

# FUTURE RETAIL



23rd 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**

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Dear Sir / Madam,

Further to our letter dated 21st December, 2020, wherein the Company submitted copy of order pronounced on 21st December, 2020 ("Court Order") by Hon'ble Ms. Justice Mukta Gupta (under Order XXXIX Rule 1 and 2 CPC) in the captioned matter, please find enclosed herewith summary of the said Court Order for your information and record.

Please note that the Company has complied with the disclosure requirement under applicable provisions of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 by submission of the copy of the court order vide our aforesaid letter. The summary is being submitted for the convenience and reference purpose only.

You are kindly requested to acknowledge the receipt.

Thanking you,

Yours faithfully,  
For **Future Retail Limited**

  
**C. P. Toshniwal**  
**Chief Financial Officer**

Encl: as above

**CC:**

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

**IN HIGH COURT OF DELHI****CS (COMM) 493/2020 & I.A. 10376/2020****FUTURE RETAIL LTD. v. AMAZON.COM INVESTMENT HOLDINGS LLC & ORS.****SUMMARY OF THE ORDER DATED 21<sup>ST</sup> DECEMBER 2020 PASSED BY HON'BLE JUSTICE MUKTA GUPTA IN CS (COMM) 493/2020****1. Brief Facts:**

- The Plaintiff/FRL is a listed company having a pan India presence in retail chains, more than 3 lakhs shareholders, and over 25,000 employees. The COVID-19 pandemic severely hit the Indian retail sector and thereby plunged FRL into heavy losses/debt.
- Reliance offered to acquire the retail and wholesale business of FRL along with the logistic and warehousing business from Future Group as a going concern on a slump sale basis for an aggregate consideration of Rs.24,713 crores, on the basis of the terms and conditions set out in the composite scheme of arrangement (“**Scheme**”).
- The Present Suit has been filed by FRL seeking relief/directions from the Hon’ble Delhi High Court against Amazon from tortiously interfering with and before regulatory and statutory authorities, like SEBI, etc. regarding the lawful Scheme sought to be implemented between FRL and Reliance and which Scheme is pending consideration as per statutory procedure before the regulatory and statutory authorities.
- Plaintiff raised a challenge on the basis that the Emergency Arbitrator who passed an order on 25<sup>th</sup> October 2020 (“**EA Order**”) lacked legal status under Indian law and Amazon’s use of the EA Order to try and prevent the regulatory and statutory authorities, like SEBI, etc from proceeding with consideration of Plaintiff’s Scheme pursuant to the resolution dated 29.08.2020 passed by the Board of FRL (“**Resolution**”). The Plaintiff did not challenge the findings in the EA Order on merits.

**2. Issues<sup>1</sup>:**

The Hon’ble High Court framed six issues in the matter, each of which, and the findings thereof are set out hereinbelow.

**I. Whether the present suit is prima facie maintainable?**

- Objections raised by Amazon against maintainability were that (i) arbitration proceedings have commenced on 05.10.2020 under the Shareholders Agreement dated 12.08.2019 (“FCPL SHA”) and there cannot be a collateral challenge to the EA Order, and (ii) the issues raised before the Delhi High Court have already been raised before the Emergency Arbitrator<sup>2</sup>.
- FRL responded to the same stating that the EA Order is not in challenge on merits but rather, only the legal status of the Emergency Arbitrator is in challenge, consequently

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<sup>1</sup> Paragraph 6.1

<sup>2</sup> Paragraph 7.1

rendering the EA Order a nullity; and therefore, the Delhi High Court has the jurisdiction to take up such plea<sup>3</sup>.

**Findings**

- Cause of action pleaded by FRL in the present suit is distinct from the cause of action in the arbitration proceedings and thus the suit is maintainable.<sup>4</sup>
- Amazon’s objection that the pleas in the present suit have already been raised before the Emergency Arbitrator and cannot be reagitated is flawed. Merely because there is an overlap of some factual aspects and legal issues does not mean that the suit is not maintainable.<sup>5</sup>
- Present suit is not barred by the invocation of the Emergency Arbitration by Amazon, as the cause of action in the suit and the arbitration are separate. Merely impleading FRL as a party in the Emergency Arbitration on the basis of conflation of FCPL SHA, FCPL SSA, and FRL SHA and “group of companies” doctrine does not bar FRL from taking any civil action against Amazon.<sup>6</sup>
- FRL is entitled to challenge the legal status of Emergency Arbitrator to the extent required for making out the ingredients of ‘unlawful means’ being resorted to by Amazon<sup>7</sup>
- 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.<sup>8</sup>
- **Prima facie, the present suit is maintainable, and the two grounds raised by Amazon are rejected.**<sup>9</sup>

II. **Validity of Emergency Arbitration** – *Whether the Emergency Arbitrator lacks legal status under Part I of the Arbitration Act and thus coram non judice?*

- FRL claimed that the EA Order is wholly without jurisdiction and coram non judice as the Emergency Arbitrator lacked legal status under Part I of the Arbitration Act.<sup>10</sup>
- Court stated that it is not going into the legality on merits of the EA Order but is solely examining the legal status of the Emergency Arbitrator, i.e. whether the same is permissible in terms of the FCPL SHA and Part I of the Act and not in conflict thereto.<sup>11</sup>

**Findings**

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<sup>3</sup> Paragraph 7.3  
<sup>4</sup> Paragraph 7.8  
<sup>5</sup> Paragraph 7.9  
<sup>6</sup> Paragraph 7.10  
<sup>7</sup> Paragraph 7.11, 7.17  
<sup>8</sup> Paragraph 7.17  
<sup>9</sup> Paragraph 7.18  
<sup>10</sup> Paragraph 8.1  
<sup>11</sup> Paragraph 8.2

- Rule 30 of the SIAC Rules provides for the option to proceed before either an Emergency Arbitrator for interim relief or to apply to a judicial authority for interim relief.<sup>12</sup>
- Parties have expressly chosen SIAC Rules as the curial law governing the arbitral proceedings and the Courts in such case would uphold the party autonomy to do so if the same is not contrary to the public policy of India and mandatory provisions of the Arbitration & Conciliation Act.<sup>13</sup>
- Therefore, the Emergency Arbitrator prima facie is not a coram non iudice.<sup>14</sup>
- Pertinently, however, there is no arbitration agreement between FRL and Amazon.<sup>15</sup> The arbitration is between FCPL and Amazon.<sup>16</sup> The legal consequence of these findings, is that the Emergency Arbitration Proceedings and the EA Order are entirely without jurisdiction qua FRL.

**III. Whether the Resolution dated 29<sup>th</sup> August 2020 of FRL is void or contrary to any statutory provision?**

- With regard to the present issue, the Hon'ble Court held that it is only required to prima facie consider whether there are supervening circumstances for the application of the doctrine of frustration which requires a multi factorial approach as held by the Supreme Court<sup>17</sup>.
- FRL's contended that (i) the COVID-19 pandemic set the stage for supervening circumstances whereby the Indian retail market took a huge hit and FRL being a listed company is facing severe losses/debts, and (ii) it is a fiduciary duty of the directors of FRL to act in the best interest of the company as required under Section 166 of the Companies Act. It is undisputed and the admitted case of Amazon that FRL was in this distressed financial position.<sup>18</sup>

**Findings**

- From the documents filed by Amazon, it is clear that Amazon was informed of the impending financial crisis in FRL due to the pandemic and was moreover asked to step in to help rescue FRL by negotiating with financial institutions for funds. However, nothing concrete emerged from Amazon's side and in face of investors recalling their securities, it was essential for FRL to act to survive. This is a case of supervening circumstance as noted by the Supreme Court and a multifactorial approach must be adopted to test the same.<sup>19</sup>
- No material has been placed by Amazon on record to show that the Resolution passed by the Board of Directors of FRL is void or contrary to any statutory provision. Amazon's contention that the said Board Resolution is in breach of FCPL SHA and

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<sup>12</sup> Paragraph 8.16

<sup>13</sup> Paragraph 8.15

<sup>14</sup> Paragraph 8.26

<sup>15</sup> Paragraph 7.10

<sup>16</sup> Paragraph 8.4

<sup>17</sup> Paragraph 9.7

<sup>18</sup> Paragraph 9.7

<sup>19</sup> Paragraph 9.16

FRL SHA is distinct from it being void or contrary to any statutory provision or contrary to the Articles of Association of FRL. FRL is not bound by the Articles of Association of FCPL but only its own.<sup>20</sup>

- FRL has placed on record Letter dated 29.08.2020 whereby FCPL has signed and consented to the transaction between Reliance and FRL.<sup>21</sup>
  - **Board Resolution dated 29.08.2020 is prima facie neither void nor contrary to any statutory provisions nor the Articles of Association of FRL.**<sup>22</sup>
- 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?*

- FRL claimed that Amazon is unlawfully interfering in the disputed transaction by conflating two separate and independent agreements (i.e. the FCPL SHA and FRL SHA). A conflation of the agreements as suggested by Amazon would confer control over the affairs of FRL to Amazon, which is in violation of FEMA and FDI Rules.<sup>23</sup>
- Amazon objected to the same on the basis that the FRL SHA, FCPL SHA and FCPL SSA are a single integrated transaction and that even if the agreements are conflated, they do not violate foreign exchange laws. Amazon further stated that by various agreements Amazon has only created protective rights for its investments in FCPL amounting to 49% of shareholding of FCPL, which in turn holds less than 10% in FRL. Thus Amazon stated that it neither owns nor controls FCPL, and thus much less FRL.<sup>24</sup>

*Findings*

- The Hon'ble Court referred to the decisions of the Supreme Court in Arcelor Mittal to hold that “Control” includes the right to appoint majority of Directors, the right to control management and the right to control the policy decision. There is a basic principle that veto rights not amounting to acquisition of control are protective rather than participative in nature. However, there is a thin line between rights being confined to veto rights which are protective in nature and veto rights transgressing to acquisition of control of company and thereby subject to FEMA and FDI Rules.<sup>25</sup>
- A conflated reading of Clause 4.1(iv) of the FCPL SHA and Clause 4.1 of the FRL SHA would mean that control was created even on the voting rights of the promoters of FCPL in relation to their decisions as shareholders of FRL to ensure no resolution of FRL is passed which is not in accordance with FCPL SHA and/or FRL SHA.<sup>26</sup>

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<sup>20</sup> Paragraph 9.17

<sup>21</sup> Paragraph 9.18

<sup>22</sup> Paragraph 9.19

<sup>23</sup> Paragraph 10.1

<sup>24</sup> Paragraph 10.2

<sup>25</sup> Paragraph 10.13

<sup>26</sup> Paragraph 10.17

- Clause 9.1 of FRL SHA provides that all “Reserved Matters” as stipulated cannot be taken up, voted upon, or implemented by FRL without the express permission of FCPL.<sup>27</sup>
- A conjoint reading of Clause 9.1 of the FRL SHA and Clause 13.1 of the FCPL SHA clearly shows that firstly the express consent of FCPL is required by FRL to act upon “Reserved Matters” (Clause 9.1 of FRL SHA) and secondly, such “Reserved Matters” that require the consent of FCPL fall squarely within Clause 13.1 of FCPL SHA which in turn requires the written approval of Amazon to be acted upon by FCPL or the Promoters.<sup>28</sup>
- The rights granted to Amazon by conflation of the two agreements are prima facie disproportionate to the actual shareholding held by Amazon and cannot be masked as mere protective rights so as to fall beyond the test of ‘control’.<sup>29</sup>
- **The Hon'ble Court held that it is of the prima facie opinion that the conflation of the three agreements i.e. FRL SHA, FCPL SHA, and FCPL SSA would render the conflated agreement violative of the FEMA FDI Rules.<sup>30</sup>**

**In view of the above findings in the Order, it is submitted that Amazon’s contention that its consent is required for FRL to undertake this Scheme is incorrect and misplaced. Amazon’s contention, would lead to an illegality and render the agreements unlawful.**

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

- Three main grounds on which FRL urges tortious interference by Amazon are<sup>31</sup>:
  - (i) EA Order on which basis Amazon seeks to obstruct the approval procedure underway before the statutory regulators/authorities is invalid as the Emergency Arbitrator is *coram non judice*;
  - (ii) Amazon is illegally claiming the Resolution dated 29.08.2020 of FRL as void and contrary to the statutory provisions;
  - (iii) By conflation of the FRL SHA, FCPL SHA, FCPL SSA, Amazon is exercising ‘control’ over FRL which is forbidden under the FEMA FDI Rules.

**Findings**

- After referring to the English and Indian decisions on the law of tortious interference, the Hon'ble Court held that the existence of a contract is a sine qua non for the tort.<sup>32</sup> The Hon'ble Court held that the Resolution satisfies the requirement of a valid contract<sup>33</sup>.

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<sup>27</sup> Paragraph 10.20

<sup>28</sup> Paragraph 10.23

<sup>29</sup> Paragraph 10.30

<sup>30</sup> Paragraph 10.31

<sup>31</sup> Paragraph 7.5

<sup>32</sup> Paragraph 11.14.

<sup>33</sup> Paragraph 11.16

- Referring to the decision of the Calcutta High Court in Lindsay International<sup>34</sup>, the Court noted that there are 4 tests for this tort (i) use by the defendant of unlawful means (ii) interfering with the action of a third party (iii) intention to cause loss to the complainant (iv) damages. The Hon'ble Court held that Amazon has prima facie satisfied the 2nd, 3rd and 4th test<sup>35</sup>.
- The Hon'ble Court held that “unlawful means” would include making fraudulent representations to third parties with an intent to cause damage to the plaintiff<sup>36</sup>. On this basis, the Hon'ble Court held that Amazon was using “unlawful means” by (i) asserting that the Resolution is void and (ii) conflating the FCPL SHA and FRL SHA which amount to control over FRL, the act of which would fall foul of the freedom of FRL to enter into the transaction, thereby causing a civil wrong and loss to both FRL and Reliance<sup>37</sup>.
- **On these two counts, FRL has been able to make out a prima facie case for tortious interference by Amazon.<sup>38</sup> It is not the making of the representation by Amazon to statutory authorities which is an actionable wrong but the making of a representation based on incorrect assertions which makes the act based on “unlawful means”.**

**In view of the above, Amazon’s interference, on the basis of the incorrect representation set out above is a civil wrong committed against FRL and Reliance and therefore SEBI cannot take cognizance of this unlawful interference in the freedom of FRL to implement the Scheme sanctioned by a valid Board Resolution in compliance with the statutory provisions and Articles of Association of FRL.**

**VI. Interim Injunction – Whether FRL is entitled to an interim injunction?**

- The Hon'ble Court held that since it has found that the representation of Amazon based on the plea that Resolution 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<sup>39</sup>.
- As regards irreparable harm, in case Amazon is not permitted to represent its case before the statutory authorities, it will suffer irreparable loss. **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.<sup>40</sup>**
- The 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 prima facie case is made, the balance

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<sup>34</sup> Paragraph 11.10.

<sup>35</sup> Paragraph 11.17

<sup>36</sup> Paragraph 11.21.

<sup>37</sup> Paragraph 11.22.

<sup>38</sup> Paragraph 11.22

<sup>39</sup> Paragraph 12.3

<sup>40</sup> Ibid.

of convenience lies in favour of both Amazon and FRL. Further the case of irreparable loss may be greater for Amazon.<sup>41</sup>

- **The Court directed the Statutory Authorities/Regulators to take its decision on the applications/objections in accordance with the law.**<sup>42</sup>

- Finally, it is pertinent to note that as there no challenge to the EA Order on merits, the Hon'ble Delhi High Court has not undertaken a review of the EA Order on merits. However, given that the Hon'ble Delhi High Court has held that:

a) the Board Resolution of FRL approving the Scheme is valid in law;

b) the conflation of FRL SHA, FCPL SHA and FCPL SSA would be illegal (for the reasons stated above) and

c) these were the only basis on which the Emergency Arbitration proceedings were initiated against FRL by Amazon, which have now been rejected by the Delhi High Court;

the entire legal basis of the EA Order stands vitiated. This is because the EA Order is premised on a conflation of the FRL SHA, FCPL SHA and FCPL SSA and on the basis that FRL is a party to the arbitration agreement contained therein. Accordingly, when considering Amazon's objections "in accordance with law", the regulatory authorities ought to be guided by the Hon'ble Delhi High Court's order and not the EA Order.

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<sup>41</sup> Paragraph 12.3

<sup>42</sup> Paragraph 13.