is in accordance with the provisions of the FCL SHA. For the purposes of this paragraph 4, the term 'FCL SHA' shall mean the shareholders' agreement dated August 22, 2019 entered into between FCL, the Existing Shareholders and Amazon.com NV Investment Holdings LLC (as may be amended, modified or supplemented from time to time). Further, by executing, and returning a copy of this letter,*

the Existing Shareholders shall be deemed to have provided their irrevocable, and unconditional consent for any Transfer or Encumbrance over Securities of the Company held by FCL, if such Transfer or Encumbrance is in accordance with the provisions of the FCL SHA.

Contentions on behalf of FRL

2.1 According to Mr.Harish Salve, learned Senior Counsel appearing for FRL states that FRL is a listed company having more than three lakhs shareholders, over 25,000 employees and several other stakeholders (including banks and financial institutions). The Covid-19 pandemic has had significant impact on Indian businesses, particularly the retail sector, in which FRL carries on its business and thus the transaction between FRL and Reliance is to protect the interest of all the stakeholders of FRL through a large infusion of funds and acquisition of liabilities of FRL's business by Reliance.

2.2 According to the learned Senior Counsel, the present plaint seeks injunction against Amazon from unlawfully interfering with the performance of the transaction between FRL and Reliance (defendant Nos.14 and 15) to restructure and transfer a part of FRL's business to Reliance to raise funds immediately required by FRL inter-alia to meet its debt repayments. Since Amazon is resorting to measures that constitute tortiuous interference with lawful contracts being entered into between FRL and Reliance, by attempting to interdict performance of the transaction, FRL has been constrained to approach this Court. Despite Amazon not being a party to the FRL SHA and FRL not being the party to the FCPL SHA and FCPL SSA, Amazon claims contravention of its contractual rights based on the FCPL SHA.

2.3 In an attempt to interdict the transaction between FRL and Reliance, Amazon invoked the Emergency Arbitration before SIAC and in its representations to various authorities relying on the EA order dated 25th October, 2020 seeks to restrain various regulatory approvals from the Stock Exchanges, SEBI etc in respect of the transaction. Despite FRL not being a party to FCPL SHA under which Amazon invoked the arbitration, FRL was joined as a party to the proceedings.

2.4 It is now the case of Amazon that the FRL SHA, FCPL SHA and FCPL SSA constitute a "Single Integrated Bargain" to which Amazon, FRL, FCPL and the Promoters are all parties. The stand of Amazon based on the conflation of FRL SHA and FCPL SHA amounts to illegality as it results in creation of control over FRL in favour of Amazon violating inter-alia the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (in short 'FEMA FDI Rules') as also violates the provisions of the Companies Act, 2013 since it amounts to vesting the power that resides in the Board of Directors of FRL, in a foreign company, even in the absence of any such provision in the articles of FRL and in derogation of the fiduciary duty of the Directors of FRL including independent Directors to act in the interest of FRL. Further Amazon's investments in FCPL also do not gain if FRL loses its value.

2.5 The present act of Amazon is to prevent any competition in the Indian retail market as is evident from the Schedule containing the list of 'Restricted persons' and is, therefore, obstructing the transaction. In case the statutory authorities are restrained from acting in terms of the provisions of the Indian laws, an irreparable prejudice would be caused to FRL and no prejudice would be caused to Amazon by the interim relief for the reason,

the procedure established by law for conclusion of transaction including sanction of the scheme of arrangement by the NCLT adequately safeguards Amazon's interest. By the collapse of FRL's business, Amazon would gain as a large competitor in the form of FRL would be out of the business. The balance of convenience, therefore, also lies in restraining Amazon from in any manner interfering with the transaction.

2.6 Claim of Amazon that the FRL SHA, FCPL SHA and FCPL SSA are a Single Integrated Transaction is not only contrary to the provisions of FRL SHA, FCPL SHA and FCPL SSA but also the representation of Amazon before the Competition Commission of India (CCI).

2.7 Contention of Amazon based on the letter dated 19th December, 2019 issued by FCPL to FRL under the FRL SHA notifying the effective date of FRL SHA as 19th December, 2019 and listing the Restricted Persons for the purposes of FRL SHA is fallacious and misleading. Based on this letter Amazon contends that FCPL SHA and FRL SHA are interlinked since the list of Restricted Persons notified under this letter was the same as the list of Restricted Persons set out in the FCPL SHA.

2.8 According to FRL the said letter was issued by FCPL in accordance with the provisions of FRL SHA which stipulates that the effective date of FRL SHA would mean the date designated in writing by FCPL after receipt of any approval from any government authority including the CCI, if applicable, that may be required by FCPL. The letter dated 19th December, 2019 merely notifies the list of restricted persons as contemplated in Clause 10.3 of FRL SHA.

2.9 According to learned Senior Counsel for FRL, FRL is a listed public limited company with over three lakhs shareholders and a private contract

entered into by the Promoters, undertaken in their capacity as shareholders of FRL, cannot bind FRL. Reliance is placed on the decision reported as 2010 (7) SCC 1 *Reliance Natural Resources Limited vs. Reliance Industries Limited* (in short 'RNRL vs. RIL') wherein an identical argument canvassed was rejected.

2.10 Representation of Amazon to the statutory authority/ regulators that the "transaction" being in breach of FCPL SHA and FRL SHA and the resolution dated 29th August, 2020 passed by the Board of Directors of the FRL is void, is without any merit for the reason Firstly, FRL's Board Resolution does not violate any provision of FRL's Article of Association or any provisions of law and, therefore, cannot be considered to be void; Secondly, the Board of FRL in compliance with their fiduciary duty owed to FRL approved the transaction with a view to salvage FRL and its stakeholders who had been adversely impacted by the Covid-19 pandemic and the Board approval of the transaction is in the best interest of its employees, lenders and shareholders of FRL; Thirdly, the Board of FRL approved the transaction in accordance with Clause-10 of FRL SHA only after FCPL accorded its written consent dated 29th August, 2020 which fact has been noted by FRL in para-29 of the plaint stating that FCPL has granted its consent. Fourthly, the Resolution can be termed void, only if it is contrary to law and the Board Resolution of FRL is not contrary to law. The Resolution is fully compliant with FRL's Article of Association and hence not ultra vires.

2.11 Amazon's contention before this Court that Board Resolution is void as it contravenes FCPL's Article of Association is also misconceived as the Board of Directors of FRL cannot be bound by FCPL's Article of

Association. Further before the Emergency Arbitrator, Amazon accepted that the Board Resolution is not illegal or void or contrary to any regulation or statute.

2.12 Amazon's case that it was persuaded to invest in FCPL being assured of certain rights under the FRL SHA, does not confer upon Amazon any derivative rights under the FRL SHA. Amazon knew, being a foreign investor, its limit of investment in view of Regulatory Regime in India and thus it was content with an investment made with the shareholder of FRL. Reliance is placed on the decisions reported as (2012) 6 SCC 613 *Vodafone International Holdings BV vs. Union of India*; *RNRL vs. RIL* (supra); 2000 (3) Mh LJ 700 *Rolta India Ltd vs. Venire Industries Ltd.*; 1959 AC 324 *Scottish Co-operative Wholesale Society Ltd vs. Mayer* and [2009] EWCA Civ 291 *Hawkes vs. Cuddy* to contend that the Directors of a listed entity have to act in fiduciary duty and not merely follow the direction of Promoters which tantamount to destroy the value of public shareholders and other stakeholders.

2.13 The WhatsApp chats between the parties clearly reveal that Amazon was aware of the fact that FRL was engaged in the talks to transfer its business to Reliance since June/July, 2020 and the representation of Amazon to the Authorities that it only came to know of the transaction on 16th September, 2020 is false. As a matter of fact, informal discussions were also held between Amazon and Reliance wherein Reliance informed Amazon that it was acquiring the assets of FRL when Amazon did not raise any objection.

2.14 Since Amazon is unlawfully interfering with the lawful transaction between FRL and Reliance by masquerading the EA order to be an order

under Section 17(2) of the A&C Act, the same amounts to unlawful interference with the transaction and is contrary to the business and economic interests of FRL. Consequently, FRL is entitled to seek an injunction against Amazon on the principles governing the tort of unlawful interference. Reliance is placed on the decisions reported as 1983 WLR 778 *Merkur Island Shipping Corporation vs. Laughton & Ors*.; [1991] 3 WLR 188 *Lonhro PLC vs. Fayed & Ors.* and [2007] UKHL 21 *OBG Ltd vs. Allan & Ors.*

2.15 Though Amazon contends that the tort of unlawful interference is not applicable as FRL has failed to produce the contract entered into between FRL and Reliance, however, this contention of Amazon is contrary to its own submissions in the application seeking emergency relief before the Emergency Arbitrator which notes the alleged breach of FCPL SHA and FRL SHA on the ground that FRL has invalidly announced a transaction with companies of the MDA Group. Further the fact that FRL and Reliance are entering into a transaction is noted in the scheme which is also in the knowledge of Amazon.

2.16 Learned Senior Counsel for FRL further contends that in Clause-15.17 in the FCPL SHA it has been explicitly recorded that the understanding between the Promoters and the Investors was no agreement or understanding whatsoever in relation to acquisition of shares or voting rights in/or exercising control over FRL and that the company, the Promoters and the Investors otherwise do not intend to act in concert with each other in any way whatsoever. However, in the teeth of Clause 15.17 Amazon tries to exercise control over the working of FRL. It is further stated that FCPL and

much less Amazon do not even have the status of a minority shareholder and can thus not interfere by exercising control over FRL.

2.17 Mr.Darius J. Khambata, learned Senior Counsel appearing on behalf of FRL further contends that the EA order is a nullity and Amazon is unlawfully interfering in the transaction by masquerading the EA order as a binding order under Section 17 of the A&C Act. Though the legality/illegality on merits of the EA order is not an issue in the present suit but the legal status of the EA order is an issue in the present suit. FRL is not challenging the legality of the findings in the EA order on merits nor seeking a declaration as to the invalidity of the EA order but since the Emergency Arbitrator has no legal status, thus the EA order is not binding, FRL seeks its relief on the basis that the EA order is a nullity. Since Amazon claims that the EA order is valid, same is an issue to be decided by this Court.

2.18 Appearance of the FRL before the Emergency Arbitrator was subject to its objections as to the jurisdiction and the said objection cannot be waived. According to learned Senior Counsel, FRL appeared before the Emergency Arbitrator without prejudice to the objection that an Emergency Arbitrator is not recognized under Part-1 of the A&C Act as is evident from the letters of FRL dated 6th October, 2010 and 7th October, 2020 to SIAC and the response dated 12th October, 2020. Thus Amazon's contention that FRL waived the objection to the jurisdiction of the Emergency Arbitrator is false and misconceived.

2.19 Further since the Emergency Arbitrator lacks legal status under Part-I of the A&C Act, the parties by consent could not confer jurisdiction on the Emergency Arbitrator. Despite the fact that the order of an Emergency Arbitrator is not recognized under Part-I of the A&C Act, Amazon has

represented the EA order to be binding on FRL in its letters dated 28th October, 2020 and 8th November, 2020 addressed to SEBI and the Stock Exchanges respectively.

2.20 According to learned Senior Counsel for FRL, validity of the appointment of Emergency Arbitrator has been canvassed on behalf of Amazon on five counts, that is, (i) Emergency Arbitrator is not incompatible with Part-I of the A&C Act, (ii) Part-I of the A&C Act allows parties to agree to procedural Rules and in the present case as per the FCPL SHA parties agreed to be governed by SIAC Rules; (iii) Termination of the mandate and substitution of Arbitrator has been provided under Section 15 of the A&C Act; (iv) the decisions of this Court reported as 2020 SCC OnLine Del 721 *Ashwani Minda and Jay Ushin Ltd. vs. U-Shin Ltd*. and 2016 SCC OnLine Del 5521 *Raffles Design International Pvt. Ltd. vs. Educomp Professional Education Ltd. & Ors*. recognize emergency arbitration in India; (v) unless set aside the interim EA order is a decree and not a waste paper.

2.21 Responding to these propositions canvassed on behalf of Amazon, learned Senior Counsel states that the legal status of an Emergency Arbitrator is an issue in this suit even though the plaintiff is not required to challenge the legality of the EA order before this Court. In para-51 to 64 of the plaint, the plaintiff has set out as to how the appointment of the Emergency Arbitrator is a nullity and lacks jurisdiction. In prayers (b) and (c) in the plaint, plaintiff has sought prayers claiming lack of jurisdiction of the Emergency Arbitrator. The entire attack of Amazon on FRL's case is based on the binding nature of the EA order. Amazon has misrepresented to

the Regulatory Authorities in its letters claiming the binding nature of the emergency arbitrator award.

2.22 According to learned Senior Counsel for FRL, arbitration has been invoked by Amazon in terms of Clause 25.2.1 of the FCPL SHA to which FRL is not a signatory which may be an International commercial arbitration seated in Delhi however, the arbitration agreement to which FRL is a party is not an International commercial arbitration as FRL SHA contemplates a purely domestic arbitration. This is a primary conflict in the two arbitration clauses, one being purely domestic arbitration and the other International commercial arbitration seated at Delhi, in India. Further in both the domestic and international commercial arbitration under Part-I, Emergency Arbitrator is barred, as the remedy for seeking an interim relief before the Arbitral Tribunal is constituted, is under Section 9 of the A&C Act from a Court. That being the only remedy available, Amazon cannot bypass the said remedy and seek appointment of an Emergency Arbitrator.

2.23 Under Section 11(1) of the A&C Act, an Arbitrator has a degree of permanence. The A&C Act also does not contemplate that for the first six months there would be one arbitrator and than other one. Further Sections 12 and 13 of the A&C Act which permit a party to challenge the jurisdiction of an Arbitrator, provide for the grounds and procedure on which appointment of the Arbitrator can be challenged. Section 15 of the A&C Act provides for the manner in which the mandate of an Arbitrator can be terminated and another Arbitrator can be substituted. It is contended that the SIAC Rules cannot override the mandatory provisions of Part-I of the A&C Act. Referring to Section 2(6) of the A&C Act, it is submitted that the parties have freedom to authorize any persons including an institution to

determine a certain issue only where Part-I leaves the parties free to do so. The said freedom cannot derogate from the mandatory provisions of the A&C Act. Section 17 of the A&C Act specifically provides that during arbitral proceedings, a party may only apply to an Arbitral Tribunal for interim reliefs and prior to the constitution of the Arbitral Tribunal, the remedy under Section 9 of the A&C Act is the only remedy available to a party. Further even Section 2 (8) of the A&C Act is applicable, subject to the situations where Part-I recognizes the parties agreement and does not override the provisions of Part-I. Thus Amazon's reliance on Rule- 1.1 of the SIAC Rules is of no avail to the extent that SIAC Rules are in derogation of the provisions of Part-I of the A&C Act. Moreover, Section 11 (2) of the A&C Act merely provides parties with the right "to agree on a procedure for appointing the arbitrator or arbitrators". The freedom to determine the procedure of appointment of an Arbitrator/Arbitrators cannot be read so far as to enable the parties to appoint the Emergency Arbitrator, when the concept of Emergency Arbitrator is not contemplated by the A&C Act.

2.24 Distinguishing the decision relied upon by Amazon reported as 2017 (2) SCC 228 *Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Limited* it is stated that in the said decision the Court was dealing with a two tier arbitration. Recognition of the two tier arbitration is not akin to an emergency arbitration which is not recognized under the A&C Act and hence, the said decision has no applicability to the facts of the present case. Distinguishing the decision relied upon by Amazon reported as 2014 (11) SCC 560 *Antrix Corporation Limited vs. Devas Multimedia Pvt. Ltd.*, it is contended that in the said decision the party had filed a petition under Section 11 after having nominated an Arbitrator pursuant to the ICC Rules

however, in the present case FRL has not appointed any nominee arbitrator. Hence the decisions are of no assistance and in any case they do not deal with the concept of an emergency arbitration.

2.25 Even the decision reported as 2002 (2) SCC 572 *Narayan Prasad Lohia vs. Nikunj Kumar Lohia*, relied upon on behalf of Amazon has no application to the facts of the present case as in the said case two Arbitrators were appointed and the Court held that the appointment of two Arbitrators would not frustrate Section 10 of the A&C Act as in the event the two Arbitrators arrive at conflicting views, they could very well appoint a third Arbitrator to act as a presiding Arbitrator. Reliance of Amazon on the Rules of Delhi International Arbitration Centre ("DIAC Rules"), Mumbai Centre of International Arbitration ("MCIA Rules") and Madras High Court Arbitration Centre ("MHCAC Rules") which provide for emergency arbitration procedures to contend that emergency arbitration is recognized under the A&C Act is also misconceived as DIAC, MCIA and MHCAC Rules cannot override the mandatory provisions of the A&C Act. Further these Rules have been made flexible so as to apply to foreign seated arbitrations as well and the Rules were framed in anticipation of the amendment proposed by 246th Law Commission Report which sought amendment to Section 2(1)(d) of the A&C Act to include emergency arbitration which was not accepted by the Parliament.

2.26 Reliance of Amazon on the decisions in *Raffles* (supra) and 2020 SCC Online Del 631 *Goodwill Non-Woven P. Ltd vs. Xcoal Energy & Resources LLC* is also misconceived as the said decisions pertain to foreign seated arbitration governed by Part-II of the A&C Act wherein the proceedings under Section 9 were filed for de-novo interim relief before the Indian Court

despite the foreign emergency award. Since the present arbitration is governed by Part-I of the A&C Act to which definition of Arbitral Tribunal under Section 2(1)(d) of the A&C Act applies, which does not contemplate Emergency Arbitrator, appointment of an emergency arbitrator is thus a nullity and contending the validity of the said EA order, the acts of Amazon representing to the regulators/statutory authorities amount to tortiuous interference in the rightful business of FRL. It is thus contended that since the concept of Emergency Arbitrator is alien to the Part-I of the A&C Act, the EA order is wholly without jurisdiction and a *coram non judice*. The EA order being a nullity, it need not be set aside by a Court and is required to be ignored for lack of legal status. Reliance is placed on the decisions reported as 1990 (1) SCC 193 *Sushil Kumar Mehta vs. Gobind ram Bohra*, 1991 (3) SCC 136 *Ajudh Raj & Ors. vs. Moti*; Manu/SC/0372/1966 *Mohd. Murtiza Khan vs. State of M.P.* and 1969 (2) SCC 883 *Sheolal & Ors. vs. Sultan & Ors*.

2.27 The decisions relied upon by Amazon for the proposition that an order has to be challenged to assert *coram non judice* are not applicable to the facts of the present case as in the said cases there was no inherent lack of jurisdiction to pass the order as in the present case with the Emergency Arbitrator Therefore, due to the lack of jurisdiction even in collateral proceedings, this Court can hold that the Emergency Arbitrator has no legal status under Part-I of the A&C Act and thus the EA order is a nullity.

Contentions on behalf of Defendant Nos.2 to 13

3.1 Mr.Mukul Rohtagi, learned Senior Counsel appearing on behalf of defendant Nos.2 to 13 contended that on 5th October, 2020 Amazon issued a notice invoking arbitration under Clause-25.2 of the FCPL SHA under the

SIAC Rules. The only persons who were party to the FCPL SHA were Amazon and defendant Nos.2 to 13 and not FRL. Before the Emergency Arbitrator, defendant Nos.2 to 13 raised the objection that the FCPL SHA was governed by the A&C Act and the concept of an Emergency Arbitrator prior to the constitution of an Arbitral Tribunal is foreign to the A&C Act and hence the Emergency Arbitrator cannot be recognized as *coram judice* for granting any reliefs under the A&C Act. Despite challenging the jurisdiction of the Emergency Arbitrator to grant interim relief as the said jurisdiction under the A&C Act is either vested in the Court in terms of Section 9(1) of the A&C Act or before the Arbitral Tribunal once it is constituted under Section 9(3) of the A&C Act, the Emergency Arbitrator passed the EA Order.

3.2 It is well settled that an Arbitral Tribunal is constituted either on the basis of agreement between the parties or under Section 11 of the A&C Act and in the present case there was neither an agreement between the parties nor a direction under Section 11 of the A&C Act for appointment of the Emergency Arbitrator Under Section 2 (6) read with Section 19 (2) of the A&C Act, derogation of the A&C Act is only possible where the A&C Act itself permits the parties to derogate therefrom. Further Section 9 of the A&C Act does not contain the phrases like "*subject to any agreement to the contrary*" or "*unless otherwise agreed by the parties*", thus, the parties cannot derogate from Section 9 of the A&C Act. The parties cannot by consent confer jurisdiction upon a body not recognized under the A&C Act to pass any interim relief prior to the constitution of the Arbitral Tribunal. The SIAC Rules are merely procedural in nature and cannot provide a substantive jurisdiction to a Forum to grant interim reliefs other than what is

mandated under Part-I of the A&C Act in Sections 9 and 17. Emergency Arbitrator is a creature of Rule 30.2 of the SIAC which is foreign to the A&C Act. The seat of arbitration as per the FCPL SHA being at New Delhi, any interim relief could have been claimed by a party prior to the constitution of the Arbitral Tribunal only before a Court defined under Section 2 (1) (e) read with Section 9 of the A&C Act. The A&C Act does not allow the parties to agree to the rules which provide or create substantive rights to either of the parties which are not in consonance with Part-I of the A&C Act. Further SIAC Rules prohibit a challenge/review or any order passed by the Emergency Arbitrator which in itself shows that the Emergency Arbitrator's award is not under Section 17 of the A&C Act. Thus the Emergency Arbitrator lacked inherent jurisdiction under the provisions of the A&C Act. Though these issues were raised before the Emergency Arbitrator however, the same were not considered.

3.3 Mr.Vikram Nankani, learned Senior Counsel appearing on behalf of FCPL contends that FCPL has already granted its consent to FRL for the transaction with Reliance in terms of the FRL SHA which fact is noted in para-29 of the plaint by acknowledging the FRL's letter dated 29th August, 2020, which was issued pursuant to the Board Resolution dated 29th August, 2020 of FCPL. Mr.Nankani also sought time to file the statement of truth in support of the letter dated 29th August, 2020, in his submissions on 20th November, 2020, which this Court declined as the same can be filed while completing formal pleadings with the written statements and replications.

Contentions on behalf of Defendant Nos. 14 & 15

4.1 Dr.Abhishek Manu Singhvi, learned Senior counsel on behalf of

Reliance contends that the EA order is a nullity in law and incapable of enforcement under Part-I of the A&C Act. The proceedings before the Emergency Arbitrator are void as it is *coram non judice*. A plain reading of Clause 25 of the FCPL SHA providing for arbitration clearly notes that the substantive law of arbitration is the Indian Arbitration and Conciliation Act, 1996 and the SIAC Rules merely prescribe the procedure for the arbitration proceedings. In case of conflict with Indian substantive law, the provisions of the A&C Act will prevail and apply *mutatis mutandis*. The seat of arbitration being New Delhi, the arbitration proceedings are governed by Part-I of the A&C Act. Under Part-I of the A&C Act, interim order can only be passed under Section 9 or 17 of the A&C Act. The Emergency Arbitrator being a temporary creature under the SIAC Rules is not the Arbitral Tribunal and has no jurisdiction to pass orders under Section 17 of the A&C Act.

4.2 Reiterating the provisions under the SIAC Rules and Section 11 of the A&C Act relating to the appointment of Arbitral Tribunal, Sections 13 to 15 and 32 of the A&C Act relating to the manner in which the mandate of Arbitral Tribunal can be terminated and Sections 14 or 15 for appointment of a substitute arbitrator, it is contended that under Part-I of the A&C Act there is no scope of appointment of different Arbitral Tribunals for various stages of arbitral proceedings viz. Emergency Arbitrator at the initial stage whose mandate automatically ends when the Tribunal is constituted.

4.3 Under Section 17 (2) of the A&C Act, an interim order of an Arbitral Tribunal is enforceable as an order of the Court however, an interim order of an Emergency Arbitrator under the SIAC Rules is temporary in nature and ceases to be binding automatically if the Arbitral Tribunal is not constituted

within 90 days. Further Rule 12 of the Schedule-I of the SIAC Rules purports to preclude the parties from appealing against an order of the Emergency Arbitrator, despite the fact that Section 37(2) (b) of the A&C Act confers the statutory right of appeal against an interim order passed by the Arbitral Tribunal under Section 17 of the A&C Act.

4.4 The concept of Emergency Arbitrator is antithetical to Section 9 of the A&C Act. In *Raffles* (supra) this Court in para-104 noted that the emergency award passed by the Arbitral Tribunal cannot be enforced under the A&C Act and the only method for enforcing the same would be to file the suit. Further Clause -25.2.1 of the FCPL SHA specifically provides for arbitration as per the SIAC Rules "*as may be modified by the provisions of*" Indian Law. The parties, therefore, recognized that the SIAC Rules cannot override the provisions of Indian law and the A&C Act and were subject thereto.

4.5 Since Amazon is misrepresenting the legality of the EA order claiming that it binds FRL and thereby causing prejudice not only to FRL but to Reliance also by asking the Regulators to deny statutory permissions for the valid and legal transaction inter-se FRL and Reliance, its invalidity can be set up even in collateral proceedings. Reliance is placed on the decision reported as 1990 (1) SCC 193 *Sushil Kumar Mehta vs. Gobind Ram Bohra* to contend when a decree passed by a Court is nullity and is non-est, its invalidity can be set up even at the stage of execution or in collateral proceedings. The Single Integrated Transaction in the FRL SHA, FCPL SHA and FCPL SSA, as claimed by Amazon is violative of the FEMA FDI Regulations and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

4.6 The UNCITRAL Model Law also does not contain any provision in relation to an Emergency Arbitrator. Since the Indian Arbitration and Conciliation Act is based on the UNCITRAL Model Law, it does not contemplate appointment of an Emergency Arbitrator which position of the law is affirmed by the Supreme Court in the decision reported as 2004 (3) SCC 155 *Firm Ashok Traders & Anr. vs. Gurumukh Das Saluja & Ors*.

4.7 Chapter XV of the Companies Act, 2013 read with the Companies (Compromise, Arrangement and Amalgamations) Rules, 2016, the National Company Law Tribunal Rules, 2016 and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('SEBI LODR') form a complete code governing all aspects of the scheme of arrangement between the company, its members and its creditors.

4.8 The Board of Directors of FRL vide Resolution dated 29th August, 2020 have approved the transaction in a properly constituted meeting at which the majority of the Directors voted in favour of the proposed transaction.

4.9 It is thus prayed that Amazon be injuncted from interfering in the transaction between FRL and Reliance.

Contentions on behalf of Amazon

5.1 According to Mr. Gopal Subramanium, learned Senior counsel appearing on behalf of Amazon the suit as filed by the plaintiff seeking an anti-arbitration injunction, anti-suit injunction and injunction with respect to communication to statutory authorities is not maintainable. The arbitration proceedings having commenced on 5th October, 2020 under Part 1 of the A&C Act in respect of a valid and subsisting arbitration agreement which

has not been challenged, the relief as sought are barred under Section 5 read with Section 8 of the A&C Act. Further, the relief of anti-suit injunction is also barred by Section 41(b) of the Specific Relief Act, 1963. The reliefs of FRL seeking to restrain Amazon from addressing communication to statutory authorities, objecting to the transaction including by relying on the order of the Emergency Arbitrator also cannot be granted for the reason representations have already been made to the statutory authorities, who have already taken cognizance of the arbitration proceedings and the EA order and have sought responses from FRL and Amazon. Further, relief sought by FRL is contrary to the stand before the Emergency Arbitrator that Amazon was free to place its objections regarding the transaction before appropriate statutory and regulatory authority. The reliefs sought in the interim application under Order XXXIX Rule 1 & 2 CPC seeking temporary injunction are identical to the final relief sought in the suit and hence the said relief cannot be granted. The prayer in the application is for an intermediary injunction seeking restoration of the status-quo ante, which cannot be granted as FRL has not made out any case for grant of extraordinary relief at the interim stage.

5.2 The present suit is an abuse of the process of the Court for the reason FRL has participated in the arbitration proceedings that commenced on 5th October, 2020 and after appearing before the Emergency Arbitrator filed various submissions including those raised in the present suit. FRL continues to participate in the arbitration proceedings and has filed a response to Amazon's notice of arbitration on 21st November, 2020. Therefore FRL recognises that the proper forum for raising its objection is in the arbitration proceedings.

5.3 In the present suit, the EA order has not been challenged and cannot be challenged. Despite the fact there is no challenge to the EA order in the present suit, FRL and defendant No.2 to 13 during the course of arguments have made an endeavour to show that EA order is illegal and hence cannot be acted upon. Without challenging the EA order, FRL seeks to claim it to be a nullity in the present proceedings. This is impermissible as a collateral challenge cannot be maintained under the Indian Law.

5.4 Though FRL has not seriously questioned the Emergency Arbitrator's findings about the applicability of the 'group of companies' doctrine and/or the theory of implied consent in these proceedings, however FRL continues to argue that it was not a signatory to the arbitration agreement in FCPL SHA. The issues agitated before the Emergency Arbitrator cannot be re-agitated in the present proceedings. During the course of arguments neither FRL nor defendant Nos.2 to 13 have addressed arguments on the breaches committed of the FCPL SHA and FRL SHA. Thus, no case is made out for the present action to safeguard the transaction, which is post the EA order, premised on a breach and an afterthought with the sole motive of a collateral challenge. Therefore, no case of tortious interference is made out.

5.5 Learned Senior counsel for Amazon takes serious objection to the filing of the documents dated 29th August, 2020 filed by FRL and FCPL on 12th November, 2020 before this Court without being accompanied by a statement of truth. This document was not produced before the Emergency Arbitrator and in this regard a finding has been returned by the Emergency Arbitrator. Further this document dated 29th August, 2020 is not produced along with Board Resolution of either FCPL or FRL which has authorized it to consent to the transaction. It is contended on behalf of Amazon that FRL

has suppressed material documents. The e-mail dated 9th April, 2020 has only the first spreadsheet which is also illegible and the remaining documents have not been filed which have been now filed by Amazon in its additional compilation at pages 1 to 10. Further FRL has also not produced the entire chain of correspondence which demonstrates Amazon's engagement with Biyanis for finding a resolution for FRL.

5.6 The principle of 'party autonomy' entitles Amazon to seek emergency relief under the SIAC Rules and such choice is enforceable under Section 2(8) of the A&C Act as SIAC Rule have been incorporated in the arbitration agreement. Reliance is placed on the decision in (*2017) 2 SCC 228 Centrotrade Minerals v. Hindustan Copper Limited*. The EA order was passed under Rule 30.2 of the SIAC Rules read with Rule 8, Schedule I to the SIAC Rules which empowers the Emergency Arbitrator to pass interim order, pending constitution of the Arbitral Tribunal to protect and preserve the subject matter of the dispute. Further Section 2(6) of the A&C Act authorizes parties to choose the authority to determine any issue unless Part I of the A&C Act expressly disallows such determination. Reliance is placed on the decision in (*2014) 11 SCC 560 Antrix Corporation Limited v. Devas Multimedia*. In terms of Rule 12 of the SIAC Rules, the EA order is binding on FRL and the same can be challenged only in appropriate proceedings. The EA order is an interim measure passed by an Arbitral Tribunal under Section 17(1) of the A&C Act and thus enforceable under Section 17(2) of the A&C Act. The EA order cannot be treated as a mere 'waste paper', especially when parties have agreed that it would be binding on them. Reliance is placed on (*1969) 2 SCR 244 Satish Kumar v. Surinder Kumar.*

5.7 An Emergency Arbitrator constitutes an 'Arbitral Tribunal' for the purpose of passing the EA order for the reason Firstly, because Section 2(1)(d) of the A&C Act defines an Arbitral Tribunal to mean 'a sole arbitrator or a panel of arbitrator'. Therefore, Emergency Arbitrator is an arbitrator under the SIAC Rules and accordingly under the A&C Act; Secondly, an Arbitral Tribunal will comprise an Emergency Arbitrator in terms of Section 2(8), Section2(1)(d) of the A&C Act and the SIAC Rules in accordance with the principle of party autonomy; Thirdly, under the SIAC Rules, the Emergency Arbitrator occupies the position of and functions as an arbitrator till the Arbitral Tribunal is fully constituted. Rule 1.3 of the SIAC Rules defines an 'Emergency Arbitrator' as 'an arbitrator appointed in accordance with Para 3 of Schedule I'. Besides several other provisions of SIAC Rules such as Rule 38, 39 and Schedule I, reinforce that an Emergency Arbitrator occupies the position of an arbitrator and functions as an arbitrator. Further there is nothing in the A&C Act which prohibits, disempower or nullify proceedings before an Emergency Arbitrator. Reliance is placed on the decision in *(1998) 3 SCC 573 K.K. Modi v. K.N. Modi*. Submission of FRL that since an Emergency Arbitrator is not expressly provided under the A&C Act, it must follow that the A&C Act prohibits emergency arbitration is fallacious. In *Centrotrade Minerals (supra)* Supreme Court held that merely because the A&C Act does not expressly recognize the procedure agreed to by the parties, in exercise of the 'grund norm' of 'party autonomy' the A&C Act does not prohibit such a procedure. It is on this basis that in *Centrotrade Minerals* Supreme Court upheld a two-tier arbitration to be valid under the A&C Act even though the same is not contemplated expressly in the A&C Act. Reliance is also placed

on the decision in (2002) 3 SCC 572 *Narayan Prasad Lohia v. Nikunj Kumar Lohia*.

5.8 Contention on behalf of the FRL that Section 15 of the A&C Act implicitly prohibits the appointment of an Emergncy Arbitrator is misconceived for the reason Section 15(1)(b) read with Section 16(2) of the A&C Act provide that the mandate of an arbitrator may terminate by or pursuant to an agreement of the parties and another arbitrator or arbitrators may be appointed. Further the SIAC Rules, inasmuch as they provide for an Emergency Arbitrator to function before an Arbitral Tribunal is fully constituted, represents this agreement of parties under Section 15(1)(b) of the A&C Act. Therefore, the A&C Act contemplates different arbitrators adjudicating at different stages of the Arbitral Tribunal.

5.9 FRL's contention that the term 'Arbitral Tribunal' cannot include an 'Emergency Arbitrator' for the reason the same though suggested in the Law Commission's recommendation in its 246th report, was not accepted by the Parliament, is incorrect. The fact that the Parliament did not accept the recommendations of the 246th Law Commission's report has no bearing on the interpretation of the provision in the A&C Act, as held in the decision in *(2020) SCC Online 656 Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited and Ors*. By mutual agreement parties can agree to a remedy such as an Emergency Arbitrator and since an Emergency Arbitrator constitutes an Arbitral Tribunal, the Courts ought to refrain from acting by virtue of Section 9(3) of the A&C Act. Further rules under many arbitration institutions in India i.e. DIAC, MCIA, MHCAC provide for Emergency Arbitrators. FRL's contention that these arbitration centres deal with foreign seated arbitration and not arbitration governed under the A&C Act is

incorrect for the reason, the rules of these centres provide that the orders of an Emergency Arbitrator shall be enforceable in the manner as provided in the A&C Act. Therefore, the proceedings before the Emergency Arbitrator were valid under the Indian law and the EA order constitutes an interim measure under Section 17(1) of the A&C Act enforceable as an order of the Court under Section 17(2) of the A&C Act.

5.10 Referring to the decisions in (2016) 9 SCC 44 *Anita International v. Tungabadra Sugar Works*; (2011) 3 SCC 363 *Krishnadevi Malchand v. Bombay Environmental Action Group*; (2002) 7 SCC 46 *Prakash Narain v. Burmah Shell* learned counsel for Amazon contends that unless an order is set aside, the same is valid and cannot be indirectly challenged in collateral proceedings. Thus the challenge of FRL to the EA order in the present suit is not maintainable. Since the EA order is an interim measure under Section 17(1) of the A&C Act, it is deemed to be an order of the Court under Section 17(2) of the A&C Act and can be challenged only in the manner prescribed by law and not otherwise. Contention of FRL that since the EA order is without jurisdiction and a *coram non judice*, hence, not required to be challenged as per the requirement of law and order in this respect thereto can be passed by this Court in the present proceedings is misconceived. Reliance is placed on the decision in *(1997) 3 SCC 443 Tayabbhai M. Bagasarwalla v. Hind Rubber*.

5.11 It is further contended that the EA order has been passed in exercise of jurisdiction by the Emergency Arbitrator under the SIAC Rules and there is a distinction between existence of jurisdiction and any issue relating to exercise of jurisdiction. Jurisdiction is defined as the authority to decide or take cognisance of the matters presented in a formal way for decision.

Reliance is placed on the decision in (1919) XXIV CWN 723 *Hriday Nath Roy v. Ramachandra Barna* and (1962) 2 SCR 747 *Hira Lal Patni v. Sri Kali Nath*. The Emergency Arbitrator derives the jurisdiction from the arbitration agreement in the FCPL SHA which incorporates the SIAC Rules and under Rule 30.2 of the SIAC Rules, parties are entitled to seek emergency interim relief pursuant to the procedures set out in Schedule I. The arbitration agreement in FCPL SHA having not been challenged in these proceedings, the Emergency Arbitrator was thus clothed with the authority to adjudicate the disputes between the parties. [see (2007) 8 SCC 559 *Carona v. Parvathy Swaminathan*]. In terms of Rule 7 and 12 of the Schedule I to the SIAC Rules, the Emergency Arbitrator was thus empowered to rule on his own jurisdiction as also provided under Section 16 of the A&C Act.

5.12 Referring to *Gary Born, International Arbitration Agreements and Competence-competence in Gary Born,International Commercial Arbitration (2nd ed., 2014)* and *Redfern and Hunter, Agreement to Arbitrate in Redfern and Hunter on International Arbitration*, learned senior counsel emphasises the applicability of the principle of competence-competence and the supremacy of the arbitration agreement which empowers an arbitrator to rule on its own jurisdiction. Reliance is also placed on the decisions reported as (2016) 10 SCC 386 *A. Ayyasamy v. A. Paramasivam*, and (2014) 5 SCC 1 *Enercon (India) Limited and Ors. V. Enercon GmBH*. Therefore, there is no basis to contend that Emergency Arbitrator lacks inherent jurisdiction. Further from the relief sought it is evident that FRL's grievance stems from the outcome of the proceeding before the Emergency Arbitrator

and not from the proceeding itself and hence no collateral challenge to the EA order can be maintained in these proceedings.

5.13 In response to the FRL's argument that it was not a party to the FCPL SHA reliance is placed on the decisions in (2013) 1 SCC 641 *Chloro Controls India (P) Ltd. v. Severn Trent*; (2018) 16 SCC 413 *Cheran Properties v. Kasturi*; (2019) SCC Online SC 995 *MTNL v. Canara Bank* and (2017) SCC Online Del 11625 *GMR Energy v. Doosan Power* to contend that non-signatories can also be bound as parties to the arbitration agreement.

5.14 Learned Senior counsel for Amazon contends that the agreements i.e. FRL SHA, FCPL SHA and FCPL SSA were negotiated at the same time amongst Amazon, FRL, FCPL and the Biyanis. The future group, including FRL was represented by a common team of legal counsel. Further, FRL SHA though executed on 12th August, 2019 became effective only on 19th December, 2019 vide letter dated 19th December, 2019 issued by FCPL to FRL, once FCPL communicated the list of restricted persons under the FRL SHA. These facts were duly considered by the Emergency Arbitrator, who held that besides these facts, the terms of the agreement established 'cogent commonality, intimate inter-connectivity and undeniable indivisibility of the contractual agreements'. In the present proceedings FRL has not seriously questioned the application of theory of implied consent and the doctrine of 'group of companies' as applied by the Emergency Arbitrator.

5.15 Contention on behalf of FRL that reading of the FRL SHA and FCPL SHA as one single transaction would give Amazon control over FRL is incorrect, as the same proceeds on the fundamentally mistaken assumption that FCPL, de-hors the Biyanis, acquired control of FRL under the FRL

SHA. In the FCPL SHA, Biyanis excluding FCPL, have been defined as the existing shareholder and thus FCPL is not part of Biyanis for the purpose of FRL SHA. FCPL on a standalone basis does not have any positive control over FRL under the FRL SHA, as it has only 9.82 % shareholding in FRL and has no right to appoint any director on the Board of FRL. FCPL (and hence Amazon) has only negative/protective rights, including protective rights relating to the continued operation of FRL to the same business. Relying upon the decision in *Arcelor Mittal (supra*) it is contended that preventing a company from doing what the latter wants to, is by itself not control. Therefore, the consequence of treating FCPL SHA and the FRL SHA as a single integrated transaction can only mean that Amazon steps into the shoes of FCPL and not the Biyanis. Further as FCPL has no control over FRL, Amazon also cannot have any greater right than FCPL under the FRL SHA.

5.16 Reliance of learned Senior counsel on behalf of FRL on Section 15.17 of the FCPL SHA is misconceived. Section 15.17 of the FCPL SHA has to be read in the light of its caption i.e. 'FRL Call Option and Associated Matters'. The provision is relevant only if and when the call option is exercised pursuant to the FCPL SHA upon a change in law event, which is not the case presently. Therefore, Amazon's rights under the FCPL SHA and FRL SHA are only protective of its investment, rights and economic interest in FCPL and FRL 'being the direct beneficiary of the money invested by Amazon' and such rights do not amount to control.

5.17 Refuting the contentions on behalf of FRL that Amazon's position before the Emergency Arbitrator was inconsistent with its representation before the CCI, it is stated that Amazon's position in the arbitration

proceedings and before this Court are consistent with its notification to the CCI dated 23rd September, 2019. Amazon notified the CCI that it had invested into FCPL and a key basis for that investment was the continued operation of FRL's retail business by FRL and the Biyanis. Before the CCI, FRL also acknowledged and confirmed this understanding by executing the FRL SHA. The integrated nature of the understanding amongst Amazon, FCPL, the Biyanis and the FRL was thus set out clearly in the representation to the CCI.

5.18 It is further contended that the FRL SHA, FCPL SHA and FCPL SSA constituting a single, integrated transaction do not make the agreement illegal being in violation of the Foreign Exchange laws. Amazon does not control FRL. FRL forms a part of the future group of companies. Defendant No.3 and 8 herein are the directors on the Board of FRL; defendant No.3 being the Executive Chairman and defendant No.8 being the Managing Director of FRL. Thus, they are the person who are entrusted with substantial power of management of the affairs of the company, as defined under Section 2(54) of the Companies Act, 2013. At the time of entering into FRL SHA and FCPL SHA, defendant No.3 to 13 (excluding FCPL) held 47.2% shares of FRL (which translate into 43.58% of FRL shares on a fully diluted basis). Thus defendant No.3 to 13 collectively (excluding FCPL) are the single largest shareholders of FRL with fragmented public shareholding and are in de-facto control of FRL.

5.19 Further Amazon's investment in FCPL does not violate the Foreign Exchange laws. As per the FEMA (FDI) Rules, foreign investment up to 51% under the government route is permitted with entities engaged in multi-brand retail trading, subject to other attendant conditions prescribed in the

FEMA FDI Rules. Further under paragraph 15.1, Schedule I to the FEMA FDI Rules, foreign investment up to 100% is permitted under the automatic route in FCPL, which is engaged in 'cash and carry wholesale trading/ wholesale trading'.

5.20 It is further contended that under Rule 23(1) of the FEMA FDI Rules, an Indian entity will be considered to have received indirect foreign investment only if the investment flows from an entity which is not Indian owned and controlled. In the present case FRL received investment from FCPL which is an Indian owned and controlled entity. Amazon neither owns nor controls FCPL in terms of explanation to Rule 23 of the FEMA FDI Rules which defines ownership. FCPL is owned by the Biyanis and not Amazon. Further, explanation to Rule 23 of the FEMA FDI Rules defines "control" to mean " the right to appoint majority of directors or to control the management or policy decision". Amazon does not have right to appoint majority directors of FCPL and the right granted to Amazon under the FCPL SHA are merely protective rights that do not relate to the day-to-day management and operation of FCPL or FRL. The illustration in the FDI Policy, 2017 clearly establishes that there will be no indirect foreign investment in a downstream entity if the upper-tier entity is owned and controlled by resident Indian citizens. FCPL is an Indian owned and controlled entity and any investment received by FRL from FCPL does not trigger any of the sectoral conditions set out in the FEMA FDI Rules.

5.21 Reliance is placed on the decision in *(2017) SCC Online Del 7810 Cruz City vs. Unitech Limited* wherein this Court passed adverse observations on the attempt of parties to wriggle out of contractual obligations by citing alleged breaches of foreign exchange laws.

5.22 It is also contended that in a case of tortious interference with contract, a party must show that there was a lawful contract and the other party had no lawful justification to interfere with such a contract. [see *(1990) SCC Online Cal 55 Balailal Mukherjee vs. Sea Traders*].

5.23 Amazon having demonstrated before the Emergency Arbitrator and before this Court that the transaction is in egregious breach of the FRL SHA and FCPL SHA, no case for grant of interim injunction as prayed for is made out. Consequently, the application be dismissed.

ISSUES

6.1 On the arguments addressed by the parties, following issues arise for consideration before this Court:

I. Whether the present suit is prima facie maintainable?

II. Whether the Emergency Arbitrator lacks legal status under Part I of the A&C Act and thus *coram non judice*?

III. Whether the Resolution dated 29th August, 2020 of FRL is void or contrary to any statutory provision?

IV. Whether by conflation of the FRL SHA, FCPL SHA and FCPL SSA, Amazon seeks to exercise 'Control' on FRL which is forbidden under the FEMA FDI Rules?

V. Whether prima facie a case for tortious interference is made out by FRL?

VI. Whether FRL is entitled to an interim injunction?

Whether the present suit is prima facie maintainable

7.1 Objections of Amazon to the maintainability of the present suit confined to the issues raised in the present application are; firstly, that the arbitration proceedings having already commenced on 5th October, 2020, the present suit is an abuse of the process of the Court and secondly, there can be no collateral challenge to the EA order. It is also stated that all the issues

urged before this Court having already been argued before the Emergency Arbitrator, the present suit is not maintainable. Learned Senior Counsel for Amazon relies upon the decisions reported as 2002 (7) SCC 46 *Prakash Narain vs. Burmah Shell*, 2011 (3) SCC 363 *Krishnadevi Malchand vs. Bombay Environmental Action Group*, and 2016 (9) SCC 44 *Anita International vs. Tungabadra Sugar Works*.

7.2 According to Mr. Gopal Subramanium, learned Senior Counsel for Amazon, the EA order has not been challenged before this Court on merits and cannot be challenged in the present suit. Further validity of EA order can only be challenged as per the procedure prescribed under the SIAC Rules or Part-I of the A&C. It is stated that the plea of FRL seeking to discard the EA order on the basis of a self styled judgment declaring it to be a nullity in the present proceedings is impermissible, as a collateral challenge cannot be manifested under the Indian law.

7.3 In response, pleas of FRL are that the EA order is not in challenge on merits before this Court and only the legal status of the Emergency Arbitrator and the consequential EA order on that ground alone is an issue before this Court. Even if the present suit does not seek a declaration as to the invalidity of the EA order on merits, this Court has jurisdiction to entertain the plea of FRL challenging the legal status of the Emergency Arbitrator and the same being invalid, the use of EA order by Amazon before the Statutory Authorities and the Regulators is illegal.

7.4 Mr.Darius J. Khambata, learned Senior Counsel appearing on behalf of FRL contends that since Amazon is using and relying upon the EA order, FRL can maintain a challenge to the jurisdiction and validity of Emergency Arbitrator in the present suit. In this regard he relies upon the decisions

reported as 1990 (1) SCC 193 *Sushil Kumar Mehta vs. Gobind Ram Bohra*, 1991 (3) SCC 136 *Ajudh Raj & Ors. vs. Moti* and MANU/SC/0372/1966 *Mohd.Murtiza Khan vs. State of M.P*.

7.5 FRL claims that the acts of Amazon in interfering with the rights of FRL (not a signatory to FCPL SHA) and to other third party i.e. Reliance, with performance of their obligations under the "transaction" is illegal, amounting to tortious interference in lawful acts of FRL and Reliance. The three grounds urged by FRL to support its plea of tortious interference by Amazon are; Firstly, that the EA order on the strength of which Amazon seeks to obstruct the approval of the transaction before the Statutory Authorities/Regulators is invalid as the Emergency Arbitrator is a *coram non judice;* Secondly, Amazon is illegally claiming the Resolution dated 29th August, 2020 of FRL as void and contrary to the statutory provisions; and Thirdly, by conflation of the FRL SHA, FCPL SHA and FCPL SSA, Amazon seeks to exercise 'control' over FRL which is forbidden under the FEMA FDI Rules.

7.6 Section 9 of the CPC provides as under:-

> *"9. Courts to try all civil suits unless barred-*
> *The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is neither expressly or impliedly barred."*

7.7 Supreme Court in 1995 Supp (4) SCC 286 *Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma*, noting the basic principle of law that every right has a remedy and every civil suit is cognizable unless it is barred, held:

"28. One of the basic principles of law is that every right has a remedy. Ubi jus ibi remediem is the well-know maxim. Every civil suit is cognizable unless it is barred, "there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue"

7.8 Reading of Section 9 of the Code of Civil Procedure (CPC) makes it clear that only where the jurisdiction of the civil court is expressly or impliedly barred, the civil court will have no jurisdiction. In the present case FRL is asserting its rights to proceed with the transaction with Reliance and is aggrieved by the acts of Amazon in interfering with the said transaction, amounting to tortious interference. Therefore, the cause of action in the present suit pleaded by FRL being the alleged tortious interference in its future course of action in entering into the transaction with Reliance, whereas the cause of action before the Emergency arbitrator being the alleged breach of the FCPL SHA and FRL SHA as pleaded by Amazon against FRL, the present suit is based on a distinct cause of action and thus maintainable.

7.9 Plea of learned Senior counsel on behalf of Amazon that since all these pleas were urged before the Emergency Arbitrator and thus cannot be reagitated in this suit is also flawed for the reason, factual foundations being same for different causes of action, overlap of factual and legal issues may occur, however, the same will not impact the maintainability of the suit.

7.10 Further the present civil suit is also not barred due to the invocation of Emergency Arbitration by the Amazon. Maintainability of the suit is determined on the basis of cause of action. Cause of action for determination before the Emergency Arbitrator was based on the claim of

Amazon in respect of the breach of two agreements i.e. FCPL SHA and FRL SHA and a relief consequential to the breach, however the cause of action in the present suit by FRL is based on the alleged interference of Amazon in the "transaction" which is essential for the survival of FRL and that the same amounts to tortious interference entailing a relief of injunction. Further, merely because Amazon impleaded FRL as a party in the Emergency Arbitration based on the conflation of the FCPL SHA, FCPL SSA and FRL SHA as also on the basis of the principle of 'group of companies' that does not imply that FRL is barred from taking any civil action against Amazon except through invoking Arbitration for the reason there is no arbitration agreement between FRL and Amazon as such.

7.11 In the present suit, seeking the relief against tortious interference by Amazon, one of the grounds urged by FRL is the invalidity of the Emergency Arbitrator amounting to use of 'unlawful means' in its representations to the authorities. Therefore, also FRL in these proceedings is entitled to challenge the legal status of Emergency Arbitrator, to the extent required for making out the ingredients of 'unlawful means'.

7.12 The issue in the present suit is not the violation of the EA order or whether the EA order is binding on FRL or not, but whether this Court can consider the legal status of the Emergency Arbitrator or that the same can be decided only in proceedings as envisaged under Part-I of the A&C Act.

7.13 Supreme Court in the decision reported as AIR 1962 SC 199 *Hira Lal Patni vs. Sri Kali Nath* held that the validity of a decree can be challenged in execution proceedings on the ground that the Court which passed the decree was lacking in inherent jurisdiction, in the sense that it could not have seisin of the case, because the subject matter was wholly foreign to its jurisdiction

or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction, in respect of the subject matter of the suit or over the parties to it. Therefore, in the case of inherent lack of jurisdiction in a Court or an authority, the same can be challenged even in collateral proceedings.

7.14 In a Full Bench Reference, the Calcutta High Court in XXIV The Calcutta Weekly Notes 723 *Hriday Nath Roy & Ors. vs. Ram Chandra Barna Sarma & Ors.,* noting the distinction between existence of jurisdiction and exercise of jurisdiction held that the authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.

7.15 Supreme Court in *Sushil Kumar Mehta* (supra) held that normally a decree passed by a Court of competent jurisdiction, after adjudication on merits of the rights of the parties, operates as res-judicata in a subsequent suit or proceedings and binds the parties or the persons claiming through them and its validity should be assailed only in an appeal or revision as the case may be. It was further held that however, a decree which is passed by a Court without jurisdiction over the subject matter or on other grounds which go to the root of its exercise of jurisdiction/lacks inherent jurisdiction is a *coram non judice*. A decree passed by such a Court is a nullity and is non-est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings.

7.16 In *Krishna Devi Malchand* (supra) relied upon by learned counsel for Amazon, Supreme Court noted the settled legal position that even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void. Supreme Court in the said decision was not dealing with the issue of the competence of a Court to decide the inherent lack of jurisdiction of the forum which passed the order, in a collateral proceedings. Thus the said decision has no application to the facts of the present case.

7.17 Challenge of FRL to the EA order is not on merits and no declaration for the EA order being invalid or illegal on merits is sought from this Court. Case of the FRL is that since Amazon is trying to enforce and act upon the EA order before the Statutory Authority/Regulators and as the Emergency Arbitrator is a *coram non-judice*, this Court can go into the validity of the same to the extent asserted in the present suit. In the present suit, the cause of action pleaded by FRL is the tortuous interference by Amazon in its lawful transaction and to determine the ingredients of the said cause of action, i.e. whether use of 'unlawful means' is being resorted by Amazon, this Court is required to return a finding.

7.18 In view of the discussion aforesaid, this Court is of the considered opinion that prima facie the present suit cannot be held to be not maintainable on the two grounds urged by Amazon, that is, that the EA order cannot be challenged in the present proceedings and secondly, that the grounds urged by FRL before this Court have already been urged and considered by the Emergency Arbitrator.

Validity of Emergency Arbitration

8.1 Claim of FRL in the present suit is that the EA order is wholly without jurisdiction and a nullity as the Emergency Arbitrator lacked legal status under Part I of the A&C Act and the parties even by consent could not have conferred jurisdiction on the Emergency Arbitrator being a *coram non judice.*

8.2 It is made clear at the outset that this Court is examining only the issue of the legal status of an Emergency Arbitrator, i.e. whether the same was permissible in terms of the FCPL SHA and Part I of Act and not in conflict thereto. This Court is not going into the legality on merits of the EA order because the same is not under challenge before this Court.

8.3 Relevant clause providing for arbitration in the FCPL SHA under which Amazon has invoked arbitration is Clause-25 which reads as under:

> *25. GOVERNING LAW AND DISPUTE RESOLUTION*
>
> *25.1. Governing Law:*
>
> *This Agreement shall be governed by and construed in accordance with Laws of India. Subject to the provisions of Section 25.2 (Dispute Resolution), the courts at New Delhi, India shall have exclusive jurisdiction over any matters or Dispute (hereinafter defined) relating or arising out of this Agreement.*
>
> *25.2. Dispute Resolution*
>
> *25.2.1. Arbitration.*
>
> *Any dispute, controversy, claim or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Agreement or the breach, termination or invalidity thereof (hereinafter referred to as a "Dispute"), failing amicable resolution through negotiations, shall be referred to and finally resolved by arbitration irrespective of the amount in Dispute or whether such Dispute would otherwise be*

considered justifiable or ripe for resolution by any court. The Parties agree that they shall attempt to resolve through good faith consultation, any such Dispute between any of the Parties and such consultation shall begin promptly after a Party has delivered to another Party a written request for such consultation. In the event the Dispute is not resolved by means of negotiations within a period of 30 (thirty) days or such different period mutually agreed between the parties, such Dispute shall be referred to and finally resolved by arbitration in accordance with the arbitration rules of the Singapore International Arbitration Centre ("SIAC"), and such rules (the "Rules") as may be modified by the provisions of this Section 25 (Governing Law and Dispute Resolution). This Agreement and the rights and obligations of the parties shall remain in full force and effect pending the award in such arbitration proceeding, which award, if appropriate, shall determine whether and when any termination shall become effective.

25.2.2.Seat and Venue of Arbitration.

The seat and venue of the arbitration shall be at New Delhi unless otherwise agreed between the Parties to the Dispute and the arbitration shall be conducted under and in accordance with this Section 25 (Governing Law and Dispute Resolution). This choice of jurisdiction and venue shall not prevent either Party from seeking injunctive reliefs in any appropriate jurisdiction."

(Emphasis supplied)

8.4 As noted above, FCPL and Amazon agreed that the agreement shall be governed by and construed in accordance with the laws of India and subject to provisions of Clause 25.2, the Courts at New Delhi, India shall have exclusive jurisdiction over any matters or disputes relating to or arising out of the agreement. Further, any dispute, controversy or claim between the parties arising out of the agreement or the breach, termination or invalidity thereof, failing amicable resolution through negotiations, was to be resolved

through arbitration. The parties further mutually agreed that the said dispute shall be referred and finally resolved by arbitration in accordance with the Arbitration Rules of SIAC and such Rules as may be modified by the provisions of Clause 25. It is thus agreed between the parties that though the law of contract and the law of arbitration agreement was Indian law with exclusive jurisdiction of Courts at New Delhi, however, the arbitration would be conducted and governed by the Rules of SIAC and such Rules as may be modified by the provisions of Clause 25 of the SHA. Therefore, the arbitration between FCPL and Amazon is an International Commercial Arbitration seated in New Delhi, India and governed by Part I of the A&C Act, however, conducted in accordance with SIAC Rules.

8.5 Contention on behalf of FRL is that since an Emergency Arbitrator is outside the scope of Part I of the A&C Act which provides for a remedy for seeking interim relief, prior to the constitution of the arbitral tribunal, before a Court under Section 9 of the A&C Act, the EA order is without jurisdiction and invalid. However, contention on behalf of Amazon is that since parties under the FCPL SHA, voluntarily choose the Arbitration Rules of SIAC as the governing law of dispute resolution and the SIAC Rules provide for appointment of an Emergency Arbitrator and seeking interim relief thereunder, there is no want of jurisdiction in the Emergency Arbitrator, thus this plea of FRL is fundamentally flawed.

8.6 The provisions of the A&C Act which have been adverted to by the parties and relevant to the present case i.e. Sections 2(1)(d), 2(2), 2(6), 2(8), 9(1)(ii), 9(2) & (3), 17(1) (ii) and 17(2) read as under:

> *"2. Definitions. (1) In this Part, unless the context otherwise requires,-*

(a) xx xx xx

(b) xx xx xx

(d) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(2) This Part shall apply where the place of arbitration is in India:

[Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.]

xxx xxx xxx

(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

xxx xxx xxx

(8) Where this Part—

(a) refers to the fact that the parties have agreed or that they may agree, or

(b) in any other way refers to an agreement of the parties,

that agreement shall include any arbitration rules referred to in that agreement."

(9) Interim measures, etc., by Court.—[(1)]A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) xxx xxx xxx

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

xxx xxx xxx

*(17) Interim measures ordered by arbitral tribunal.—(1) A party may, during the arbitral proceedings 2***, apply to the arbitral tribunal—*

(i) xxx xxx xxx

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure,1908 (5 of 1908), in the same manner as if it were an order of the Court.

8.7 Relevant provisions of SIAC Rules and the Schedule thereunder, including providing for Emergency Arbitration are as under:

1. Scope of Application and Interpretation

1.1 Where the parties have agreed to refer their disputes to SIAC for arbitration or to arbitration in accordance with the SIAC Rules, the parties shall be deemed to have agreed that the arbitration shall be conducted pursuant to and administered by SIAC in accordance with these Rules.

1.2. xxx xxx xxx

1.3 In these Rules:

"Award" includes a partial, interim or final award and an award of an Emergency Arbitrator;

"Emergency Arbitrator" means an arbitrator appointed in accordance with paragraph 3 of Schedule 1;

"Rules" means the Arbitration Rules of the Singapore International Arbitration Centre (6th Edition, 1 August 2016);

"SIAC" means the Singapore International Arbitration Centre; and

"Tribunal" includes a sole arbitrator or all the arbitrators where more than one arbitrator is appointed.

xxx xxx xxx

30. Interim and Emergency Interim Relief

30.1 The Tribunal may, at the request of a party, issue an order or an Award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.

30.2 A party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.

30.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.

xxx xxx xxx

SCHEDULE

Emergency Arbitrator

1. A party that wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application for emergency interim relief with the Registrar. The party shall, at the same time as it files the application for emergency interim relief, send a copy of the application to all other parties. The application for emergency interim relief shall include:

a. the nature of the relief sought;

b. the reasons why the party is entitled to such relief; and

c. a statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith

to provide a copy or notification to all other parties.

xxx xxx xxx

6. *An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties.*

7. *xxx xxx xxx*

8. *The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders that may be made pending any hearing, telephone or videoconference or written submissions by the parties. The Emergency Arbitrator shall give summary reasons for his decision in writing. The Emergency Arbitrator may modify or vacate the preliminary order, the interim order or Award for good cause.*

xxx xxx xxx

11. *Any interim order or Award by the Emergency Arbitrator maybe conditioned on provision by the party seeking such relief of appropriate security.*

12. *The parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made, and undertake to carry out the interim order or Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.*

8.8 The Courts of India have for long recognized the legal position that in an International Commercial Arbitration, there are three sets of law that may apply, i.e. proper law of the contract; proper law of the arbitration agreement/*lex arbitri*; and proper law of the conduct of arbitration/*lex fori*/curial law.

8.9 Supreme Court in the decision reported as 1992 (3) SCC 551 *National Thermal Power Corporation vs. Singer Company &Ors*. dealt with the

consequences of parties having chosen a different governing law and procedural law in an International Commercial Arbitration, though under the Arbitration Act of 1940 and held:-

> *26. Whereas, as stated above, the proper law of arbitration (i.e., the substantive law governing arbitration) determines the validity, effect and interpretation of the arbitration agreement, the arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitration proceedings will be conducted in accordance with that law so long as it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respects self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration. [See the observation of Kerr, LJ. in Bank Mellat v. HellinikiTechniki SA [(1983) 3 All ER 428 (CA)]. See also Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 2nd edn. (1990).] To such an extent the appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the*

jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. [See Mustil& Boyd, Commercial Arbitration, 2nd edn.; Allen Redfern and Martin Hunter, Law & Practice of International Commercial Arbitration, 1986; Russel on Arbitration, 20th edn. (1982); Cheshire & North's Private International Law, 11th edn. (1987).]

27. The proper law of the contract in the present case being expressly stipulated to be the laws in force in India and the exclusive jurisdiction of the courts in Delhi in all matters arising under the contract having been specifically accepted, and the parties not having chosen expressly or by implication a law different from the Indian law in regard to the agreement contained in the arbitration clause, the proper law governing the arbitration agreement is indeed the law in force in India, and the competent courts of this country must necessarily have jurisdiction over all matters concerning arbitration. Neither the rules of procedure for the conduct of arbitration contractually chosen by the parties (the ICC Rules) nor the mandatory requirements of the procedure followed in the courts of the country in which the arbitration is held can in any manner supersede the overriding jurisdiction and control of the Indian law and the Indian courts.

28. This means, questions such as the jurisdiction of the arbitrator to decide a particular issue or the continuance of an arbitration or the frustration of the arbitration agreement, its validity, effect and interpretation are determined exclusively by the proper law of the arbitration agreement, which, in the present case, is Indian law. The procedural powers and duties of the arbitrators, as for example, whether they must hear oral evidence, whether the evidence of one party should be recorded necessarily in the presence of the

other party, whether there is a right of cross-examination of witnesses, the special requirements of notice, the remedies available to a party in respect of security for costs or for discovery etc. are matters regulated in accordance with the rules chosen by the parties to the extent that those rules are applicable and sufficient and are not repugnant to the requirements of the procedural law and practice of the seat of arbitration. The concept of party autonomy in international contracts is respected by all systems of law so far as it is not incompatible with the proper law of the contract or the mandatory procedural rules of the place where the arbitration is agreed to be conducted or any overriding public policy.

48. It is true that the procedural law of the place of arbitration and the courts of that place cannot be altogether excluded, particularly in respect of matters affecting public policy and other mandatory requirements of the legal system of that place. But in a proceeding such as the present which is intended to be controlled by a set of contractual rules which are self-sufficient and designed to cover every step of the proceeding, the need to have recourse to the municipal system of law and the courts of the place of arbitration is reduced to the minimum and the courts of that place are unlikely to interfere with the arbitral proceedings except in cases which shock the judicial conscience. (See the observations of Kerr, LJ. in Bank Mellat v. HellinikiTechniki SA [(1983) 3 All ER 428 (CA)].)

49. Courts would give effect to the choice of a procedural law other than the proper law of the contract only where the parties had agreed that matters of procedure should be governed by a different system of law. If the parties had agreed that the proper law of the contract should be the law in force in India, but had also provided for arbitration in a foreign country, the laws of India would undoubtedly govern the validity,

interpretation and effect of all clauses including the arbitration clause in the contract as well as the scope of the arbitrators' jurisdiction. It is Indian law which governs the contract, including the arbitration clause, although in certain respects regarding the conduct of the arbitration proceedings the foreign procedural law and the competent courts of that country may have a certain measure of control. (See the principle stated by Lord Denning, M.R. in International Tank and Pipe SAK v. Kuwait Aviation Fuelling Co. KSC [(1975) 1 All ER 242 (CA)].)

51. In sum, it may be stated that the law expressly chosen by the parties in respect of all matters arising under their contract, which must necessarily include the agreement contained in the arbitration clause, being Indian law and the exclusive jurisdiction of the courts in Delhi having been expressly recognised by the parties to the contract in all matters arising under it, and the contract being most intimately associated with India, the proper law of arbitration and the competent courts are both exclusively Indian, <u>while matters of procedure connected with the conduct of arbitration are left to be regulated by the contractually chosen rules of the ICC to the extent that such rules are not in conflict with the public policy and the mandatory requirements of the proper law and of the law of the place of arbitration</u>. The Foreign Awards Act, 1961 has no application to the award in question which has been made on an arbitration agreement governed by the law of India. (emphasis supplied)

8.10 Thus the finding of the Supreme Court in <u>*NTPC vs. Singer*</u> (supra) is that in case the parties have not chosen the procedural law, the procedure for conduct of arbitration will be determined by the law of the seat of arbitration. However, if the parties have expressly chosen the Rules or the procedure to be applicable on the conduct of the arbitration, the said Rules

will apply so long as the same are not in conflict to the public policy or the mandatory requirements of the law of the country in which the arbitration is seated. Therefore, as per the decision of the Supreme Court in *NTPC vs. Singer* (supra) the SIAC Rules will apply to the arbitration conducted in terms of Clause 25 of the FCPL SHA, to the extent they are not contrary to: (i) public policy of India; and/or (ii) mandatory requirements of the law under the A&C Act.

8.11 In the decision reported as 1998 (1) SCC 305 *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. &Ors.*, Supreme Court defined the area of operation of curial law relying upon various foreign decisions and commentaries concluding that (i) in the absence of an expressed agreement regarding the choice of curial law, the curial law would be the same as the law of the place of arbitration on the ground, that is the country most closely connected with the proceedings; (ii) it is open for the parties to chose a curial law which is different from the law governing the arbitration agreement; and (iii) when the law governing the arbitration agreement and the curial law are different, the Court will first look at the arbitration agreement to see if the dispute is arbitrable, then to the curial law to seek how the reference should be conducted and then return to the first law in order to give effect to the resulting award. The relevant extract of the report is set out hereunder:-

> *10. In the Law and Practice of Commercial Arbitration in England, 2nd Edn. by Mustill and Boyd, there is a chapter on "The Applicable Law and the Jurisdiction of the Court". Under the sub-title "Laws Governing the Arbitration", it is said,*
>
> *"An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to*

arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by repudiation or frustration, in much the same manner as in more ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own, which need not be the same as the law governing the substantive contract.

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will be found in the great majority of cases that the curial law, i.e., the law governing the conduct of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference, it then looks to the curial law to see how that reference should be conducted and then returns to the first law in order to give effect to the resulting award.

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It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws—

1. The proper law of the contract, i.e., the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

2. The proper law of the arbitration agreement, i.e., the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.
3. The curial law, i.e., the law governing the conduct of the individual reference.

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1. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.
2. The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.
3. The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.

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In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate."
15. We think that our conclusion that the curial law does not apply to the filing of an award in court must, accordingly, hold good. We find support for the conclusion in the extracts from Mustill and Boyd which we have quoted earlier. Where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be

conducted, "and then returns to the first law in order to give effect to the resulting award". (Emphasis supplied)

8.12 In the light of the law settled by the Supreme Court in *Singer v. NTPC* (supra) and *Sumitomo* (supra), while it is perfectly legal for the parties to choose a different procedural law, the issue which is required to be considered is whether the provisions of Emergency Arbitration of such procedural law (in this case the SIAC rules), are in any manner contrary to/repugnant with the public policy of India, or with the mandatory requirements of the procedural law under the Arbitration and Conciliation Act, 1996 (A&C Act).

8.13 It is now well settled that party autonomy is the backbone of arbitration. The courts in India have given due importance to the concept of party autonomy, and have further given full effect to the choice of the parties with respect to all three laws involved in an arbitration agreement, subject to the public policy of India and the mandatory provisions of the A&C Act. Supreme Court in (2017) 2 SCC 228 *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd* reiterated the importance of party autonomy as under:-

"38. Party autonomy is virtually the backbone of arbitrations. This Court has expressed this view in quite a few decisions. In two significant passages in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126 : (2016) 2 SCC (Civ) 580, Hon'ble Judges/Coram: Anil R. Dave, Kurian Joseph and Amitava Roy, JJ.] this Court dealt with party autonomy from the point of view of the contracting parties and its importance in commercial contracts. In para 5 of the Report, it was observed: (SCC p. 130)

"5. Party autonomy being the brooding and guiding

> *spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract— (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law". The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in Sumitomo Heavy Industries Ltd. v. ONGC Ltd., [Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305] which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent Reliance Industries Ltd. v. Union of India [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737] ." (Emphasis supplied)*

8.14 In *Centrotrade* (supra), a three judge bench of the Supreme Court was called upon to test the legality of a double-tier arbitration agreement. The parties had agreed that if either of them is dissatisfied with the domestic award rendered in India, they would have the right to appeal in a second arbitration seated in London. The Supreme Court upheld the validity of the double-tier arbitration agreement between the parties. Dealing with the issue of public policy of India, Supreme Court held that there is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or the appellate arbitration-either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. The Court further noted that despite granting finality to the domestic award as per the A&C Act, the parties deliberately and consciously chose to agree upon an appellate arbitration, and that one party cannot wriggle out of solemn commitment made by it voluntarily. The

relevant observations of the Supreme Court in addition to the aforementioned extract, are set out hereunder:-

> *46.For the present we are concerned only with the fundamental or public policy of India. Even assuming the broad delineation of the fundamental policy of India as stated in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] we do not find anything fundamentally objectionable in the parties preferring and accepting the two-tier arbitration system. The parties to the contract have not by-passed any mandatory provision of the A&C Act and were aware, or at least ought to have been aware that they could have agreed upon the finality of an award given by the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Yet they voluntarily and deliberately chose to agree upon a second or appellate arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. There is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or appellate arbitration — either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. We are not concerned with the reason why the parties (including HCL) agreed to a second instance arbitration — the fact is that they did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open." (Emphasis supplied)*

8.15 In the present case, the parties have expressly chosen the SIAC Rules as the curial law governing the conduct of arbitration proceedings. The said Rules are self sufficient to govern the proceedings under arbitration at every stage. The Courts in such cases would uphold the express choice of the parties subject to the public policy of India and the mandatory provisions of

the A&C Act. As observed by the Supreme Court in *NTPC v. Singer* (Supra), it would be unlikely for the Courts to interfere with such arbitral proceedings except in cases which shock the judicial conscience.

8.16 Rule 30 of the SIAC Rules deals with Interim and Emergency Relief. Rule 30.3 in clear terms provides that the parties to the arbitration are also entitled to apply to a judicial authority for grant of interim relief, and that such request made to a judicial authority for grant of interim relief shall not be incompatible with the SIAC Rules. Therefore, the SIAC rules themselves recognize and uphold the right of a party to avail interim relief under Section 9 of the A&C Act. The SIAC rules however provide an option to the aggrieved party to either approach the emergency arbitrator for interim relief, or to approach a judicial authority for the same, prior to the constitution of the Tribunal. In such circumstances, this Court finds that the SIAC Rules do not take away the substantive right of the parties to approach the Courts in India for interim relief.

8.17 Where the parties exercising autonomy expressly choose different procedural rules for conduct of arbitration, they are assumed to be aware of the provisions of such rules, including the procedure for obtaining interim relief, and the fact that such rules provide for emergency arbitration by appointment of an emergency arbitrator. In the present case, the parties had with open eyes left it for themselves, to choose between availing interim relief from the emergency arbitrator on the one hand, or the Courts under Section 9 of the A&C Act on the other hand. Thus, Amazon has exercised its choice of the forum for interim relief as per the arbitration agreement between the parties. Nothing in the A&C Act prohibits the parties from doing so.

8.19 The Indian law of arbitration allows the parties to choose a procedural law different from the proper law, and this Court finds that there is nothing in the A&C Act that prohibits the contracting parties from obtaining emergency relief from an emergency arbitrator. An arbitrator's authority to act is implied from the agreement to arbitrate itself, and the same cannot be restricted to mean that the parties agreed to arbitrate before an arbitral tribunal only and not an Emergency Arbitrator. Further the parties having deliberately left it open to themselves to seek interim relief from an emergency arbitrator, or the Court in terms of Rule 30.3 of SIAC Rules, the authority of the said emergency arbitrator cannot be invalidated merely because it does not strictly fall within the definition under Section 2(1)(d) of the A&C Act.

8.20 Mr. Harish Salve, learned Senior Counsel on behalf of FRL contended that under Section 2(d) of the A&C Act, the term 'arbitral tribunal' cannot deem to include an Emergency Arbitrator for the reason the same was recommended by the Law Commission in its 246th Report, however, the said recommendation was not accepted by the Parliament and no amendment was brought to Section 2(1)(d) of the A&C Act. It is thus contended that what was expressly rejected by the Parliament cannot be deemed to be included in the definition of 'arbitral tribunal' under Section 2(1)(d) of the A&C Act. On the contrary, Mr.Gopal Subramanium contended that the Parliament in its wisdom did not accept the recommendation of the Law Commission to provide for an Emergency Arbitrator in the amendment to the A&C Act, does not mean that the Emergency Arbitrator was excluded in the A&C Act, and that the recommendation of the Law Commission has no bearing on the

interpretation of a provision in the A&C Act.

8.21 In the decision reported as 2020 SCC OnLine 656 *Avitel Post Studioz Ltd. & ors. vs. HSBC PI Holdings (Mauritius) Ltd.*, Supreme Court dealing with the contention that an amendment to Section 16 proposed by the 246th Law Commission Report in the light of the Supreme Court decision i.e. 2010 (1) SCC 72 *N. Radhakrishnan vs. Maestro Engineers* which appears to denude an Arbitral Tribunal of the power to decide on issues of fraud etc. claimed that the decision in *N. Radhakrishnan* (supra) having not been legislatively overruled, cannot now be said to be in any way deprived of its precedential value, as the Parliament has taken note of the proposed Section 16 (7) in the 246th Law Commission Report, and has expressly chosen not to enact it. Supreme Court held that the development of law by the Supreme Court cannot be thwarted merely because a certain provision recommended in a Law Commission Report is not enacted by the Parliament. It noted that the Parliament may have felt, that it was unable to make up its mind and instead, leave it to the Courts to continue, case by case, deciding upon what should constitute the fraud exception. Parliament may also have thought that Section 16(7), proposed by the Law Commission, is clumsily worded as it speaks of "a serious question of law, complicated questions of fact, or allegations of fraud, corruption, etc." The judgment of the Supreme did not lay down that serious questions of law or corruption etc. is vague and, therefore, Parliament may have left it to the Courts to work out the fraud exception.

8.22 In view of the decision of Supreme Court in *Avitel Post* (supra), it cannot be held that an Emergency Arbitrator is outside the scope of Section 2(1)(d) of the A&C Act, because the Parliament did not accept the

recommendation of the Law Commission to amend Section 2(1)(d) of the A& C Act to include an ' Emergency Arbitrator'.

8.23 FRL has also relied upon Section 2(6) of the A&C Act to contend that the said provision grants freedom to the parties to authorise any person including an institution to determine a certain issue, only when Part 1 of the A&C Act allows the parties to do so. It was submitted that since Part 1 of the A&C Act does not grant parties, the freedom to approach any other person except the Court under Section 9 of the A&C Act and the Tribunal under Section 17 for grant of interim relief, it is apparent that Emergency Arbitrator is incompatible with the provisions of the A&C Act. Further, FRL relied on Section 2(8) of the A&C Act and contended that although this provision also recognizes the agreement of parties as to arbitration rules, but such rules cannot override the provisions of Part 1 of the A&C Act itself.

8.24 As noted in the proviso to Section 2(2) of the A&C Act, in the case of an International Commercial Arbitration even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of the A&C Act, provisions of Section 9, 27 and Clause (b) of sub Section (1) and sub Section (3) of Section 37 of the A&C Act, would be applicable, subject to an agreement to the contrary between the parties. Thus, parties by agreement can decide to the inapplicability of these provisions. The phrase "*even if the place of arbitration is outside India",* further makes it clear that the said entitlement of the parties to exclude the aforementioned provisions by agreement is available in international commercial arbitrations seated in India, and even if the seat of such international commercial arbitration is outside India. Clarifying the position, Supreme Court in (2012) 9 SCC 522

Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc. (BALCO) held that if the parties to an arbitration seated outside India choose the A&C Act to govern the arbitration proceedings, it would still not make Part 1 of the A&C Act applicable. Instead, only the provisions in the A&C Act relating to the internal conduct of the arbitration proceedings will be applicable, to the extent they are not inconsistent with the mandatory provisions of the curial law of the seat of arbitration. Thus, the fact that applicability of Section 9 can be excluded in an International Commercial Arbitration, conducted as per the provisions of A&C Act indicates that Section 9 of the A&C Act is not a mandatory provision.

8.25 Thus, this Court finds no merit in the contention of FRL with respect to Section 2(6) and 2(8) of the A&C Act, in view of the finding that the SIAC Rules relating to emergency arbitration are not contrary to the mandatory provisions of the A&C Act. As discussed above, the parties have chosen SIAC Rules that grant them freedom to approach the Court also under Section 9 of the A&C Act to obtain interim relief, thus, to that extent there is no incompatibility between Part I of the A&C Act and the SIAC Rules.

8.26 From a conspectus of the discussion above, this court arrives at the conclusion that Firstly, the parties in an international commercial arbitration seated in India can by agreement derogate from the provisions of Section 9 of the A&C Act; Secondly, in such a case where parties have expressly chosen a curial law which is different from the law governing the arbitration, the court would look at the curial law for conduct of the arbitration to the extent that the same is not contrary to the public policy or the mandatory requirements of the law of the country in which arbitration is held; Thirdly,

inasmuch as Section 9 of the A&C Act along with Sections 27, 37(1)(a) and 37(2) are derogable by virtue of the proviso to Section 2(2) in an International arbitration seated in India upon an agreement between the parties, it cannot be held that the provision of Emergency Arbitration under the SIAC rules are, per se, contrary to any mandatory provisions of the A&C Act. Hence the Emergency Arbitrator prima facie is not a *coram non judice* and the consequential EA order not invalid on this count.

Whether the Resolution of FRL dated 29th August, 2020 is void or contrary to statutory provisions

9.1 Supreme Court in *(2012) 6 SCC 613 Vodaphone International Holdings B.V. Vs. Union of India* that a shareholders' agreement (SHA) is essentially a contract between some or all shareholders in a company, the purpose of which is to confer rights and impose obligations over and above those provided by the company law. It was held that SHA is a private contract between the shareholders compared to the Articles of Association of the company, which is a public document. Being a private document, it binds parties thereon and not the other remaining shareholders of the company. Explaining the advantages of a SHA, Supreme Court noted that it gives greater flexibility, unlike Articles of Association and makes provision for resolution of any dispute between the shareholders and also how the future capital contributions have to be made. It was further held that the provisions of the SHA may also go contrary to the provisions of the Articles of Association, however, in that event, naturally provisions of Articles of Association would govern and not the provisions in SHA.

9.2 Following the decision in *AIR 1965 SC 1535 Shanti Prasad Jain Vs. Kalinga Tubes Limited*, Supreme Court in *Vodaaphone* (supra) further held

that the agreement between non-members and members of a company will not bind the company, but there is nothing unlawful in entering into agreement for transferring of shares. Of course, the manner in which such agreement is to be enforced in the case of breach is given in the general law between the company and the shareholders. A breach of SHA which does not breach the articles of association is a valid corporate action and the parties aggrieved can get remedies under the general law of the land.

9.3 Therefore, a shareholders' agreement is a private contract between the shareholders, an agreement enforceable under the Contract Act and for the breach thereof, any party aggrieved can seek remedy under the law or in case provided under the agreement through arbitration, however, as held by the Supreme Court in case of conflict between the shareholders agreement and the Articles of Association of the company, the later will prevail.

9.4 The rationale behind the Articles of Association of a company prevailing over a shareholder's agreement stems from the basic principles that the general law i.e. the Contract Act has to give way to the Special Act i.e. the Companies Act, in case of conflict. Indubitably, it is in the interest of the society that the integrity of the contracts are maintained as contractual remedies promise broad commercial stability, however it is equally true that the Indian Contract Act is not a complete Code as was noted by the Privy Council in AIR 1929 PC 132 *Jwaladutt R. Pillani vs. Bansilal Moti Lal* based on the preamble of the Indian Contract Act, 1872 which notes, *"whereas it is expedient to define and amend certain parts of the law relating to contracts*".

9.5 Further, Section 56 of the Contract Act acknowledges the supervening circumstances not contemplated by the parties resulting in

making the contract impossible of being performed. Supervening circumstances/ subsequent impossibilities on occurrence of an unexpected event or change of circumstances which are beyond what was contemplated by the parties at the time when they entered into the agreement have been duly recognized in the various Supreme Court decisions. In *AIR 1954 SC 44 Satyabrata Ghose Vs. Mugneeram Bangor & Co. & Anr.* Supreme Court held that when such an event or change of circumstance occurs, which is so fundamental, to be regarded by law striking at the root of contract as a whole, it is the Court which can pronounce the contract to be frustrated and at an end. It was held that the word "impossible" has not been used in the Section, in the sense of physical or literal impossibility and though the performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties.

9.6 Supreme Court in the decision (2017) 14 SCC 80 *Energy Watchdog vs. Central Electricity Regulatory Commission & Ors.* noted the evolution of law in relation to the impact of an unforeseen event on the performance of a contract, after it is made, as under:

> *"34. "Force majeure" is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Sections 32 and 56 are set out herein:*
>
> > *"32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens,*

cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

xx xx xx

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the Act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

35. Prior to the decision in Taylor v. Caldwell [Taylor v. Caldwell, (1863) 3 B & S 826 : 122 ER 309 : (1861-73) All ER Rep 24], the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of the Common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in Taylor v. Caldwell [Taylor v. Caldwell, (1863) 3 B&S 826 : 122 ER 309 : (1861-73) All ER Rep 24] in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.

36. The law in India has been laid down in the seminal decision of Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word "impossible" has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the Act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place dehors the contract, it will be governed by Section 56.

37. In Alopi Parshad & Sons Ltd. v. Union of India [Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588] , this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract

ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. Similarly, in Naihati Jute Mills Ltd. v. Khyaliram Jagannath [Naihati Jute Mills Ltd. v. Khyaliram Jagannath, (1968) 1 SCR 821 : AIR 1968 SC 522] , this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

39. It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH [Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, 1962 AC 93 : (1961) 2 WLR 633 : (1961) 2 All ER 179 (HL)] , despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

40. This view of the law has been echoed in Chitty on Contracts, 31st Edn. In Para 14-151 a rise in cost or expense has been stated not to frustrate a contract. Similarly, in Treitel

on Frustration and Force Majeure, 3rd Edn., the learned author has opined, at Para 12-034, that the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance. It is clear that a more onerous method of performance by itself would not amount to a frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration. (See Para 15-158.)

41. Indeed, in England, in the celebrated Sea Angel case [Edwinton Commercial Corpn. v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd. (The Sea Angel), 2007 EWCA Civ 547 : (2007) 2 Lloyd's Rep 517 (CA)] , the modern approach to frustration is well put, and the same reads as under:

> *"111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject-matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere*

> *incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances." (Emphasis supplied)*

9.7 At this stage, this Court is only required to prima facie consider the supervening circumstances for application of the doctrine of frustration which requires a multi factorial approach as noted in the decision reported as 2007 EWCL Civ 547 (the Sea Angel's case) and approved by the Supreme Court in *Energy Watchdog* (supra). In the present suit, case of FRL is of the supervening circumstance that due to the COVID-19 pandemic, the retail sector has taken a big hit and FRL a listed company having public shareholdings besides the shareholders who entered into FCPL SHA, has also been seriously impacted. FRL has a large number of stores all over India with 25000 employees therein and is burdened with loans from banks and financial institutions and is on the verge of collapse, which fact was duly informed to Amazon. FRL thus required more funds to survive, failing which the company will be defaulting entailing serious consequences on the company and its directors. This distressed financial position of FRL is not disputed by Amazon. As a matter of fact, it is Amazon's case that to help FRL out of this position, Amazon was in touch with other entities to infuse funds in FRL. It is the case of FRL that since the directors of FRL stand in fiduciary capacity, they will have to act in the best interest of the company which position of law cannot be disputed in view of Section 166 of the Companies Act, 2013 and decisions noted hereinafter.

9.8 The Companies Act, 2013 which is a special enactment codifies the fiduciary duty of the directors of a company under Section 166 as under:

"166. Duties of directors

(1) Subject to the provisions of this Act, a director of a company shall act in accordance with the articles of the company.

(2) A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

(3) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment."

9.9 Supreme Court in *AIR 1950 SC 172 Nanalal Zaver & Anr. Vs. Bombay Life Assurance Co. Ltd. & Ors.* reiterating the well settled principle that in exercising their powers, whether general or special, the directors, must always bear in mind that they hold a fiduciary position and must exercise their powers for the benefit of the company and for that alone. It was held that the Court can intervene to prevent the abuse of a power, whenever such abuse is held proved, and also cautioned that where directors have a discretion and are bona-fidely acting in the interest of the company, it is not the habit of Court to interfere with the same. It was further held that when a company is in no need of further capital, directors are not entitled to use their power of issuing shares merely for the purpose of maintaining themselves and their friends in management over the affairs of a company, or merely for the purpose of defeating the wishes of the existing majority of the shareholders. It was held:

"41. It is well established that directors of a company are in a fiduciary position vis-a-vis the company and must exercise their power for the benefit of the company. If the power to issue further shares is exercised by the directors not for the benefit of the company but simply and solely for their personal aggrandisement and to the detriment of the company, the Court

will interfere and prevent the directors from doing so. The very basis of the Court's interference in such a case is the existence of the relationship of a trustee and of cestui que trust as between the directors and the company."

9.10 Following the decision in *Nanalal Zaver* (supra), this principle of fiduciary duty of the directors of a company was reiterated by the Supreme Court in (*1981) 3 SCC 333 Needle Industries Ltd. & Ors. Vs. Needle Industries Newey (India) Holdings Ltd. & Ors.*

9.11 Learned Senior Counsel for FRL has relied upon the decision reported as 1959 AC 324, *Scottish Co-operative Wholesale Society Ltd. vs. Meyer & Anr.* wherein the House of Lords was dealing with the duties of the nominee Directors, in relation to a company formed as a subsidiary to a co-operative wholesale society to enable it to get licenses and participate in the manufacture and sale of rayon materials, the production whereof was controlled till 1952. The two respondents therein were appointed as Joint Managing Directors of the company. It was noted that nominees of a parent company upon the Board of a subsidiary company may be placed in a difficult and delicate position. It is, then, the more incumbent on the parent company to behave with scrupulous fairness to the minority shareholders and to avoid imposing upon their nominees, the alternative of disregarding their instructions or betraying the interests of the minority. It was noted that the society pursued a different course. It acted in oppression and unscrupulously which act was promoted by the action or inaction of the nominee Directors. The company which might had recovered its former prosperity could not do as the Directors thought it had served its purposes and it can conveniently be liquidated. It was held:

"The short answer is that it was the policy of the society that the affairs of the company should be so conducted and the minority shareholders were content that it should be so. They relied—how unwisely the event proved—upon the good faith of the society, and, in any case, they were impotent to impose their own views. It is just because the society could not only use the ordinary and legitimate weapons of commercial warfare but could also control from within the operations of the company that it is illegitimate to regard the conduct of the company's affairs as a matter for which they had no responsibility. After much consideration of this question, I do not think that my own views could be stated better than in the late Lord President Cooper's words on the first hearing of this case. "In my view," he said, "the section warrants the court in looking at the business "realities of a situation and does not confine them to a narrow "legalistic view. The truth is that, whenever a subsidiary is "formed as in this case with an independent minority of share-"holders, the parent company must, if it is engaged in the same "class of business, accept as a result of having formed such a "subsidiary an obligation so to conduct what are in a sense its "own affairs as to deal fairly with its subsidiary." At the opposite pole to this standard may be put the conduct of a parent company which says: "Our subsidiary company has served its "purpose, which is our purpose. Therefore let it die," and, having thus pronounced sentence, is able to enforce it and does enforce it not only by attack from without but also by support from within. If this section is inept to cover such a case, it will be a dead letter indeed. I have expressed myself strongly in this case because, on the contrary, it appears to me to be a glaring example of precisely the evil which Parliament intended to remedy."

"Lastly, on the facts, it is to be noted that while the society's directors of the company, who were also directors of the society, knew all that was happening within the society, Dr. Meyer and Mr. Lucas knew nothing apart from what they could infer from the communications, verbal and written, which they had received, with reference to the alignment of the shareholding and the taking over of shares from the petitioners,

and the general attitude of the society's directors on the company's board. On the vital matters affecting the company's prosperity known to the nominee directors these directors remained silent, concealed the facts from the petitioners and took no action and gave no advice helpful to the company. As Lord Sorn put it, their conduct as directors was a negative one to "let the company drift towards "the rocks."

My Lords, if the society could be regarded as an organization independent of the company and in competition with it, no legal objection could be taken to the actions and policy of the society. Lord Carmont pointed this out in the Court of Session. But that is not the position. In law the society and the company were, it is true, separate legal entities. But they were in the relation of parent and subsidiary companies, the company being formed to run a business for the society which the society could not at the outset have done for itself, unless they could have persuaded Dr. Meyer and Mr. Lucas to become servants of the society. This the petitioners were not prepared to do. The company, through, the knowledge, the experience, the connections, the business ability and the energies of the petitioners, had built up a valuable goodwill in which the society shared and which there is no reason to think would not have been maintained, if not increased, with the co-operation of the society. The company was in substance, though not in law, a partnership consisting of the society, Dr. Meyer and Mr. Lucas. Whatever may be the other different legal consequences following on one or other of these forms of combination one result, in my opinion, followed in the present case from the method adopted, which is common to partnership, that there should be the utmost good faith between the constituent members. In partnership the position is clear. As stated in Lindley on Partnership, 11th ed., p. 401: "A partner cannot, without the consent of his co-"partners lawfully carry on for his own benefit, either openly or "secretly, any business in rivalry with the firm to which he "belongs." It may not be possible for the legal remedies that would follow in the case of a partnership to follow here, but the principle has, I think, valuable application to the circumstances of this case."

9.12 In the decision reported as [2009] EWCA Civ 291; [2010] B.C.C. 597 *Hawkes vs. Cuddy* the Court of Appeals held, the fact that a Director of a company was nominated to that office by a shareholder did not, of itself, impose any duty on the director, owed to his nominator. The director may owe duties to his nominator if he was an employee or officer of the nominator, or by reason of a formal or informal agreement with his nominator. Such duties did not arise out of his nomination, but out of a separate agreement or office. Such duties could not, however, detract from his duty to the company of which he was a director when he was acting as such. An appointed director, without being in breach of his duties to the company, may take the interests of his nominator into account, provided that his decisions as a director were, in what he genuinely considered to be the best interests of the company; but that was a very different thing from his being under a duty to his nominator by reason of his appointment by it.

9.13 In *RNRL vs. RIL* (supra), Supreme Court reiterated that the Board of Directors has to act in a fiduciary capacity vis-a-vis the shareholders and that this duty has been a part of broader understanding of company law from the time of settlement companies that were the precursors of joint stock companies. Supreme Court deprecating the demand of RNRL that the Board of RIL only act at the behest and as rubber stamp of the decisions of the promoters held, that acceptance of such demands would destroy the fabric of the Company Law itself and the foundation of trust, faith and honest dealing with the shareholders.

9.14 According to Amazon its investment in FCPL was premised on the basis that defendant Nos.3 and 8 in the present suit who were the major shareholders of FCPL were also the Executive Chairman and Managing

Director of FRL respectively, exercised control over FRL. However, as noted above defendant Nos. 3 and 8 were also required to perform their fiduciary duty towards FRL even though bound by FCPL SHA and FRL SHA.

9.15 From the documents filed by Amazon it is clear that defendant No.3 (Kishore Biyani) in March, 2020 informed Amazon expressing its fear of Covid-19 disrupting capital markets globally leading to significant deterioration of FRL's market capitalization with the stock falling down per share, leading to a requirement for increased encumbrances of FRL's shares and a shortfall in security in two of their facilities under UBS AG and L & T Finance Ltd.

9.16 Amazon was also asked to step in and nominate lenders of financial institutions (replacement financial institutions) to avoid alienation or disposal of FRL's shares held by the promoter groups. Considering the down turn in the market in April and May, 2020 several of FRL's lenders began recalling their facilities. From the documentation it is clear that the grim situation of FRL was duly notified to Amazon and though Amazon through its various options including from SAMARA was trying to negotiate however, nothing concrete resulted. It is in this peculiar circumstance and the fact, as the shares of FRL fell down with investors recalling their securities, it was essential for FRL to act, to survive. This is thus a case of supervening circumstance and as noted by the Supreme Court in *Energy Watchdog's* decision (supra) a multi-factorial approach should be adopted and the acts of both FRL and Amazon have to be tested on the said anvil.

9.17 Though the claim of Amazon in the representation to statutory authorities regarding the transaction is that the same is in breach of FCPL SHA and FRL SHA and the resolution dated 29th August, 2020 passed by the Board of Directors of FRL is void, however, no material has been placed on record by the FRL to show that the resolution dated 29th August, 2020 passed by the Board of Directors of FRL is void or contrary to any statutory provision. Case of FRL is that its Board Resolution dated 29th August, 2020 does not violate any provision of the FRL's Article of Association or any provision of law and that the same is in compliance with the fiduciary duty owed by FRL to its stakeholder, which averments have not been seriously disputed by Amazon except contending that the Board Resolution dated 29th August, 2020 is in breach of FCPL SHA and FRL SHA. The resolution being in breach of the FRL SHA and FCPL SHA is distinct from the resolution being void or contrary to any statutory provision or contrary to the Articles of Association of FRL. Further contention of Amazon is that the Board Resolution dated 29th August, 2020 of FRL is in contravention with FCPL's Article of Association. However, FRL is bound by its Article of Association and not that of FCPL's.

9.18 To claim that the Board Resolution of FRL dated 29th August, 2020 is void, Amazon also contends that consent of FCPL as required under the FRL SHA has not been taken in this regard. However, FRL has placed on record the letter dated 29th August, 2020, signed on behalf of both FRL and FCPL wherein FCPL has granted its approval for the transaction between FRL and Reliance. During the course of arguments, learned counsel for FRL contested the letter dated 29th August, 2020 claiming that the same is not accompanied by a statement of truth based on affidavit, however, as

noted in the preceding paras, since arguments in the application have been heard finally at the ad interim stage, both parties have filed documents without filling the necessary affidavits, which the parties will be required to in the suit, while completing the pleadings.

9.19 In view of the discussion above, this Court is of the opinion that the Board Resolution dated 29th August, 2020 of FRL is prima facie neither void nor contrary to any statutory provision nor the Articles of Association of FRL.

Whether conflation of the FRL SHA, FCPL SHA and FCPL SSA amounts to 'Control' of Amazon on FRL

10.1 The third ground on which FRL claims that Amazon is unlawfully interfering in the transaction is that by conflating the FCPL SHA and FRL SHA, Amazon seeks to control the affairs of FRL which is impermissible as at best it is a shareholder of FCPL and any rights vis-à-vis that of a shareholder of FCPL vests in Amazon and in the said garb it cannot exercise control over FRL. Further the 'control' exercised by Amazon amounts to violation of FEMA FDI Rules. Relying upon the decision reported as 2019 (2) SCC 1 *Arcelormittal India Pvt. Ltd. vs. Satish Kumar Gupta & Ors.,* learned Senior Counsel for Amazon contends that Amazon does not have right to appoint the majority Directors of FCPL and the rights granted to Amazon under FCPL SHA are merely protective rights that do not relate in any manner to the day-to-day management and operation of FCPL or FRL. This is exactly the dichotomy of which FRL is aggrieved of. According to FRL, though Amazon claims that in terms of FCPL SHA the rights, if any, with Amazon are protective rights for its investments with no interference in

day-to-day management and operations of FCPL or FRL, however, on conflation of the FCPL SHA and FRL SHA, Amazon has complete control over the functioning of FRL.

10.2 According to Amazon, the FRL SHA, FCPL SHA and the FCPL SSA being a single integrated transaction do not violate the foreign exchange laws of India. It is stated that FRL is a part of Future Group of Companies, defendant No.3 is the Executive Chairman of FRL and defendant No.8 is the Managing Director of FRL and they continue to hold the powers of management of the affairs of FRL. Further the Biyanis excluding FCPL are collectively the single largest shareholders of FRL with fragmented public shareholding and therefore, in de-facto control of FRL. According to Amazon as per FEMA FDI Rules, foreign investment upto 51% under the government route is permitted in entities engaged in multi-brand retail trading, subject to other attendant conditions under the rules. Further as per para-15.1, Schedule-I of FEMA FDI Rules, foreign investments upto 100% is permitted under the automatic route in FCPL which is engaged in "*cash and carry wholesale trading/wholesale trading*". By the various agreements Amazon has only created protective rights for its investments in FCPL amounting to 49% of shareholding of FCPL which holds less than 10% shares in FRL. Thus even by the downstream investment Amazon has less than 5% investment in FRL. Since the investment in FRL is not by Amazon but by FCPL which is an Indian entity, it cannot be considered an indirect foreign investment as the investment flows from an entity which is Indian owned and controlled. It is the specific case of Amazon that it neither owns nor controls FCPL much less FRL. Amazon further relies upon the illustration in the FDI Policy, 2017 which reads as under:

"*(ii) Counting of indirect foreign investment*

(a) The foreign investment through the investing Indian company/LLP would not be considered for calculation of the indirect foreign investment in case of Indian companies/LLPs which are 'owned and controlled' by resident Indian citizens and/or Indian Companies/LLPs which are owned and controlled by resident Indian citizens.

...

To illustrate, if the indirect foreign investment is being calculated for Company X which has investment through an investing Company Y having foreign investment, the following would be the method of calculation:

(A) where Company Y has foreign investment less than 50%- Company X would not be taken as having any indirect foreign investment through Company Y."

10.3 Provisions of FEMA FDI Rules relevant to the contentions of the parties and relied upon by FRL are as under:

"2(r) "FDI" or "Foreign Direct Investment" means investment through equity instruments by a person resident outside India in an unlisted Indian company; or in ten per cent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company;

2 (t) "foreign portfolio investment" means any investment made by a person resident outside India through equity instruments where such investment is less than ten per cent of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than ten per cent of the paid-up value of each series of equity instrument of a listed Indian company;

2(u) "FPI" or "Foreign Portfolio Investor" means a person registered in accordance with the provisions of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014

3. Restriction on investment in India by a person resident outside India.- Save as otherwise provided in the Act or rules or regulations

made thereunder, no person resident outside India shall make any investment in India :

Provided that an investment made in accordance with the Act or the rules or the regulations made thereunder and held on the date of commencement of these rules shall be deemed to have been made under these rules and shall accordingly be governed by these rules:

Provided further that the Reserve Bank may, on an application made to it and for sufficient reasons and in consultation with the Central Government, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary.

xx xx xx

6. Investments by person resident outside India: - A person resident outside India may make investment as under:-

(a) may subscribe, purchase or sell equity instruments of an Indian company in the manner and subject to the terms and conditions specified in Schedule I:

Provided that a person who is a citizen of Bangladesh or Pakistan or is an entity incorporated in Bangladesh or Pakistan cannot purchase equity instruments without the prior government approval:

Provided further that a citizen of Pakistan or an entity incorporated in Pakistan cannot invest in defence, space, atomic energy and sectors or activities prohibited for foreign investment even through the government route.

Note: Issue or transfer of "participating interest or right" in oil fields by Indian companies to a person resident outside India would be treated as foreign investment and shall comply with the conditions laid down in Schedule I.

(b) A person resident outside India, other than a citizen of Bangladesh or Pakistan or an entity incorporated in Bangladesh or Pakistan, may invest either by way of capital contribution or by way of acquisition or transfer of profit shares of an LLP, in the manner and subject to the terms and conditions specified in Schedule VI.

(c) A person resident outside India, other than a citizen of Bangladesh or Pakistan or an entity incorporated in Bangladesh or Pakistan, may invest in units of an investment vehicle, in the manner and subject to the terms and conditions specified in Schedule VIII.

(d) A person resident outside India may invest in the depository receipts (DRs) issued by foreign depositories against eligible securities in the manner and subject to the terms and conditions specified in Schedule IX.

xx xx xx

10. Investment by FPI - A FPI may make investments as under:-

(1) A FPI may purchase or sell equity instruments of an Indian company which is listed or to be listed on a recognised stock exchange in India, and/or may purchase or sell securities other than equity instruments, in the manner and subject to the terms and conditions specified in Schedule II.

Note - A FPI may trade or invest in all exchange traded derivative contracts approved by Securities and Exchange Board of India from time to time subject to the limits specified by the Securities and Exchange Board of India and the conditions prescribed in Schedule II.

(2) A FPI may purchase, hold, or sell Indian Depository Receipts (IDRs) of companies resident outside India and issued in the Indian capital market, in the manner and subject to the terms and conditions as prescribed in Schedule X.

xxx xxx xxx

23. Downstream investment -

(1) Indian entity which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as applicable for foreign investment. Explanation: Downstream investment by an LLP not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India is allowed in an Indian company operating in sectors where foreign investment up to one hundred percent is permitted under automatic route and there are no FDI linked performance conditions.

xx xx xx

Explanation.- For the purposes of this rule,-

(a) "ownership of an Indian company" shall mean beneficial holding of more than fifty percent of the equity instruments of such company and "ownership of an LLP" shall mean contribution of more than fifty percent in its capital and having majority profit share;

(b) "company owned by resident Indian citizens" shall mean an Indian company where ownership is vested in resident Indian citizens and/ or Indian companies, which are ultimately owned and controlled by resident Indian citizens and "LLP owned by resident Indian citizens" shall mean an LLP where ownership is vested in resident Indian citizens and/ or Indian entities, which are ultimately owned and controlled by resident Indian citizens;

(c) "company owned by persons resident outside India" shall mean an Indian company that is owned by persons resident outside India and "LLP owned by persons resident outside India" shall mean an LLP that is owned by persons resident outside India;

(d) "control" shall mean the right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement and for the purpose of LLP, "control" shall mean the right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of an LLP;

(e) "company controlled by resident Indian citizens" means an Indian company, the control of which is vested in resident Indian citizens and/ or Indian companies which are ultimately owned and controlled by resident Indian citizens and "LLP controlled by resident Indian citizens" shall mean an LLP, the control of which is vested in resident Indian citizens and/ or Indian entities, which are ultimately owned and controlled by resident Indian citizens;

(f) xx xx xx;

(g) xx xx xx

(i) "indirect foreign investment" means downstream investment received by an Indian entity from,-

(A) another Indian entity (IE) which has received foreign investment and (i) the IE is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India; or

(B) an investment vehicle whose sponsor or manager or investment manager (i) is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India : Provided that no person resident in India other than an Indian entity can receive Indirect Foreign Investment;

(j) "total foreign investment" means the total of foreign investment and indirect foreign investment and the same will be reckoned on a fully diluted basis"

10.4 Additional condition under the FDI Policy Circular of 2017**:**

b. In any sector/activity, where Government approval is required for foreign investment and in cases where there are any inter-se agreements between/amongst shareholders which have an effect on the appointment of the Board of Directors or on the exercise of voting rights or of creating voting rights disproportionate to shareholding or any incidental matter thereof, such agreements will have to be informed to the approving authority. The approving authority will consider such interse agreements for determining ownership and control when considering the case for approval of foreign investment."

10.5 Para-3 of Schedule-I of FEMA FDI Rules, reads as under:

"(3) Permitted sectors, entry routes and sectoral caps for total foreign investment Unless otherwise specified in these Rules or the Schedules, the entry routes and sectoral caps for the total foreign investment in an Indian entity shall be as follows, namely:-

(i) "automatic route" means the entry route through which investment by a person resident outside India does not require the prior approval of the Reserve Bank or the Central Government;

(ii) "government route" means the entry route through which investment by a person resident outside India requires prior Government approval and foreign investment received under this route shall be in accordance with the conditions stipulated by the Government in its approval;

(iii) Aggregate foreign portfolio investment up to forty-nine percent of the paid-up capital on a fully diluted basis or the sectoral or statutory cap, whichever is lower, shall not require Government approval or compliance of sectoral conditions as the case may be, if such investment does not result in transfer of ownership and control of the resident Indian company from resident Indian citizens or transfer of ownership or control to persons resident outside India and other investments by a person resident outside India shall be subject to the conditions of Government approval and compliance of sectoral conditions as laid down in these rules."

10.6 The decision of this Court reported as 2017 SCC OnLine Del. 7810 *Cruz City 1 Mauritius Holdings vs. Unitech Limited* relied upon by Amazon does not support its case as the said judgment does not permit violation of the foreign exchange law. The decision held that the foreign award could not be set aside merely on the ground that the enforcement of the foreign award required remittance in the form of foreign exchange for which necessary approvals could be taken from the RBI.

10.7 Before this Court case of Amazon is that FRL SHA, FCPL SHA and FCPL SSA are a single integrated transaction and Amazon entered into the transaction based on two broad sets of special and protective rights as per the three agreements; the first set of rights being that the retail assets of FRL would not be alienated without the prior consent of Amazon, never to a restricted person mentioned in the Schedule and that Biyanis had agreed that FRL would remain the sole vehicle for conduct of the retail business. The second set of rights that were granted in favour of Amazon by the three agreements as a single integrated transaction was that, if the Indian laws permitted Amazon could become the single largest shareholder of FRL and

in this regard, the Biyanis agreed to maintain the minimum shareholdings of 16.18% free from encumbrances.

10.8 On the date of notification of FRL SHA, that is, 26th December, 2019, only 16.18% FRL securities were free from encumbrances and as per Clause-17.2(i) of the FCPL SHA, the promoters were under an obligation to reserve the said minimum shareholding.

10.9 'Control' is defined in the Companies Act, 2013 under Section 2(27) as:

> *"2 In this Act, unless the context otherwise requires,—*
> *"control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner"*

10.10 Similar definition of 'control' is provided under the Insolvency and Bankruptcy Code 2016, SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, Insurance Laws (Amendment) Act, 2015 and Explanation to Rule 23 FEMA FDI Rules.

10.11 In *Arcelormittal* (supra), Supreme Court dealing with the meaning of expression 'management and control' under the Insolvency and Bankruptcy Code held that the expression 'management' would refer to the de-jure 'management' of a corporate debtor and the expression 'control' denotes any positive control, which means that the mere power to block special resolution of a company cannot amount to 'control' and as contrasted with 'management', means de-facto control of actual management or policy decisions that can be or are in fact taken. It was held:

49. The expression "control" is defined in Section 2(27) of the Companies Act, 2013 as follows:

> *"2. (27) "control" shall include the right to appoint majority of the Directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;"*

50. The expression "control" is therefore defined in two parts. The first part refers to de jure control, which includes the right to appoint a majority of the Directors of a company. The second part refers to de facto control. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be "in control". A management decision is a decision to be taken as to how the corporate body is to be run in its day-to-day affairs. A policy decision would be a decision that would be beyond running day-to-day affairs i.e. long-term decisions. So long as management or policy decisions can be, or are in fact, taken by virtue of shareholding, management rights, shareholders agreements, voting agreements or otherwise, control can be said to exist.

51. Thus, the expression "control", in Section 29-A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. "Control" here, as contrasted with "management", means de facto control of actual management or policy decisions that can be or are in fact taken. A judgment of the Securities Appellate Tribunal in Subhkam Ventures (I) (P) Ltd. v. SEBI [Subhkam Ventures (I) (P) Ltd. v. SEBI, 2010 SCC OnLine SAT 35], made the following observations qua "control" under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, wherein "control" is defined in Regulation 2(1)(e) in similar terms as in Section 2(27) of the Companies Act, 2013. The Securities Appellate Tribunal held: (SCC OnLine SAT para 6)

> *"6. ... The term control has been defined in Regulation*

2(1)(c) of the Takeover Code to "include the right to appoint majority of the Directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner". This definition is an inclusive one and not exhaustive and it has two distinct and separate features: (i) the right to appoint majority of Directors or, (ii) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreements or in any other manner. This definition appears to be similar to the one as given in Black's Law Dictionary (Eighth Edn.) at p. 353 where this term has been defined as under:

> *'Control—The direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee.'*

Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power. In a board managed company, it is the board of Directors that is in control. If an acquirer were to have power to appoint majority of Directors, it is obvious that he would be in control of the company but that is not the only way to be in control. If an acquirer were to control the management or policy decisions of a company, he would be in control. This could happen by virtue of his shareholding or management rights

or by reason of shareholders agreements or voting agreements or in any other manner. The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these questions is in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control." *(Emphasis supplied)*

10.12 In the decision reported as 2000 (3) Mh.L.J 700 *Rolta India Ltd., Mumbai & Anr. vs. Venure Industries Ltd. Haryana & Ors*. the Division Bench of the Bombay High Court dealing with the pooling agreement between two or more shareholders held that by such an agreement shareholders bind one another to vote as they mutually agree. These agreements are enforceable because the right to vote is a proprietary right which right to vote may be aided and effectuated by a contract. It was also held that a pooling agreement may be utilized in connection with an election of Directors and shareholders' resolution where shareholders have a right to vote however, a pooling agreement cannot be used to supersede the statutory right given to the Board of Directors to manage the company, the underlying reason being the shareholders cannot achieve by pooling agreement that what is prohibited to them if they are voting individually. It was held:

"*22. A pooling agreement may be utilised in connection with the election of Directors and shareholders' Resolutions where shareholders have a right to vote. However, a pooling agreement cannot be used to supersede the statutory rights given to the Board of Directors to manage the company, the underlying reason being that the shareholders cannot achieve*

by pooling agreement that which is prohibited to them, if they are voting individually. Therefore, the power of shareholders to unite is not extended to contracts, whereby restrictions are placed on the powers of Directors to manage the business of the Corporation. It is for this reason that a pooling agreement cannot be between Directors regarding their powers as Directors. There is vast difference in principle between the case of a shareholder binding himself by such a contract and the Director of the Company undertaking such an obligation by compromising his fiduciary status. The shareholder is dealing with his own property. He is entitled to consider his own interests, without regard to interests of other shareholders. However, Directors are fiduciaries of the Company and the shareholders. It is their duty to do what they consider best in the interests of the Company. They cannot abdicate their independent judgment by entering into pooling agreements. The Company works through two main organs, viz. the shareholders and the Board of Directors." *(Emphasis Supplied)*

10.13 Therefore, 'control' includes the right to appoint majority of Directors, the right to control management and the right to control the policy decision. Such rights can be exercised individually or collectively, directly or indirectly by shareholdings' management rights, shareholders agreements, voting agreements etc. Such control based on the rights accruing through the shareholding/voting rights may be easily determinable however, when the same are through agreements assessments of such rights often becomes complex due to the camouflage of the language used. Though the basic principle governing the field is that veto rights not amounting to acquisition of control may be protective in nature rather than participative, that is, that such rights are vested in the investor to protect his investment or prevent dilution of his shareholding however, there is a thin line between these rights being confined to veto rights which are protective in nature and the veto

rights transgressing to acquisition of control on the company, the later being subject to FEMA FDI Rules. Thus to determine whether the rights conferred on Amazon under the FCPL SHA and the FRL SHA, amount to control over FRL would be a question to be determined on analysis of the various clauses of the agreement and can be determined only after the parties have completed their necessary pleadings and documents showing the underlined intention or by the competent fact finding authority. At this stage, this Court is only forming a prima facie opinion thereon based on the clauses of the FCPL SHA and FRL SHA.

10.14 Relevant Clauses of FCPL SHA read as under:

> *4. COMMITMENT OF THE PARTIES*
>
> *4.1. The Promoters hereby agree, covenant and undertake:*
>
> *(i) to perform and observe and also cause the Company to perform all of the provisions of this Agreement and the Organizational Documents;*
>
> *(ii) that in their capacity as Shareholders they will exercise any power to vote or cause the power to vote to be exercised, at any meeting of the Shareholders of the Company so as to enable the approval of any and every resolution of the Company necessary or desirable to give full effect to this Agreement and the FRL SHA and likewise so as to ensure that no resolution of the Company is passed which is not in accordance with this Agreement and, or, the FRL SHA;*
>
> *(iii) that they will cause any Person appointed by them as their nominee Director on the Board to exercise any power to vote or cause the power to vote to be exercised, at any meeting of the Board of the Company (or any committee thereof) so as to enable the approval of any and every resolution necessary or desirable to give full effect to this Agreement and the FRL SHA, and likewise so as to ensure that no resolution is passed which is not*

in accordance with this Agreement and, or, the FRL SHA;

(iv) that they will exercise any power to vote or cause the power to vote, on behalf of themselves and the Company, to be exercised, at any meeting of the shareholders of the Material Entities so as to enable the approval of any and every resolution necessary or desirable to give full effect to this Agreement and the FRL SHA, and the likewise so as to ensure that no resolution of any Material Entity is passed which is not in accordance with this Agreement and, or, the FRL SHA, as the case may be; and

(v) to cause its Affiliates, to comply with the provisions of paragraph (i), paragraph (ii), paragraph (iii), and paragraph (iv) of this Section 4.1.

xx xx xx

8.1. Notwithstanding anything contained in this Agreement, the Promoters and the Company hereby agree, covenant and undertake that the matters set out in Schedule IX (Investor Protective Matters) ("Investor Protective Matters") shall not be taken-up, decided, acted upon or implemented by the Company; nor the Investor Protective matter be placed for a vote thereon at a Shareholders' meeting of the Company; nor any decision be taken by the Shareholders or Board or any committee of the Board; nor the Company be bound/committed to any resolutions/transactions pertaining to the Investor Protective matters, unless the Investor Protective Matter has been, first approved in the affirmative, in writing, by the Investor. Without limiting the generality of the foregoing, in the event that the Company proposes to take up, or decide any Investor Protective matters, in (a) any meeting of the Board, or any committee thereof, such matter shall be taken-up only if the written consent of the Investor has been obtained prior to such meeting, or if at least 1(one) Investor Nominee Director is present in such meeting, and such Investor Nominee Director votes in favour of such matter, or (b) any meeting of the Shareholders of the Company, such matter shall be

taken-up only if the written consent of the Investor has been obtained prior to such meeting, or if an authorized representative of the Investor is present in such meeting, and such representative votes in favor of such matter.

xx xx xx

10. 1 Ownership and Control of the Promoters and Promoter Affiliates.

10.1.1. The Promoters hereby agree, covenant and undertake that they shall, and shall undertake and ensure that, any promoter Affiliate, holding Company Securities (in accordance with this Agreement) shall, at all times till it holds any Company Securities, (i) (if it is a body corporate) be wholly Controlled, to the exclusion of others, by the Ultimate Controlling Person, and his Immediate Relative, and the Ultimate Controlling Person and his Immediate Relative shall hold (directly and or indirectly) at least 76% (seventy six percent) of the legal and beneficial ownership and voting interests, on a fully diluted basis of such Promoter and, or, Promoter Affiliate; (ii) (if it is a body corporate), undertake and ensure that no Restricted Person shall hold any ownership interest, voting interests or share capital or Control in, or over such Promoter, or such Promoter Affiliates, and (iii) qualify as a 'resident Indian citizen' as defined under the FEMA Regulations, and where such Promoter or such Promoter Affiliate is a Person other than a natural Person, it shall be ultimately owned and Controlled by Persons who are resident Indian citizens under the FEMA Regulations.

10.1.2. It is hereby agreed that the provisions of Section 10.1.1(ii) shall apply mutatis mutandis to any Person (not being a natural Person) which holds securities, ownership or voting interests, whether directly, and, or indirectly in the Promoters which hold Company Securities, or Promoter Affiliates which hold Company Securities. The Promoters shall cause and ensure compliance by such Person as referred to in this Section 10.1.2 with Section 10.1.1(ii).

10.2. Restrictions on Transfer

10.2.1. Except where the prior written consent of the Investor has been obtained in accordance with Section 8 (Investor Protective Matters and Investor Protective Notice Matters) or Section 10.2.2, or as expressly permitted by this Agreement in Section 10.3 (Transfer to Promoter Affiliates and Promoter Trust), Section 10.4 (Transfer by the Investor), Section 11 (Exit of the Investor) and Section 15 (FRL Call Option and Associated matters), the Shareholders agree, covenant and undertake that no Shareholder shall Transfer, or Encumber any Company Securities to another Person, without the prior written consent of the other Shareholder, which consent may be provided or withheld in such Shareholder's sole and absolute discretion.

xx xx xx

13.1 Consent of the investor, and the Promoters.

13.1.1. Notwithstanding anything to the contrary contained in this Agreement, the Parties hereby agree, covenant and undertake that the Promoters and the Company shall, and shall cause a Material Entity to, not (i) take-up, decide, act upon or implement the matters set out in the FRL SHA which require the consent of the Company, or (ii) place such matters for a vote thereon at the board of shareholders meeting of the material Entity, or (iii) take any decision or cause any decision to be taken by the shareholders or the board or any committee of the board of the Material Entity on such matters, or (iv) be bound/committed to any resolutions/transactions pertaining to such matters; unless a prior written consent of the Investor and the Promoters has been obtained by the Company; provided however, that for a matter which pertain to issuance of Securities by a Material Entity and where the Company intends to or proposes to decline, or recuse itself from participating in such issuance, or not subscribing to its entire pro-rata entitlement required to maintain the Company's shareholding in the Material Entity (on a fully diluted basis) as on the date

immediately prior to such issuance by the Material Entity, a written consent shall be required to be obtained only from the Investor prior to the Company declining, recusing itself, or not subscribing to its pro-rata entitlement in the Material Entity.

13.1.2. The Company and the Promoters agree, covenant and undertake that any updates to the list of Restricted Persons and its communication to FRL under FRL SHA shall be undertaken only after a prior written consent of the Investor has been obtained.

13.1.3. The Company and the Promoters agree, covenant and undertake that any assignment of the rights and obligations of the Company or the Promoters under the FRL SHA shall be undertaken only after a prior written consent of the Investor has been obtained.

13.2. FRL SHA

13.2.1. The Promoters and the Company agree, covenant and undertake to comply with the provisions of the FRL SHA at all times. If any provision of the FRL SHA is breached or likely to be breached ("FRL SHA Breach"), the Promoters and the Company shall be obligated to undertake all actions necessary to ensure that such a breach is duly addressed and, or rectified and the rights and, or, interests of the Company under the FRL SHA are not violated and shall promptly, notify the Investor in writing in relation to such FRL SHA Breach.

13.2.2. Upon the occurrence of a FRL SHA Breach, the Company, and, or, the Promoters shall promptly issue a notice to the Investor, specifying in such notice, details with respect to the FRL SHA Breach, and the remedial actions proposed to be undertaken by the parties thereto. Without prejudice to the foregoing, the Investor shall have the right to issue a written notice to the Company specifying the details of the FRL SHA Breach to the extent the details of the breach are available with it, along with the remedial measures and steps that it is of the opinion that the Company should undertake in

respect of such FRL SHA Breach to enforce and protect the rights of the Company (the notice issued by the Investor pursuant to this Section 13.2 (FRL SHA) hereinafter, the "FRL SHA Breach Notice")

13.2.3. Within 10 (ten) days of receipt of the FRL SHA Breach Notice, the Company shall and the Promoters shall cause the Company to take all such actions as may be necessary and, or, as may be suggested by the Investor under the FRL SHA Breach Notice for rectifying the concerned breach of the FRL SHA and ensuring that the terms of the FRL SHA are strictly complied with.

13.2.4. In the event the Company and, or, the promoters fail to take appropriate and adequate steps and actions to protect and enforce the rights and entitlements of the Company under the FRL SHA and the applicable Laws, pursuant to such FRL SHA Breach, within a period of 15 (fifteen) Business Days or such other extended period as may be approved in writing by the Investor, or in the event the Promoters and the Company fail to get the FRL SHA Breach rectified or abandon the conduct of the remedial measures initiated, at any point in time, for rectification or resolution of the FRL SHA Breach, to the satisfaction of the Investor, the Company and the Promoters agree and acknowledge that the Investor shall be deemed to be the Company's duly appointed attorney with the full power, rights and authority to take such actions and steps as it deems fit on behalf of the Company and in the name of the Company in order to protect and enforce the rights, entitlements and interests of the Company. In this regard, the Company hereby grants the authority and the power to the Investor and its advisors, authorized representatives, officers and agents, to act as the legal representative/nominee/attorney of the Company and exercise, as the Investor deems fit on behalf of the Company, all such rights and powers that may be available to the Company under the FRL SHA and as a shareholder of FRL, including but not limited to the right to vote, attend shareholders' meetings (for and

on behalf of the Company), initiate any legal proceedings against FRL and, or, the Promoters, for the purposes of ensuring that the FRL SHA is strictly complied with and the Company's rights under the FRL SHA are adequately safeguarded.

13.2.5. The company and the Promoters hereby agree that any action or decision that may be undertaken pursuant to Section 13.2 (FRL SHA) above is being undertaken in the best interest of the Company and to safeguard rights and entitlements of the Company.

10.15 Relevant Clauses of FRL SHA read as under:-

4.1. The Existing Shareholders hereby agree, covenant, and undertake:

(i) To perform and observe all of the provisions of this Agreement, the Memorandum of Association, and the Articles of Association.

(ii) To ensure and procure that every Person for the time being representing it in its capacity as a Shareholder will exercise any power to vote or cause the power to vote to be exercised, at any meeting of the Shareholders so as to enable the approval of any and every resolution necessary or desirable to give full effect to this Agreement, and likewise so as to ensure that no resolution is passed which is not in accordance with this Agreement; and

(iii) To cause its Affiliates, to comply with the provisions of paragraph (i) and (ii) of this Section 4.1.

xx xx xx

6. TRANSFER OF SECURITIES.

6.1. <u>Ownership and Control of the Existing Shareholders and Existing Shareholder Affiliates</u>.

6.1.1. The Existing Shareholders hereby represent and warrant that the shareholding/ownership pattern of the Existing Shareholders listed in <u>Part B</u> of <u>Schedule I</u> (Existing Shareholders) as on the Execution Date is, and as on the Effective Date shall be, as set forth in <u>Schedule V</u> (Shareholding Patten of Existing Shareholders) and that as on

the Execution Date, and the Effective Date, the Ultimate Controlling Person wholly owns and shall own, directly and through his Immediate Relatives, and Controls, and shall Control, each of the Existing Shareholders listed in Part B of Schedule I (Existing Shareholders).

6.1.2. Each Existing Shareholder (including any Existing Shareholder and, or, Existing Shareholder Trust) which acquires Securities pursuant to Section 6.2.4 (Transfer to Affiliates) hereof, or any Affiliate or person forming part of the Promoter Group (as defined in the SEBI (ICDR) Regulations) of the Company who acquires further Securities of the Company (and each such Person, the "Existing Shareholder Affiliate"), which is a body corporate, hereby agrees, covenants, and undertakes that as long as it holds any Securities of the Company, the Ultimate Controlling Person and his Immediate Relatives, shall Control such Existing Shareholder, Existing Shareholder Trust or Existing Shareholder Affiliate (to the exclusion of other Persons), and own and hold at least 76% (seventy six percent) of the legal and beneficial ownership (and voting interests) on a fully diluted basis of such Existing Shareholder, Existing Shareholder Trust and, or Existing Shareholder Affiliate.

6.2. Restrictions on Transfer of or Encumbrances over Existing Shareholder Securities.

6.2.1. Each of the Existing Shareholders hereby covenant, undertake and agree that it shall not, and shall ensure that the Existing Shareholder Affiliates shall not and FCL hereby agrees, covenants, and undertakes that it shall not, Transfer or Encumber any of the Securities of the Company held by it to any Person or create any Encumbrance over the Securities of the Company held by it except pursuant to mutual written consent of FCL and the Existing Shareholders. All Transfer of Securities permitted by this Agreement may only be made in compliance with requirements of Law.

6.2.2. Encumbrances over Existing Shareholder Securities: In the event there is a breach, or event of default, or any

other event or occurrence, under any agreement, or arrangement relating to any loan, and, or debt taken or raised by the Company with a Lender whereby the Lender makes or is entitled to make a claim of any interests over the Existing Shareholders Securities (such event, the "Existing Shareholders Event of Default"), including any right of alienation, disposal etc., the Existing Shareholders shall immediately, and no later than 1(one) day from the occurrence of such event, notify FCL, in writing, of such event and in such case, the Company shall, if requested by the Existing Shareholders, and the FCL, undertake all such actions as may be required to replace the Lenders of the Company with such other Persons as may be nominated by the Existing Shareholders, and FCL.

6.2.3. The Company shall not assume any share transfer restrictions (including without limitation any lock-in, right of first refusal, right of first offer, tag-along rights) on the Existing Shareholder Securities in favour of any Person, without the prior consent in writing of FCL (which consent may be provided, or denied by FCL, in its sole and absolute discretion). Any request for FCL's consent pursuant to this Section 6.2.3 by the Company shall be made in writing and shall be accompanied with adequate details of the exact nature of rights proposed to be granted, the third party to whom the rights are proposed to be granted, the tenure of these rights, and true and accurate copies of any agreements proposed to be executed with such third party.

6.2.4. Transfer to Affiliates.

(i) Notwithstanding anything to the contrary contained in this Agreement, any Existing Shareholder may Transfer Existing Shareholder Securities:

(a) to its Affiliate (provided such Affiliate satisfies the requirement of Section 6.1 (Ownership and Control of the Existing Shareholders and Existing Shareholder Affiliates) and the Existing

Shareholder has obtained an executed Deed of Adherence from such Affiliate, and delivered the same to the Company and FCL) or to another Existing Shareholder; or

(b) to a trust whose only trustees and only ultimate beneficiaries are such Existing Shareholder's Immediate Relatives, and if such Existing Shareholder is not a natural Person, then to a trust whose only trustees and only ultimate beneficiaries are the Ultimate Controlling Person, or his Immediate Relatives ("Existing Shareholder Trust"), as part of a bona fide succession-planning exercise, provided that the Existing Shareholders have obtained an executed Deed of Adherence from such trust, and its trustees, and delivered the same to the Company and FCL; or

(ii) If, after any Transfer pursuant to Section 6.2.4(i)(a), or Section 6.2.4(i)(b), the applicable Affiliate ceases to be an Affiliate (or ceases to satisfy the requirement of Section 6.1). or the trust ceases to be Existing Shareholder Trust, then the Existing Shareholder that made the Transfer (the "Transferring Party") shall, procure that such Person shall immediately Transfer such Existing Shareholder Securities to the Transferring Party or to another Affiliate, or Existing Shareholder Trust of the Transferring Party in accordance with the terms of this Section 6.2.4 and the Transferring Party shall immediately give notice to the Company, and FCL that such Transfer has occurred.

xx xx xx

9. RESERVED MATTERS AND OTHER MATTERS.

9.1. Notwithstanding anything to the contrary, the Existing Shareholders, and the Company hereby agree and undertake that the matters set forth below shall not be taken-up, decided, acted upon or implemented by the Company ("Reserved Matters"); nor the Reserved

Matters be placed for a vote thereon at a Shareholders' meeting of the Company; nor any decision be taken by the Shareholders or Board or any committee of the Board; nor the Company be bound/ committed to any resolutions/ transactions pertaining to the Reserved Matters, unless the Reserved Matter has been, first approved in the affirmative, in writing, by FCL. Without limiting the generality of the foregoing, in the event that the Company proposes to take up, or decide any Reserved Matters, in (a) any meeting of the Board, or any committee thereof, such matter shall be taken up only if the written consent of FCL has been obtained prior to such meeting, or (b) any meeting of the Shareholders of the Company, such matter shall be taken-up only if the written consent of FCL has been obtained prior to such meeting.

(i) except as otherwise provided in Section 9.2 (Permitted Transactions), any transfer or license of all or substantially all of the Assets of the Company (including all, or substantially all Intellectual Property), including without limitation a Restricted Transfer;

(ii) any Restricted Transfer to an Affiliate, or a 'related party' of the Company, or the Existing Shareholders;

(iii) any amendment to the Articles of Association which is in conflict with the rights of FCL under this Agreement; and

(iv) any issuance of Securities to a Proposed Investor not in accordance with Section 7 (Further Issue of Capital).

10.16 Rights to veto in relation to amendment to Memorandum and Article of Association of a company which adversely impact the investors' right, alteration in its capital structure, material divestment, transfer or disposal of an undertaking, material acquisition of any company business, undertaking or joint venture which have a direct effect on the investment do not form

part of the ordinary course of business and are meant for protection of the investment and may not amount to control on the company, however, the imposition of restriction on voting rights for all the promoters and shareholders without the prior consent of the investor and the rights to interfere beyond the protective rights of the investment and disproportionate thereto, may cross over from the protective rights to controlling rights.

10.17 A conflated reading of the Clause-4.1 (iv) of the FCPL SHA and Clause-4.1 of the FRL SHA would show that vide the FCPL SHA a control was created even on the voting rights of the promoters of FCPL in relation to their decisions as shareholders of FRL so as to enable the approval of any and every resolution necessary or desirable to give effect to FCPL SHA and FRL SHA and likewise to ensure that no resolution of FRL is passed which is not in accordance with the FCPL SHA and/or FRL SHA. Even Clause-4.1 of the FRL SHA correspondingly provides for an obligation on every person representing as a shareholder of FRL, to exercise any power to vote or cause the power to vote to be exercised at any meeting of the shareholders so as to enable the approval of any and every resolution necessary or desirable to give full effect to the FRL SHA and to ensure that no resolution which is not in accordance with FRL SHA is passed.

10.18 Clause 9.1 of the FRL SHA relates to reserved matters. It is a non-obstante clause that obligates the existing shareholders (as set out in Schedule 1) and FRL to undertake that FRL would not take up, decide, act upon or implement certain 'Reserved Matters', and further that such Reserved Matters shall not be voted upon at a shareholders meeting of FRL, nor any decision would be taken on such reserved matters by the shareholders or the directors or any committee of the board of FRL, nor

would FRL be bound to any such resolutions relating to such reserved matters, unless such Reserved Matter has been first approved in the affirmative by FCPL.

10.19 The reserved matters are set out in Clause 9.1(i) to (iv) and comprise of:-

i) Any transfer or license of all or substantially all of the Assets of FRL (including all, or substantially all Intellectual Property), including without limitation a Restricted Transfer;
ii) Any Restricted Transfer to an Affiliate or a 'related party' of FRL or the Existing Shareholders.
iii) Any amendment to the Articles of FRL which is in conflict with the rights of FCPL under the FRL SHA; and
iv) Any issuance of securities to a Proposed Investor not in accordance with Section 7 of the FRL SHA (relating to further issue of capital).

10.20 Clause 9.1 therefore provides that all 'Reserved Matters' as stipulated in Clause 9.1(i) to (iv) cannot be taken up, voted upon or implemented by FRL unless the same are expressly permitted by FCPL.

10.21 Whereas clause 9.1 makes it mandatory for FRL to first obtain consent of FCPL for acting upon Reserved Matters, Clause 13.1 of the FCPL SHA requires FCPL to take consent of Amazon for all such matters, Clause 13.1 of the FCPL SHA is also a non-obstante clause that obligates the Promoters and FCPL to not cause the material entity, i.e, FRL, to take up the following matters unless a prior written consent of the Investor, i.e., Amazon and the Promoters has been obtained by FCPL:

i) Take up, decide, act upon or implement the matters set out in the FRL SHA which require the consent of FCPL, or

ii) Place such matters which require the consent of FCPL for a vote thereon at the board of directors meeting or shareholders meeting of FRL, or

iii) Take any decision or cause any decision to be taken by the shareholders of the board of directors or any committee of the board of FRL on matters requiring consent of FCPL or

iv) Be bound or committed to any resolutions or transactions pertaining to such matters which require the consent of FCPL;

10.22 Further Clause 13.1.1 of the FCPL SHA requires the promoters of FCPL and FCPL to not cause FRL to take up, decide, act upon or implement the matters as set out in FRL SHA, which require the consent of FCPL or place such matters for a vote thereon at the board or shareholders meeting of the FRL or take any decision or cause any decision to be taken by the shareholders or the Board or any committee of the board of FRL on such matters, or be bound/committed by any resolutions/transactions pertaining to such matters unless a prior written consent of Amazon and the promoters has been obtained by FCPL. It further provides that FCPL is required to take prior written consent from Amazon in case FRL issues securities which FCPL proposes to decline to subscribe.

10.23 A conjoint reading of Clause 9.1 of the FRL SHA and Clause 13.1 of the FCPL SHA therefore shows that firstly, express consent of FCPL is required by FRL to act upon 'Reserved Matters' under Clause 9.1, and that secondly, such 'Reserved Matters' that require the consent of FCPL squarely fall under Clause 13.1 of the FCPL SHA, which cannot be acted upon by FCPL or the Promoters unless approved in writing by Amazon.

10.24 Cumulatively, it is clear that Amazon's consent is required by FRL to act upon 'Reserved Matters' and that without the consent of Amazon, FRL

is only entitled to deal with and carry out 'Permitted Transactions' which are set out in Clause 9.2 of the FRL SHA.

10.25 Clause 9.2 (i) and (ii) set out the Permitted Transactions. It is severely limited in its operation and includes the sale or transfer of 'Non-Core Assets' (other than Retail Assets) which constitute less than 2% of the turnover or Assets of FRL at the time of such sale, provided that such sale is undertaken at fair market value, and that in any one financial year, the FRL does not undertake more than one of such transaction. Another Permitted Transaction under 9.2(ii) is the sale or transfer of securities of any Person held by FRL where such Person operates the convenience stores under the brand name '7-Eleven' which is an exempted entity.

10.26 Accordingly, for any sale or transfer to be undertaken by FRL which is not a Permitted Transaction (covered under Clause 9.2 of the FRL SHA), FRL would require the express consent of FCPL, and FCPL would in turn require the express consent of Amazon for all such matters as per Clause 13.2 of the FCPL SHA. As set out above, given the narrow ambit of permitted matters that can be taken up by FRL without requiring the consent of Amazon, there is prima-facie a very limited discretion available to FRL for conducting its own business.

10.27 Clause 15.17 of the FCPL SHA strongly relied upon by FRL provides:

> "*For the avoidance of doubt, Parties hereby expressly record their undertaking that the Promoters and the Investor have no agreement or understanding whatsoever in relation to the acquisition of shares or voting rights in, or exercising control over, FRL and that the Company, the Promoters and the Investors otherwise do not intend to act in concert with each other in any way whatsoever.*"

10.28 According to Amazon Clause 15.17 of the FCPL SHA is under the heading Call Options and not the main provisions. Clause 15 of the FCPL SHA provides Amazon with a Call option to purchase FRL shares, to become the single largest shareholder, upon the occurrence of a change in law event which is defined to include a relaxation if any, or all conditions prescribed, as on the Execution Date, under FEMA Regulations, with respect to foreign direct investment in multi retail brand. Thus, even on being able to exercise the call option if Amazon is not to have control over FRL then Amazon cannot exercise control over FRL *in praesenti* based on the conflation of the FCPL SHA and FRL SHA. Further as per Clause 15.1 Amazon though has a right in its sole discretion, to purchase either by itself or by its permitted affiliates, the FRL call option securities upon occurrence of a FRL change in Law Event, Amazon had no obligation to exercise the said option.

10.29 As noted above, the promoters of FCPL are the majority shareholders of FRL. Further, 9.82% of FRL's shareholding is with FCPL. Thus as per the FCPL SHA, on matters which require the consent of FCPL as set out in FRL SHA, no matter can be taken up, decided or implemented by the majority shareholders of FRL and the shareholders of FCPL without the consent of Amazon. These covenants prima facie transgress from a protective right to a controlling right in favour of Amazon particularly in view of the fact that the matters essentially requiring the consent of Amazon are of a very wide ambit, and the matters within the sole discretion of FRL are very limited. This seems to be for the reason that Amazon was not only safeguarding its investments by creating protective rights, but also creating preemptive rights

in contemplation of any change in Indian law that would permit Amazon to hold substantial shareholding of FRL.

10.30 The rights granted to Amazon by conflation of the two Shareholders Agreements are prima facie disproportionate to the actual shareholding of Amazon and by camouflaging of words, the extensive rights held by Amazon by the provisions of the inter se agreements set out above, cannot be masked as mere protective rights so as to fall beyond the test of 'control' as elaborated in *Arcelor Mittal* (supra).

10.31 Therefore, this Court is prima facie of the opinion that the conflation of the three agreements i.e. FRL SHA, FCPL SHA and FCPL SSA besides creating protective rights in favour of Amazon for its investments also transgress to 'control' over FRL requiring government approvals and in the absence thereof are contrary to FEMA FDI Rules.

Tortious interference

11.1 Case of FRL is that Amazon is unlawfully interfering in FRL's endeavour to survive by amalgamation of FRL alongwith other group companies with Future Enterprises Limited (FEL) and the subsequent transfer and vesting of the 'retail and wholesale undertaking' from FEL as a going concern on a slump sale basis to Reliance. FRL's transaction with Reliance being legal and valid, interference of Amazon therein amounts to tortious interference, hence Amazon is liable to be injuncted. Specific case of FRL is that the EA itself being a nullity, as the Emergency Arbitrator is a *coram non judice,* upholding the illegality thereof and/or holding that the Resolution dated 29th August, 2020 of FRL is not void or contrary to the statutory provisions and the right sought to be exercised by Amazon by

conflating the FRL SHA, FCPL SHA and FCPL SSA as a single integrated contract, being illegal and violative of FEMA FDI Rules 2019, Amazon is liable to be injuncted from interfering in the transaction which is being carried out in the best interest of FRL and its stakeholders.

11.2 The tort of unlawful interference in a contract, also referred to as 'tortious interference' and 'causing loss by unlawful means' forms a species of economic torts and has since decades been a subject of judicial and academic debate. Lord Nicholls of Birkenhead in his opinion in *OBG Ltd v Allan, [2007] UKHL 21* described the complexity in determining the ingredients of the tort of unlawful interference as under:-

> *"139. ..... In particular the House is called upon to consider the ingredients of the tort of interference with a business by unlawful means and the tort of inducing breach of contract. These are much vexed subjects. Nearly 350 reported decisions and academic writings were placed before the House. There are many areas of uncertainty. Judicial observations are not always consistent, and academic consensus is noticeably absent. In the words of one commentator, the law is in a 'terrible mess'. So the House faces a daunting task.*
>
> *(Emphasis Supplied)*

11.3 Similar observations were made by the Supreme Court of Canada in the decision of *A.I. Enterprises Ltd. Versus Bram Enterprises Ltd. and Jamb Enterprises Ltd*, 2014 SCC Online Can SC 16. Writing for the Court, Cromwell, J., opined:-

> *28. I will not dwell on the unfortunate state of the common law in relation to the unlawful means tort. As I noted earlier, there is not even consensus about what it ought to be called. One leading scholar simply observed that "[t]he economic torts [of which the unlawful means tort is one] are in a mess": H. Carty, "Intentional Violation of Economic Interests: The Limits of Common Law Liability" (1988), 104 Law Q. Rev. 250, at p.*

> *278. Careful review of the development of the unlawful means tort reveals confusion, overlap and inconsistency: see, e.g., Carty, An Analysis of the Economic Torts (2nd ed.), at pp. 73-78; P. Burns, "Tort Injury to Economic Interests: Some Facets of Legal Response" (1980), 58 Can. Bar Rev. 103, at pp. 145-48; T. Weir, Economic Torts (1997), at pp. 36-43; L.L. Stevens, "Interference With Economic Relations — Some Aspects of the Turmoil in the Intentional Torts" (1974), 12 Osgoode Hall L.J. 595, at pp. 617-19. At its core, however, the tort has two key ingredients: intention and unlawfulness. The gist of the tort is the intentional infliction of economic harm by unlawful means.*
>
> *(Emphasis Supplied)*

11.4 One of the leading decisions on this subject and relied upon by FRL is the decision of the House of Lords in *OBG Ltd. v. Allan (Supra),* where the House of Lords was deciding 3 appeals that involved the same issues of law, though the facts therein were different. This decision succinctly lays down the law in relation to economic torts. The decision also discusses the other two decisions cited by FRL i.e. *Lonhro PLC vs. Fyed* and *Merkur Island Shipping Corporation* (supra)

11.5 In *OBG Ltd. v Allan (Supra)*, the House of Lords rejected the unified theory propounded in *Torquay Hotel Co Ltd v Cousins [1969] 2 Ch 106*, where Lord Denning held that there could be liability for preventing or hindering performance of the contract (unlawful interference) on the same principle as liability for procuring a breach of contract. The decision in *Torquay Hotel* of Lord Denning was approved by Lord Diplock in *Merkur Island (Supra)*. Therefore, pursuant to *Merkur Island*, the courts treated inducement/procurement of a breach of contract as the same tort as causing loss by unlawful means (tort of unlawful interference).

11.6 In *OBG Ltd.*, the court rejected this unified theory and held that the

tort for inducement/procuring the breach of contract is distinct from the tort of unlawful interference/causing loss by unlawful means. The position was concluded by Lord Nichols in Paragraph 194:-

> *"194. It may be helpful to pause and take an overall look at where this leaves the law. The effect of the views expressed above is to draw a sharp distinction between two economic torts. One tort imposes primary liability for intentional and unlawful interference with economic interests. The other tort imposes accessory liability for inducing a third party to commit an actionable wrong, notably a breach of contract, but possibly some other actionable civil wrongs as well."*

11.7 In para 45, the House of Lords held that the most important question concerning this tort is determining what constitutes as 'unlawful means'. Lord Hoffman opined as under:-

> *"45. The most important question concerning this tort is what should count as unlawful means. It will be recalled that in Allen v Flood [1898] AC 1, 96, Lord Watson described the tort thus- when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case…the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."*

11.8 The rationale of the tort was noted by Lord Hoffman in para 46 as under:-

> *46. The rationale of the tort was described by Lord Lindley in Quinn v Leathem [1901] AC 495, 534-535: "a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the*

damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact – in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified – the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done." *(Emphasis Supplied)*

11.9 FRL has cited paragraph 47 and 51 of *OBG v. Allan (Supra)*. These paragraphs form part of the opinion of Lord Hoffman, who wrote for the majority in so far as the essence of the tort of unlawful interference and the issue of unlawful means as an element of the tort of unlawful interference is concerned. Paras 47 and 51 of the report read as under:

"47. The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant. The old cases of interference with potential customers by threats of unlawful acts clearly fell within this description. So, for the reasons I have given, did GWK Ltd v Dunlop Rubber Co Ltd 42 TLR 376. Recent cases in which the tort has been discussed have also concerned wrongful threats or actions against employers with the intention of causing loss to an employee, as in Rookes v Barnard [1964] AC 1129, or another employer, as in J T Stratford & Son Ltd v Lindley [1965] AC 269. In the former case, the defendants conspired to threaten the employer that unless the employee was dismissed, there would be an unlawful strike. In the latter, the union committed the Lumley v Gye tort of inducing breaches of the contracts of the employees of barge hirers to prevent them from hiring the plaintiff's barges.

xx xx xx

51. Unlawful means therefore consists of acts intended to

cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant."

11.10 In India, the ingredients of tortious unlawful interference were succinctly laid down in the decision *2017 SCC Online Calcutta 14920 Lindsay International Vs. L.N. Mittal* following the decision in *OBG Limited* (supra) as under:

(i) use by the defendant of unlawful means.
(ii) interfering with the action of a third party in relation to the claimant.
(iii) intention to cause loss to the complainant.
(iv) Damages.

11.11 In *Lindsay International* (supra) the Court also noted various decisions from different jurisdictions abroad before laying down the necessary ingredients for determining tortious unlawful interference as under:

"73. The indeterminate ambit of "unlawful means" thus remains one of the principal causes of uncertainty as to the potential scope of liability under this tort. The issue has been the subject of some judicial deliberation in other common law jurisdictions. In Scotland, in McLeod v. Rooney, Lord Glennie concluded from an extensive review of the speeches in OBG Ltd. v. Allan that "the essential aspect [of the tort] is that the loss is caused to the claimant through a third party on whom the defender has unlawfully acted. That is the control mechanism. The inquiry focuses on the nature of the disruption caused as between the third party and the claimant rather than on the directness of the causative link between the defender's wrong and the claimant's loss." ([2009] CSOH 158; 2010 S.L.T. 499 at 18)

74. A party must be shown to have known that they were inducing a breach of contract. It is not enough that a defendant knows that he is procuring an act which, as a matter of law or construction of the contract, is a breach, nor that he ought reasonably to have known that it is a breach. (See OBG v. Allan per Lord Hoffman at Paragraph 39; British Industrial Plastics Ltd. v. Ferguson (1940) 1 All E.R. 479).

75. In East England Schools CIC (t/a 4MySchools) v. Palmer (2013) EWHC 4138 (QB); (2014) I.R.L.R. 191, it was held that the second defendant knew that it was likely that the first defendant was subject to some form of restrictive covenant, but had failed to take reasonable steps to make himself aware of the precise nature of those restrictions. Further, the second defendant knew that his instructions could well require the first defendant to act in breach (and in fact they did). As such, the second defendant was liable for procuring the first defendant's breach. (See Clerk & Lindsell on Torts, 21st Edition)

76. In Quinn v. Leathem Lord Macnaghten (1901) A.C. 495 at 510) it is said that "a violation of a legal right committed knowingly is a cause of action, and… It is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."

77. Interference with the performance of a contract is an actionable wrong unless there be justification for interfering with the legal right. This tort is committed when A either persuades B to break his contract with C or by showing some unlawful acts he indirectly prevents B to perform contract. The origin of this tort is traced to Lumley v. Gye as mentioned earlier.

78. The principles that emerged from the discussions made above are that interference with the subsisting contract may arise in three different ways. It is not restricted simply to procuring a breach of contract but covers interference with the performance of the contract as well, that is to say, preventing or hindering one party from performing his contract even though it may not be a breach of the contract. Direct intervention by the persuasion whether by himself or his agents

by words or other acts of communication if are intended to influence to break the contract with C would constitute a cause of action.

79. The second category consists of cases where the intervener does some unlawful acts on the person or property of B which disables him in performing his contract with C.

80. The third category covers cases where intervener persuades the third party to do some unlawful acts which interferes in B's due performance of his contract with C as was intended.

81. In Greig v. Insole, (1978) 3 All ER 449, five conditions have laid down that are required to be fulfilled by the plaintiff in a suit for interference with a subsisting contract. First, there must be either (a) 'direct' interference with performance of the contract or (b) indirect interference with performance coupled with the use of unlawful means. Secondly, the defendant must be shown to have knowledge of the relevant contract; but it is not necessary that he should have known its precise terms. (Emerald Construction Co. Ltd. v. Lawthien, (1966) 1 WLR 691). Thirdly, he must be shown to have had the intent to interfere with it. Fourthly, the plaintiff must show that he has suffered special damage, that is, more than nominal damage. Fifthly, so far as is necessary, the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.

82. At this stage, however, the Court is only required to find out if the necessary ingredients of such "economic tort" constituting the cause of action are present in the plaint and not to assess the evidentiary value of such averments."

11.12 In *1999 (50) DRJ 656 Pepsi Foods Ltd. Vs. Bharat Coca Cola Holdings Pvt. Ltd*., referred by Amazon though not relied during the course of arguments, Pepsi Foods sought permanent injunction against Coca Cola restraining it from making offers and inducement to their key employees from time to time, to breach employment contract with Pepsi and join Coca Cola This Court declining the interim injunction held that the matter required evidence and that the inducement would curtail right to seek better

employment and the freedom to change employment. It was held that an injunction can be granted only for protecting rights of the plaintiff but cannot be granted to limit the legal rights of the defendant.

11.13 In *2020 SCC Online Del 673 Inox Leisure Limited Vs. PVR Limited*, a Coordinate Bench of this Court was dealing with a case where Inox had entered into a contract with property owners in Amritsar to develop a multiplex. Inox contended that PVR, its competitor, induced the property owner to break its contract with Inox and instead entered into a contract with PVR for developing the multiplex. Thus, Inox sought permanent injunction restraining the defendant from attempting to induce breach of contract. The suit was dismissed at the stage of settling of issues, allowing the application under Order VII Rule 11 CPC by holding that relief as claimed was barred by law in view of Section 27 of the Indian Contract Act and the fundamental right to carry on business. However, in appeal, although the impugned judgment was not challenged on merits, the Division Bench of this Court observed that an action for tortious interference is a matter of evidence and trial is necessary.

11.14 Thus existence of a contract, interference wherein is alleged is a *sine qua non* for the tort of inducement. Contention on behalf of Amazon is that no such contract between FRL and Reliance has been placed on record hence FRL's suit for tortious interference is not maintainable. The two fold submission of Amazon in this regard is that firstly, the resolution of FRL dated 29th August, 2020 is void and secondly FCPL has not granted its consent which was required by FRL before proceeding with the transaction and in any case the said document has not seen the light of the day.

11.15 As noted in the preceding paragraphs, the resolution dated 29th August, 2020 is neither void nor contrary to any statutory provisions. Further, FRL has filed the document dated 29th August, 2020, signed by FRL and FCPL showing that FCPL has consented to the transaction. According to Amazon since the said document has not been filed accompanied by statement of truth under Order VI Rule 15(a) of CPC the said document cannot be looked into. As noted above in the initial paragraphs of this judgment, parties at the ad-interim stage have advanced arguments at length without filing written statements/counter affidavits and to this procedure both parties agreed. Amazon has also filed number of documents including various emails, transcripts of the proceedings recorded before the Emergency Arbitrator beseeching this Court to consider the same without even filing written statements or counter affidavits much less statement of truth. Hence, this court is not declining to take on record the document dated 29th August, 2020. Of course, it will be for the parties to comply with the provisions of the Code of Civil Procedure, 1908 while completing the pleadings in the suit and file necessary affidavits.

11.16 The Resolution dated 29th August, 2020 of FRL approving the proposed transaction between FRL and Reliance satisfies the requirement of a valid contract. Further the plea of Amazon that the Resolution is in breach of the FRL SHA as no prior consent of FCPL is taken is negated by the letter dated 29th August, 2020 from FRL to FCPL whereon consent of FCPL is duly enclosed. The Resolution and the letter of FRL dated 29th August, 2020 clearly satisfy the first requirement of a subsisting contract, interference wherein is alleged.

11.17 Thus applying the four tests as laid down in *Lindsay International*

(supra) to the facts of the present case, it is evident that the second, third and fourth test stand prima facie satisfied as Amazon has written letters to various statutory authorities/Regulators asking them not to grant approval to the transaction between FRL and Reliance, which would cause loss and damages to both FRL and Reliance.

11.18 As regards the first test of "use of unlawful means" by Amazon, FRL has relied on three grounds, reliance whereon by Amazon in its representations to the statutory authorities/Regulators makes Amazon's representation illegal. Firstly, that Amazon has illegally relied upon the EA order which is invalid as the Emergency Arbitrator has no legal status in Part I of the A&C Act; Secondly, that Amazon's characterization of the board resolution of FRL dated 29th August, 2020 as a void board resolution is wholly without any basis in law and illegal; and Thirdly, that Amazon has made false assertions as to the legality of its rights by conflating the FCPL SHA and FRL SHA, as the same amounts to violation of FEMA (FDI) Rules.

11.19 In *OBG Ltd. v. Allan* (Supra), the House of Lords recognized that although the ingredient of 'unlawful means' is well established, there exists controversy as to its scope. Various earlier decisions were discussed and the broad and narrow scope of 'unlawful means' was highlighted. Relevant extract is set out hereunder:-

> *149. Although the need for 'unlawful means' is well established, the same cannot be said about the content of this expression. There is some controversy about the scope of this expression in this context.*
>
> *150. One view is that this concept comprises, quite simply, all acts which a person is not permitted to do. The distinction is between 'doing what you have a legal right to do and doing*

> *what you have no legal right to do': Lord Reid in Rookes v Barnard [1964] AC 1129, 1168-1169. So understood, the concept of 'unlawful means' stretches far and wide. It covers common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on.*
>
> *151. Another view is that in this context 'unlawful means' comprise only civil wrongs. Thus in Allen v Flood itself Lord Watson described illegal means as 'means which in themselves are in the nature of civil wrongs': [1898] AC 1, 97-98. A variant on this view is even more restricted in its scope: 'unlawful means' are limited to torts and breaches of contract.*
>
> *(Emphasis Supplied)*

11.20 Eventually, the House of Lords by majority agreed to the view taken by Lord Hoffman, who opined that the scope of 'unlawful means' should be narrow as laid down in *[1898] AC 1 Allen v Flood*. It was in this background that he defined 'unlawful means' in Paragraph 51 of his opinion as noted above.

11.21 Various examples of what was found 'unlawful means' in this context can be ascertained from the judicial decisions referred to in OBG (Supra). Lord Hoffman illustrated the cases of *[1908] 1 Ch 335 National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd*, where the defendant had fraudulently induced a third party to act to the plaintiff's detriment. The fraud was 'unlawful means' as it was actionable by the third party if it had suffered any loss. The decision in *[1990] 2 QB 479 Lonrho plc v Fayed* was also highlighted where the defendant had made fraudulent representations to third parties with an intent to cause damage to the Plaintiff, which would have been actionable by the third parties if they had suffered loss.

11.22 Applying the principles to determine the "unlawful means" as laid down by Lord Hoffman in *OBG Ltd.* (supra) to the facts of the present case, it is evident that on two counts, that is, Amazon asserting that the Resolution dated 29th August, 2020 is void and also asserting its right conflating the FCPL SHA and FRL SHA which amount to control over FRL, the act of Amazon would fall foul of the freedom of FRL and Reliance to enter into the transaction thereby causing loss to both FRL and Reliance which would be a civil wrong actionable by both FRL and Reliance in case they suffer any loss. Thus Amazon's interference on the basis of the incorrect representation would be a civil wrong committed against FRL and Reliance and would thus fall within the test as laid down for 'unlawful means' as defined in *OBG Ltd.* (supra). Therefore, on two counts, FRL has been able to make out a prima facie case of tortious interference by Amazon. It is clarified that it is not the making of the representation by Amazon to the statutory authorities or the Regulators, which is an actionable wrong but making a representation based on incorrect assertions which makes the act based on "unlawful means". It is further clarified that at this stage this Court is only required to form prima facie opinion which this Court has done on the facts before it and as held by the Division Bench of this Court in the case of *Inox Leisure Ltd.* (supra), that whether there is an unlawful interference or not, can be finally determined only after the parties have lead evidence. There is yet another test which has been laid down in some of the decisions such as *Balailal Mukherjee vs. Sea Traders*, *Pepsi Food Ltd.* and *Greig vs. Insole* (supra) that there should be no lawful justification of the defender in interfering however, that is an issue which overlaps while determining the

issue of balance of convenience and will be dealt in the subsequent paragraphs.

Interim Injunction

12.1 Supreme Court in the decision reported as 1992 (1) SCC 719 *Dalpat Kumar &Anr. vs. Prahlad Singh &Ors.* laying down the principles for grant of injunction noted that the grant of injunction is a discretionary relief and exercise thereof is subject to the Court satisfying that (1) there is a serious disputed question to be tried in the suit and that on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it. It was held that therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. However, satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but

means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

12.2 In the decision reported as 1995 (5) SCC 545 *Gujarat Bottling Co.Ltd. & Ors. vs. Coca Cola Co. & Ors*. the Supreme Court reiterating the principles for grant of interim injunction noted that the decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting

from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies. [See: *Wander Ltd.* v. *Antox India (P) Ltd.* [1990 Supp SCC 727]. In order to protect the defendant while granting an interlocutory injunction in his favour the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial.

12.3 Thus the trinity of the principles for grant of interim injunction i.e. prima facie case, irreparable loss and balance of convenience are required to be tested in terms of principles as noted above. Since this Court has held that prima facie the representation of Amazon based on the plea that the resolution dated 29th August, 2020 of FRL is void and that on conflation of the FCPL SHA and FRL SHA, the 'control' that is sought to be asserted by Amazon on FRL is not permitted under the FEMA FDI Rules, without the governmental approvals, this Court finds that FRL has made out a prima facie case in its favour for grant of interim injunction. However, the main tests in the present case are in respect of "balance of convenience" and "irreparable loss". Even if a prima facie case is made out by FRL, the balance of convenience lies both in favour of FRL and Amazon. If the case of FRL is that the representation by Amazon to the statutory authorities /regulators is based on illegal premise, Amazon has also based its representation on the alleged breach of FCPL SHA and FRL SHA, as also the directions in the EA order. Hence it cannot be said that the balance of convenience lies in favour of FRL and not in favour of Amazon. It would be a matter of trial after parties have led their evidence or if decided by any

other competent forum to determine whether the representation of Amazon that the transaction between FRL and Reliance being in breach of the FCPL SHA and FRL SHA would outweigh the plea of FRL in the present suit. Further in case Amazon is not permitted to represent its case before the statutory authorities/Regulators, it will suffer an irreparable loss as Amazon also claims to have created preemptive rights in its favour in case the Indian law permitted in future. Further there may not be irreparable loss to FRL for the reason even if Amazon makes a representation based on incorrect facts thereby using unlawful means, it will be for the statutory authorities/Regulators to apply their mind to the facts and legal issues therein and come to the right conclusion. There is yet another aspect as to why no interim injunction can be granted in the present application for the reason both FRL and Amazon have already made their representations and counter representations to the statutory authorities/regulators and now it is for the Statutory Authorities/Regulators to take a decision thereon. Therefore, this Court finds that no case for grant of interim injunction is made out in favour of the FRL and against Amazon.

Conclusion

13. Consequently, the present application is disposed off, declining the grant of interim injunction as prayed for by FRL, however, the Statutory Authorities/Regulators are directed to take the decision on the applications/objections in accordance with the law.

(MUKTA GUPTA)
JUDGE

DECEMBER 21, 2020
'vn/ga'