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

COMMERCIAL ARBITRATION PETITION NO. 476 OF 2019

Banyan Tree Growth Capital L.L.C. ….Petitioner

V/s.

1. Axiom Cordages Limited
(Previously Known as
Axion Impex International Ltd.)

2. Responsive Industries Limited.

3. Wellknown Business Ventures LLP
(Previously known as Wellknown
Business Ventures Private Limited) …. Respondents.

WITH

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Mr. Aspi Chinoy, Senior Advocate a/w Mr. Rohan Rajadhyaksha, Ms. Anshika Misra, Mr. Sherna Doongaji i/b AZB Partners, Advocates for Petitioners.

Mr. Zal Andhyarujina, Senior Advocate a/w Ms. Ankita Singhania, Mr. Yuvraj Chokshi, Mr. Karan Bhide, Mr. Siddhartha Srivastava, Mr. Sahil Menon i/b Link Legal India Law Service, Advocates for Respondents.

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CORAM : G.S. KULKARNI, J.

DATE : 30 April 2020
(Pronounced through Video Conferencing)

JUDGMENT:

Commercial Arbitration Petition No. 476 Of 2019

1. This petition under Sections 47 to 49 of the Arbitration and Conciliation Act, 1996 (for short **"the A&C Act"**), prays for enforcement of an arbitral award titled as "Put Award" dated 15 January 2019 (as subsequently corrected), of the Singapore International Arbitration Centre (SIAC) Arbitration No. 37 of 2016, as a decree of this court and for prayers consequential to the enforcement of the award.

2. Factual Conspectus

Briefly the facts are: To appreciate the nature of the disputes it would be necessary to note as to how the parties stand in their contractual relations. The petitioner (for convenience **"Banyan Tree"**) is a company incorporated under the laws of Mauritius. It is stated to be a closed-ended fund regulated by the Financial Services Commission in Mauritius having its shareholders *interalia* comprising of large global development financial institutions. The business of Banyan Tree in India is to make investments in mid-market companies with the objective of capital formation for the investee companies and long term capital appreciation for its investors. Banyan Tree is stated to have made an investment of about USD 7.5 million and holds 11.25% of the equity shareholding in respondent no.1-Axiom Cordages Limited which is a company incorporated in India under the provisions of the Companies Act, 1956. (for convenience respondent no. 1 is

referred as **"Axiom"**). Axiom is engaged in the business of manufacturing and export of specialised synthetic ropes.

3. Respondent No.2-Responsive Industries Limited (for short **"Responsive"**) is an Indian company incorporated under the Companies Act, 1956, stated to be listed on the National Stock Exchange and Bombay Stock Exchange. Responsive is engaged in the business of manufacturing polyvinyl chloride (**"PVC"**) based products such as PVC flooring, artificial leather cloth, rigid film, etc. Responsive owns 58% of the paid up share capital in Axiom.

4. Respondent no. 3 is "Wellknown /business Ventures LLP (previously known as Wellknown Business Ventures Private Limited). (for short **"Wellknown"**). It is a Limited Liability Partnership (LLP) involved in inland and foreign trade, transport, infrastructure, industry and finance. Wellknown owns about 7.98% of paid up share capital in Axiom and 56% of the paid up share capital in Responsive. Responsive and Wellknown are promoters of Axiom.

5. In 2008 Responsive and Wellknown were seeking capital infusion in Axiom which was for development of Axiom through acquisition of certain assets from IDBI stressed Asset Rehabilitation Fund (IDBI) and funding of capital expenditure of Axiom. In March 2008, Banyan Tree entered negotiations with Responsive and Wellknown for possible investment in Axiom. The negotiations culminated to the effect that on 12 September 2008 the parties entered into a **"Share Subscription Agreement (SSA)"**, whereby Banyan Tree agreed to make an initial investment of USD 50 million in Axiom. In return for its investment, Banyan Tree received equity shares and convertible debentures in Axiom. Banyan Tree being a

limited life company, agreed for viable time bound mode of exit for its investment, as the same was stated to be crucial to its decision to invest in Axiom, which according to Banyan Tree was at all times central to the transactions negotiated between the parties. Being a consolidated transaction in Clause 1.1.63 of the SSA, parties *interalia* agreed that the **"transaction documents"** shall mean the **SSA**, the **Put Option Deed** being an agreement between the Promoters, Issuer and the Investors and the **Escrow Agreement**. In the SSA the promoters provided for three potential options for Banyan Tree to exit its investment. The **first exit** option was an initial public offering (IPO) of Axiom, allowing Banyan Tree to sell its Axiom shares on the stock exchange. The **second exit** option was a merger of Axiom into Responsive, whereupon Banyan Tree would receive shares in Responsive, a publicly listed company. The **third exit** option was that Banyan Tree would exit its investment under the Put Option Deed whereby Banyan Tree would require Responsive and Wellknown to buy its shareholding in Axiom, should the first and second exit options were not to be available to Banyan Tree.

6. In Schedule 16 of the SSA, Banyan Tree's rights to exercise put option were provided in clause 9.1 in the following terms:-

> *"9.1 **Put Option***
>
> *The Investors shall have the right to, exercise the Put Option on the Promoters, in accordance with the Put Option Agreement within the Put Option Exercise Period in the manner prescribed therein.*
>
> *For the purpose of this Paragraph:*
>
> *"**Put Option**" shall mean the option granted by the Promoters to the Investors, to sell the Debentures and/or Equity shares issued upon Conversion and/or Subscription Shares, held by the Investors to the Promoters, in accordance with the Put Option Agreement.*

> *"**Put Option Agreement"** shall mean a put option agreement dated on or about the date hereof, entered into between, inter alia, the Investors, the Issuer, and the Promoters."*

7. Accordingly, also on 12 September 2008 as a condition precedent to the initial investment, an agreement titled as **"Put Option Deed"** was executed between the parties being the same day on which the SSA was executed. The disputes in the present proceedings as noted above arise under the Put Option Deed.

8. On 30 September 2008, the parties entered into an **Escrow Agreement,** which provided that Wellknown agrees to keep the shares in Responsive or their cash equivalent in escrow, in a specified escrow account. The Escrow accounts were to be managed by a designated escrow agent, namely IL&FS Trust company Limited as appointed. By the Escrow Agreement, parties intended to ensure that the Promoters Wellknown and Responsive had the requisite liquidity to meet their payment obligations under the terms of the Put Option Deed in case Banyan Tree exercises its Put option. Accordingly under the Escrow Agreement shares of Responsive held by Wellknown were held in a demat account to be operated by the Escrow agent. If the promoters (Responsive and Wellknown) failed to purchase the put securities in terms of the Put Option Deed, the shares of Responsive held in escrow under the Escrow agreement, were to be sold and the proceeds deposited in a designated bank account to be used to settle the put option.

9. These agreements were acted upon. On 3 December 2008, Banyan Tree appointed Mr. Naval Totla as its nominee director on the board of Wellknown, who on 10 January 2013 was also appointed as

Banyan Tree's nominee director on the board of Axiom replacing the earlier director Mr. Sanjiv Singhal.

10. Thereafter in 2009, Banyan Tree made a further investment in Axiom of USD 2.56 million. During that period, Axiom also benefited from the investment by another entity, namely, Nederlandse Financierings Maatschappij Voor Ontwikkelingslanden N. V. ("**FMO**"). The investments made by Banyan Tree and FMO collectively amounted to approximately USD 27.5 million, while the capital previously employed in Axiom amounted to less than USD 20 million. Banyan has stated that between the financial year 2007-2008 to 2011-2012 Axiom grew by more than five-fold in terms of revenues.

11. It so happened that from 2008 to 2014, there were some attempts to provide Banyan Tree with an exit, however, these attempts as made by the Promoters could not succeed. Also the Promoters could not list Axiom on a stock exchange and subsequently made an offer to buy out Banyan Tree's shares in Axiom at a price that Banyan Tree refused. Such an offer according to Banyan Tree was also not as per the terms provided under the Put Option Deed. According to Banyan Tree during this entire period the promoters consistently recognized that it was incumbent upon them to provide Banyan Tree with an exit, based on the contractually agreed terms contained in the SSA as also the Put Option Deed.

12. Thereafter in August 2013, in contemplation of a proposed merger of Axiom with Responsive, the parties agreed that Banyan Tree would convert the compulsory convertible debentures it held in Axiom, into equity shares. The merger did not take place, however,

Banyan Tree was nonethless required to convert its debentures into equity shares.

13. The first spark, is an event namely on 19 March 2014, Wellknown transferred the Escrow Shares out of the designated demat-Escrow Accounts without authority or consent of Banyan Tree and/or the Escrow Agent to a new account operated solely by Wellknown. Similarly on 23 July 2014 the cash account was closed without authority and consent of Banyan Tree and/or the Escrow Agent in breach of the Escrow Agreement.

14. On 16 February 2015, Banyan Tree discovered that Wellknown had closed the Escrow Accounts, without any authorization or knowledge of Banyan Tree or the Escrow Agent. Wellknown transferred the shares which were to be held in Escrow Account to a new account operated fully by it. The Escrow Agent being confronted with this situation sought restoration under the escrow mechanism. However, Wellknown by its letter dated 31 March 2015 refused to reinstate the shares, asserting that the Escrow Agreement and the Put Option Deed were illegal under Indian Law.

15. Banyan Tree in the above circumstances was required to approach this Court in a petition under Section 9 of the A&C Act praying for interim measures pending the arbitration. This Court on 5 May 2015 passed an order directing Responsive and Wellknown to maintain status-quo with respect to the Wellknown shares which formed the subject matter of the proceedings before it and ordered that shares be kept in a designated account.

16. On 18 June 2015, Banyan Tree issued a Dispute Notice under Clause 12.2.1 of the Escrow Agreement seeking restoration by Wellknown of the escrow mechanism as prescribed by the Escrow Agreement and seeking amicable resolution of the disputes. Wellknown did not respond to the said notice. Hence, Banyan Tree on 21 August 2015, now issued a notice to Responsive under the terms of the Put Option Deed being a 'Put Exercise Notice'. A copy of the said notice was also forwarded to Wellknown. By this notice Banyan Tree exercised its option under the 'Put Option Deed' requiring the Promoters to buy its shares in Axiom. In this notice, Banyan Tree specified that the 'Put Settlement Date' would be 20 September 2015, by which date the Promoters would be required to transfer the 'Put Option Price', to the investors/Banyan Tree in their account, the details of which were set out. The Promoters did not immediately respond to the Put Exercise Notice nor provided the requested valuation certificates of the Put Securities.

17. Thereafter, on 18 September 2015, Banyan Tree addressed another letter to the Promoters interalia setting out its estimate of the fair market value of the Put Securities calculated to be in the sum of INR 1,017,346,252.00 (or INR 346.54 per Put Security). This figure being arrived was as per valuation report dated 15 July 2015 prepared by MZSK & Associates, Chartered Accountants, which was subsequently reviewed and endorsed by BDO India LLP in its Review Report dated April 2017. These experts calculated the said fair market value (FMV) of the put securities using the discounted cash flow method which according to Banyan Tree was an internationally accepted valuation method. Banyan Tree contended that as per Axiom's balancehseet the FMV calculated as per Schedule 3 of the Put Option Deed was significantly higher than the FMV derived by MZSK

& Associates. The promoters however failed to purchase the put securities as per the terms of the Put Option Deed and as required under the put option notice. Moreover, Responsive on behalf of the Promoters, by its letter dated 30 September 2015 denied liability to buy Banyan Tree's shares alleging that the "Put Option Deed" is illegal, contrary to the laws of India and therefore void-ab-initio.

18. In the circumstances, Banyan Tree by its letter dated 1 October 2015 issued a 'Dispute Notice' as per clause 19.3(a) of the Put Option Deed to the promoters. Banyan Tree accordingly notified the Promoters that the dispute had arisen under the Put Option Deed and requested for a meeting between the concerned representatives/ executives of the Promoters to discuss an amicable way forward. By a letter dated 8 October 2015, Responsive acknowledged receipt of the Dispute Notice and reiterated interalia its position as taken in its letter dated 30 September 2015, that the Put Option Deed is illegal, void-ab-initio and non-est, hence there was no question of honouring any obligation or of there being any breach. Responsive accordingly denied existence of any dispute. Responsive also proposed a meeting to be held on 16 October 2015 at Mumbai for an attempt to resolve the disputes amicably, which failed.

19. On 29 December 2015, Banyan Tree issued a notice of arbitration to the SIAC, Axiom, Responsive and Wellknown, requesting that the Escrow Agreement and the Put Option Deed be performed. This notice was received by the SIAC on 29 December 2015, SIAC accordingly commenced arbitration on 29 December 2015 as per SIAC 2013 Rules.

20. Welknown and Responsive by their letter dated 11 January 2016 replied to the Banyan Tree's Notice of Arbitration interalia recording that the claims as made by Banyan Tree were false, frivolous, illegal and bad in law and as such unenforceable. It was re-asserted that both the Escrow Agreement and the Put Option Deed were void ab-initio being expressly barred by law in India namely by the provisions of the Foreign Exchange Management Act,1999 (for short '**FEMA**'), the Foreign Exchange Management (Transfer or Issue of Securities by a Person Resident Outside India) Regulations 2000 ('**FEMA Regulations**') and notifications issued from time to time under the Securities Exchange Board of India (**SEBI**), It was contended that the provisions of these legislations and regulation prohibited foreign investors to take any fixed rate of return on their investments in India.

21. The case of Banyan Tree before the arbitral tribunal was of Banyan Tree being entitled to damages for the non-performance of the Put Option Deed by Responsive and Wellknown. Banyan Tree contended that Put Option Deed was a valid contract capable of being enforced and that the case of Responsive and Wellknown of illegality of the Put Option Deed lacked merit and it was a sham defence as an excuse for non performing their obligations under the Put Option Deed. Banyan Tree contended that Responsive and Wellknown had tremendously benefited from Banyan Tree's investment into Axiom. It was contended that the promoters illegally refused to perform their obligations under the Put Option Deed and their conduct of justifying their wrongful breach was contrary to their express representations and warranties. Banyan Tree contended that the Promoters had made clear representations and warranties as to the validity, legality and enforceability of these obligations under the Indian law. Banyan Tree argued that under Clause 7.4 of the Put Option Deed, Banyan Tree

was required to obtain special permission from the Reserve Bank of India for the transaction. It was contended that Clause 7.4 provided that not only did the parties anticipate that the sale and purchase of the Put Option Securities might require special approval, but the Put Option Deed clearly allocated the responsibility of such approval as may be necessary to effect the transaction on the Promoters. Banyan Tree contended that the Promoter's obligation under Clause 7.4 was an absolute one and that it was the Promoter's obligation to take all necessary steps including obtaining special permission from the Reserve Bank of India to perform their obligations under Clause 3.3 of the Put Option Deed. In the alternative, Banyan Tree also claimed that it is entitled to restitution against unjust enrichment pursuant to the principles as contained under Indian Contract Act 1872. Also in relation to Escrow Agreement, Banyan Tree prayed for specific performance from Wellknown pending the resolution of the arbitration. Following are the reliefs which were claimed by Banyan Tree before the arbitral tribunal in the arbitration under the Put Option Deed:-

> *(a) Requiring the Respondent(s) to pay damages to the Claimant in the amount of USD 11,1410,000 (plus interests and costs as provided in sub-paragraphs (c) and (d) for the Respondents' breach of the Put Option Deed;*
>
> *(b) In the alternative to sub-paragraphs (a) above, the Respondents to pay to the Claimant an amount no less than USD 11,140,000 (plus interests and costs as provided in sub-paragraphs (c) and (d) below) by way of restitution;*
>
> *(c) Pre-award and post-award interest;*
>
> *(d) Costs and expenses of this arbitration, including attorneys and expert fees and arbitration costs; and*

*(e) Such further reliefs or other reliefs as the Tribunal deems just and proper".*

22. Responsive and Wellknown defended the arbitral claim as made by Banyan Tree to contend that neither Banyan Tree was entitled for specific performance nor damages should be awarded under the Put Option Deed. This on the allged illegality and unenforceability under Indian Law, of the Put Option Deed. It was contended that the Put Option Deed was an agreement prohibited by various Indian Statutes and regulations namely the Foreign Exchange Management Act,1999 (FEMA), Securities Contracts (Regulation)Act, 1956 (SCRA) and the Regulations framed thereunder, Circulars and Notifications issued by the RBI. According to the respondents, the object of Put Option Deed was to provide assured returns to foreign investors in the securities of an Indian company which was expressly barred under the Indian Law. Hence, the Put Option Deed was not enforceable. This was also a common defence in regard to the representation and warranties as sought by the Banyan Tree, that Responsive and Wellknown cannot be estopped from claiming illegality of the Put Option Deed, as there can be no estoppel against statute under the Indian jurisprudence. Thus, principal bone of contention of Responsive and Wellknown was that the arbitral tribunal ought to rule that the Put Option Deed was contrary to Indian public policy and secondly unenforceable under Section 23 of the Indian Contract Act 1872. Responsive and Wellknown also objected to the jurisdiction of the tribunal to decide any issue as raised under the Share Subscription Agreement (SSA ). The arbitral tribunal on aforesaid conspectus framed the following three issues:-

(i) Whether the Put Option Deed is valid and legal under Indian Law?

(ii) Whether the Put Option Deed is legal under FEMA and its secondary legislations?

(iii) Whether the Put Option Deed is legal under the SCREA and its secondary legislations?

23. The respondents cross examined Banyan Tree's witnesses but as contended by Banyan Tree chose not to cross examine the valuation expert and accordingly accepted the valuation of the put option shares calculated by Banyan Tree's experts. In August,2017 the arbitral proceedings were closed for an award to be pronounced. Further on 6 September 2017, the Section 9 petition filed by Banyan Tree in this Court was also disposed of in view of a joint statement made by the parties, directing that the ad-interim order shall continue to operate till the declaration of the award by the arbitral tribunal.

24. Considering the pleadings, documentary and oral evidence and the arguments as advanced on behalf of the parties, the arbitral tribunal by its award in question dated 15 January 2019 allowed the claims as made by Banyantree in the following terms:-

> 243. The Tribunal AWARDS, DECLARES and ORDERS that:
>
> (i) The Put Option Deed was a valid and legal contract in Indian law at the time it was made and remains so;
>
> (ii) The performance of the Put Option Deed was legal at the time the Claimant, Banyan Tree, exercised its right to exit under it;
>
> (iii) The Promoters, being the First and Second Respondents, have breached their obligations under the Put Option Deed. As a result of this breach the Claimant is entitled to and is awarded damages in an amount corresponding to the Put Option Price as calculated by the Claimant and not contested by the Respondents in the sum of USD 11,140,000.00 plus interest at the rate of 5.33% compounded annually from 20 September 2015 to the date of this Final Award, and at 6% compounded annually from

> the date after the date of this Final Award until full and final payment of the sum awarded;
>
> (iv) The Claimant is further entitled to and is awarded the sums of USD 493,135.15, SGD 143,106.35 and INR 302,975.00 in respect of its costs, plus interest at the rate of 6% compounded annually from the date of this Final Award until full and final payment of the sums awarded;
>
> (v) The First and Second Respondents are ordered to pay to the Claimant the sum itemised in paragraphs 240(d) and (e) above;
>
> (vi) The Claimant has undertaken and is ordered to remit the Put Securities (i.e. all its Axiom shares) to the First and Second Respondents upon payment by the First and Second Respondents to the Claimant of the sums itemised in paragraph 240(d) above;
>
> (vii) The Respondents will bear the sum of SGD 468,467.81 in respect of the costs of the arbitration as determined by the Registrar."

25. Banyan tree has contended that during the course of the arbitral proceedings, the respondents refused to pay their share of deposits as requested by the SIAC Registry for the cost of the SIAC arbitration. The arbitral tribunal in pursuance of the applications filed by the petitioners issued two partial awards being partial award dated 30 January 2017 and partial award dated 31 August 2017 in relation to reimbursement of deposits. It is contended that these awards were not challenged by the respondents and hence these findings according to Banyan Tree also stand subsumed in the put award and have become binding on the respondents.

26. On 30 January 2019, Banyan Tree applied for correction of certain clerical and/or typographical errors in the put award under rule 29.1 of the SIAC Rules. The arbitral tribunal corrected the put

award as requested by Banyan Tree and accordingly a "memorandum of corrections" dated 25 February 2019, came to be issued. Thereafter on 11 February 2019 the respondents filed an application before the arbitral tribunal seeking an additional award and an interpretation of the put award. It is contended that Banyan Tree had opposed the said application interalia contending that the application is beyond the scope of the SIAC rules. It is stated that the said application is pending adjudication.

**Contentions of Banyan Tree in seeking enforcement of the foreign award:-**

27. Banyan Tree contends that the Put award is a foreign award within the meaning of chapter I of part II of the A&C Act, namely that it is a New York Convention award. It is contended that the only recourse against the put award was to challenge the same under the Singapore International Arbitration Act (IAA), under the laws of Singapore. It is contended that under section 19 B (1) of the IAA, the put award becomes final and binding upon passing and can be relied upon by any of the parties in any court of competent jurisdiction. It is contended that to the knowledge of Banyan Tree the respondents have not taken out any application to challenge the put award within the prescribed time period of three months to challenge the award, from the date of receipt of the award or the date on which request for correction was disposed of by the arbitral tribunal. Thus according to Banyan Tree the put award is final and binding upon the respondents, at the time of filing of the present petition seeking enforcement of the award. Banyan Tree has contended that Singapore is a reciprocating

territory which is a signatory to the New York Convention and is so notified by the Central Government.

28. It is contended that the arbitral tribunal granted a full fledged opportunity of hearing to all the parties and after applying its mind to the facts and circumstances of the dispute and considering all relevant aspects of the dispute has passed a comprehensive award holding that the put option deed is legal and valid under the laws of India, which was governing the parties in relation to the contract in question. It is contended that the put award contains a decision on matters falling within the terms and scope of the submission to arbitration. It is contended that even the composition of the arbitral tribunal and the arbitration procedure was in accordance with the 'put option deed' and as per the applicable SIAC rules and the laws of Singapore, being the law at the seat of arbitration as chosen by the parties. It is further contended that the requirements contemplated by section 47 and 48 of the A&C Act, thus stand duly complied. Hence Banyan Tree is entitled for a relief of enforcement and execution of the put award against the respondents.

## Respondent's Opposition

29. The respondents(Axiom, Responsive and Well-known) in opposing the present petition have filed a counter affidavit of Mr K.K. Agarwal who is the authorised signatory on behalf of the respondents, under the respective board resolutions as set out in paragraph one of the reply. The contention of the respondents in opposing the petition is firstly on the ground that there is a section 34 petition filed by the respondents in this Court challenging the put award. It is stated that

the said petition is pending, hence the present petition filed under section 47 and 48 of the A&C Act is not maintainable. It is next contended that there is another arbitration pending between the parties under the 'share subscription agreement-SSA', which is the parent agreement under which the put option right was granted to Banyan Tree. It is contended that in the said arbitration a declaration has been sought by the respondents that the put option deed is void ab- initio being illegal and unenforceable hence not binding on the parties. It is thus contended and that any action taken in furtherance thereof shall be against the public policy of India. It is contended that the SSA arbitration is at final stages, the award which would be made in the said arbitration would have a material and direct impact on the orders that would be passed on this petition, hence this petition should not be entertained. The next contention of the respondents is that the put option deed is in contravention of section 18 A of the Securities Contracts (Regulation) Act 1956 for the reasons which are set out in paragraph D of the counter affidavit and the notifications issued thereunder. It is contended that the put option deed was also contrary to the RBI regulations which were in force, on the date the put option deed was executed between the parties, as set out in paragraph E of the reply. It is next contended that the put option deed also does not comply with the requirements under the Foreign Exchange Management Regulations, in as much as assured returns were prohibited under the said regulations. It is further contended that under section 3 and 6 of the Foreign Exchange Management act 1999 (for short FEMA), the subject transaction qualifies as a 'capital account transaction'and the Reserve Bank of India (for short 'the RBI') was empowered to restrict and regulate such transactions as per the provisions of the FEMA. Hence FEMA 20 regulations would be applicable namely the pricing guidelines as contained in the

regulations dated 3 May 2000, the 2004 Regulations, more particularly regulation 10 (B) as amended by circular dated 4 October 2004. Also the notifications issued thereafter namely notification dated 17 March 2005, 22 April 2009, 4 May 2010 whould not approve of such transaction. These contentions are found in the averments as made in paragraph E of the reply. Thus broadly the case of the respondents as pleaded in the reply is that for these reasons the award in question is against the public policy of India being in contravention of the fundamental policy of Indian law within the meaning of sub-section (2) of section 48 of the A&C Act. Hence the petition be rejected by not granting enforcement of the put award.

30. There is an additional affidavit dated 21 June 2019, filed on behalf of the respondent after the detailed counter affidavit (156 Pages) came to be filed, *interalia* raising an objection and for the first time in the present proceedings that the 'Put Option Deed' is not adequately stamped, it therefore amounts to a void contract. Hence the arbitral award if enforced would amount to enforcing an illegal contract.

## SUBMISSIONS ON BEHALF OF THE RESPONDENTS

31. Mr, Zal Andhyarujina learned counsel for the respondents has made the following submissions opposing the enforcement and execution of the arbitral award : –

**On Put Option Deed being inadequately stamped**

At the outset it is contended that the put option deed is insufficiently stamped and cannot be relied upon in the present proceedings. It is contended that the 'Put Option Deed' was required to be stamped as per the provisions of article 5 (c) (ii) or article 5 (h) (A) (iv) of the Maharashtra Stamp Act 1958, whichever is higher. It being

stamped with a value of Rs. 300/– is an insufficient stamping. According to the respondents section 47 enjoins upon a party applying for enforcement of a foreign award in India, to produce together with its application interalia “evidence” of the 'agreement for arbitration'. It is contended that section 33 of the Maharashtra Stamp Act 1958, it is the duty of any judicial authority empowered to receive evidence, to impound a document which is found to be unstamped or insufficiently stamped and to further send the said document for adjudication, in keeping with the objective and the public policy to protect the interests of the revenue. It is submitted that hence the judicial authority when it comes across an arbitration clause in an agreement which is found to be unstamped or insufficiently stamped, is enjoined by the provisions of the Maharashtra Stamp Act to first impound the agreement and ensure that the lawful stamp duty together with penalty if any is paid before the agreement can be acted upon in any manner whatsoever. It is submitted that under the law as also under the Maharashtra Stamp Act 1958 an agreement is not enforceable in law unless it is sufficiently stamped. It is a settled principle of law, that an arbitration clause in an agreement would not exist when the agreement itself is insufficiently stamped. It is submitted that it is also trite, that it is not possible to sever an arbitration clause contained in such agreement so as to give independent existence to such arbitration clause. It is next submitted that section 1 (2) of the Maharashtra Stamp Act 1958 makes it clear that the applicability of the said act is restricted to the State of Maharashtra and as such, the Act was inapplicable in Singapore where the present arbitration took place. For this reason the respondents did not have any opportunity to have challenged the admissibility of the put option deed in the arbitration as held in Singapore, on grounds of it being insufficiently stamped. This is the correct judicial forum as

referred in section 33 of the Maharashtra Stamp Act, by which the document can be impounded. The arbitral tribunal in Singapore had no powers to impound the put option deed, as the Maharashtra Stamp Act was inapplicable outside the State of Maharashtra. Even Section 35 of the Maharashtra Stamp Act does not preclude this Court from impounding the put option deed in as much as the Maharashtra Stamp Act precludes a party from acting upon an insufficiently stamped document. This is much different from a document insufficiently stamped being admitted in evidence in the course of trial. Hence, the put option deed is unenforceable in law and as such cannot be relied upon in the present proceedings, being an illegal document. In support of these contentions reliance is placed on the decisions of the Supreme court in **SMS Tea Estates (P) Ltd versus Chandmari Tea Co (P) Ltd.**[1] and **Garware Wall Ropes Ltd versus Coastal Marine Constructions and Engineering Ltd.**[2]

## 32. Respondents' Submissions on illegality of the award Under SCRA

It is next submitted that the 'put option' as contained in the Put Option Deed is invalid under the provisions of the Securities Contract Regulation Act 1956 (for short "**the SCRA**") and the notifications issued thereunder. The avowed public policy of the SCRA is to prevent speculation in securities and the same is also set out in the preamble of the SCRA namely 'an act to prevent undesirable transactions in securities by regulating the business of dealing therein...". Respondents refer to the definition of the term 'derivative', 'option in securities', 'spot delivery contract', as defined under the SCRA as also the provisions of section 16 which provides for power to prohibit contracts in certain cases and more particularly reference to section

1 **(2011) 14 SCC 66**
2 **2019 SCC online SC 55**.

18A which deals with contracts on derivatives, in support of this contention. It is submitted that the put option is violative of the provisions of the SCRA and the Foreign Exchange Management Act 1992 and the notifications issued thereunder on different counts as under :-

(I) The development of law, on options in securities and derivatives, itself demonstrates that it has been the fundamental policy of Indian law to prohibit all contracts in derivatives except those expressly permitted under the provisions of SCRA. According to the respondents this can be seen from the following:-

(i) When the SCRA was enacted and brought into force with effect from 20 February 1957, section 20 thereof contained an absolute prohibition on "*options in securities*'. The legislative intention was also clear from the preamble of the SCRA which provided that this legislation was enacted to prevent undesirable transactions in securities by regulating the business of dealing therein, by prohibiting options and other matters connected therewith.

(ii) Thereafter on 27 June 1969 the Government of India, through the Ministry of Finance, vide its notification No. SO 2561, issued under section 16 of the SCRA, prohibited forward contracts and permitted contracts for the sale or purchase of securities, interalia so long as such contracts qualified as spot delivery contracts.

(iii) By virtue of the Securities Laws (Amendment) Act, 1995, with effect from 25 January 1995, section 20 of the SCRA containing the prohibition on options in

securities, came to be deleted. It is submitted that although section 20 was deleted, the 1960 notification continued to be in force prohibiting forward contracts and permitting only spot delivery contracts.

(iv) By the Securities Laws (Amendment) Act 1999, with effect from 22 February 2000, Section 18A was introduced in the SCRA to regulate derivative transactions in terms specifying that transactions in derivatives would be legal and valid, if the same were traded on a recognised stock exchange and settled on the clearing house of a recognised stock exchange. Also Section 2 (aa) as it then stood , came to be inserted in the SCRA incorporating a definition of the term '*derivative*'. A corresponding amendment was also made to Section 2 (h) which defined securities for the purposes of the SCRA to include derivative as constituting a 'security' under the SCRA.

(v) On 1 March 2000 SEBI, by its notification bearing reference No. SO 184 (E), issued under section 16 of the SCRA prohibited contracts for the sale or purchase of securities other than, spot spot delivery contracts or contracts for cash or hand delivery or contract in derivatives as is permissible under the SCRA. It is submitted that in terms of the said notification, for the purposes of the present case, it was relevant that only contracts for spot delivery and contracts in derivatives in accordance with Section 18 A of the SCRA were permitted.

(vi) On 23 May 2011 SEBI by its Interpretative Letter in Vulcan Engineers, issued under the SEBI (Informal Guidance) Scheme, 2003, in a similar contract as in the present case, it was opined that option contracts fall foul of the rule of spot delivery and were prohibited under the provisions of the SCRA. SEBI also opined that a put option, deriving its value from the underlying securities, had to meet the requirements and the mandate of section 18 A of the SCRA. This letter demonstrated SEBI's view being the market regulator in regard to the applicability of the provisions of the SCRA to the put option agreements. This letter of the SEBI was not considered by the arbitral tribunal.

(vii) On 3 October 2013 SEBI vide its notification bearing No. LAD -NRO/GN/2013 – 14/26/6667 (“2013 SEBI Notification) issued under Section 16 of the SCRA interalia rescinded the notification dated 27 June 1969, and for the first time interalia permitted contracts in shareholders agreements or articles of association of companies, for purchase or sale of securities pursuant to the exercise of an option contained therein to buy or sell the securities, on the terms and conditions set out therein. It is submitted that the second proviso to the said notification provided that nothing contained in the said notification shall 'affect or validate' any contract which has been entered into prior to the date of the said notification. Also the explanation to the said notification clarified that the contracts in shareholders agreements or articles of association of a company shall be valid notwithstanding

anything contained in section 18A. This notification according to the respondents, therefore, leaves no room for doubt that option contracts as in the present case, entered prior to the date of the said notification, attracted the rigors of Section 18A of the SCRA and were prohibited under the provisions of the SCRA. Also this notification repealed the SEBI notification dated 1 March 2000.

(viii) Shortly thereafter on 12 November 2013 the Reserve Bank of India vide its Notification amended FEMA-20, to allow optionality in FDI instruments for the first time and the same was prospective in its operation.

(II) The Put Option Deed was executed on 12 September 2008 at which time the SEBI notification dated 1 March 2000 was in operation, interalia prohibiting forward contracts and requiring contracts for the sale or purchase of securities to qualify as spot delivery contracts. Additionally, the put option as granted to Banyan Tree/ the petitioner was in respect of the shares/securities of respondent No. 1- Axiom, which was an unlisted public company. As the SEBI notification dated 1 March 2000 permitted contracts for the sale or purchase of securities, so long as such contracts qualified as spot delivery contracts and in cases where the same would constitute a derivative, such contracts were to comply with section 18A of the SCRA. Thus, the put option deed which was dated 12 September 2008 was required to be settled as spot delivery contract.

(III) The put option deed being a contract in derivatives also attracted the rigors of Section 18A, namely that such an option

must be traded on a recognised stock exchange and settlement on the clearing house of the recognised stock exchange. The put option being an option in securities as defined in the SCRA also satisfies the definition of derivative as the value of the put option was derived from the value of the underlying shares, as upon the exercise of the option, the shares of Axiom held by Banyan Tree would have to be purchased by respondent No. 2 and 3. Secondly the exchange fluctuation in regard to the put option was to be its value from the fluctuation in the conversion rates of USD in to INR. To support this contention reliance is placed on the decision of the Madras High Court in **Rajshree Sugars and Chemicals limited versus Axis Bank Ltd and others**[3]

IV A derivative, like the put option, in the present case therefore, being an option attached to the shares of an unlisted public company, was not permitted at such time and would fall foul of the public policy under the SCRA. This is also bolstered by the observations of SEBI in the Interpretive Letter (supra) dated 23 May 2011 wherein SEBI clearly recorded that forward contracts namely contracts other than spot delivery contracts, are prohibited under the SCRA and put options are in violation of Section 18 A and hence prohibited.

V The 2013 SEBI notification does not validate the put option for various reasons. In this regard at the outset it ought to be noted that the 2013 SEBI notification rescinds the 2000 SEBI notification, which held the field prior to the 2013 notification, in terms whereof, the contract for sale or purchase of securities was required to qualify as a spot delivery contract hence attracted the limitations of section 18 A. Clause (d) of the

3 AIR 2011 Madras 144.

2013 notification permitted '*contracts in shareholders agreements or articles of association of companies or other body corporate, for purchase or sale of securities pursuant to the exercise of an option contained therein to buy or sell the securities',* notwithstanding the limitation imposed by Section 18A of the SCRA. Therefore contracts entered prior to the date of the 2013 notification attracted the rigor's of Section 18A of the SCRA. Such contracts hence were not permitted prior to the 2013 notification. The 2013 notification was applicable prospectively, which was also clearly borne out from the second proviso to the said notification which expressly provided that the said notification would not validate any contracts entered prior to the date of the said notification. Even if it is assumed that the put option in question came into existence upon its exercise in 2015, the put option would nevertheless be hit by the provisions of the SCRA inasmuch as put option amounts to a forward contract and does not meet the requirements of a spot delivery contract, and as such is invalid under the 2013 SEBI notification. Banyan Tree's contention that the put option deed is not within the ambit of the 2013 notification as it is a '*contract containing an option'* is misplaced as the SCRA does not make any distinction between '*an option in securities'*and a contract *'containing an option'.* Moreover such a distinction is nowhere found in the language of the SCRA.

VI The decision of the Division bench of this Court in **MCX Stock Exchange Ltd Versus Securities and Exchange Board of India & Ors**[4] on the applicability of section 18A of the SCRA in relation to a buyback arrangement and as to whether it constituted an option in securities or derivatives would not

4 2012 (114) BomLR 1002

support the case of Banyan Tree in the present facts. In the said case this court had held that options come into existence upon the exercise thereof, however the said decision did not decide the question of legality of buyback arrangements pursuant to put option vis-a-vis the provisions of section 18 A and the same was kept open, as it was not the ground taken by SEBI in the show cause notice. In the facts of the said case there was nothing to show that the contract would be settled in any manner other than by way of spot delivery. In the facts of the present case the put option deed on consideration of the various provisions makes it clear that the same amounts to a forward contract inasmuch as price at which the put option will be exercised, being the put option price is predetermined price for future transfer of shares and on account of such transfer being effected, one month after the date of exercise of the option, the same will not be settled on a spot delivery basis, as seen from the definitions of '*put option price'* and '*put settlement date'* as contained in the put option deed. In fact, this decision would support the respondents as in the present case it is an undeniable fact that the put option which has been exercised by Banyan Tree will not be completed by means of spot delivery.

VII The Supreme Court in the case of **BOI Finance Ltd versus The Custodian and others**[5] , referring to the Government of India notification dated 27 June 1969 issued under section 16 of the SCRA has unequivocally held that the contract for the sale or purchase of securities other than by way of spot delivery are impermissible and invalid. Also in the case of **Naresh K. Aggarwalla & Co versus Canbank Financial Services Ltd**[6] again

5 (1997) 10 SCC 488
6 (2010) 6 SCC 178

referring to the 27 June 1969 notification, it was held that what was permitted by the said notification was only spot delivery contracts and those contracts for the sale or purchase of securities not falling within the definition of spot delivery contracts were impermissible and invalid, this also in the context of unlisted public companies to which the SCRA would apply. In **Bhagwati Developers Private Limited versus Peerless General Finance and Investment Company Limited & Anr.**[7], the Supreme Court upheld the findings of the company law board to hold that the term "securities"as defined in the SCRA applied to the shares of both listed and unlisted public companies. It will also held that the 1969 notification of the Government of India permitted only spot delivery contracts and that the transaction in question in the said case did not qualify as a spot delivery contract as the deed of transfer of shares was exhibited in 1987 while the consideration for the transfer of the said shares was paid in the year 1994 and as such did not qualify as a spot delivery contract.

The judgement of the learned Single Judge of this court in **Edelweiss Financial Services Ltd versus Percept Finserve Pvt Ltd & Anr**[8] in which it is held that an agreement containing an optionality clause would not fall foul of the provisions of the SCRA, is per incuriam as also is distinguishable in the facts of the present case. This judgement of the learned single Judge is contrary to the law as laid down by the Supreme Court in **Bhagwati Developers (supra)**.

7 (2013) 9 SCC 584

8 Judgment dtd. 27/3/2019 in Arbitration Petition No. 220 of 2014

33. **Submissions on illegality of the award Under Foreign Exchange Management Act 1992 (FEMA)**

The put option is violative of the provisions of the FEMA and the rules and regulations framed under. This is clear from the following:-

(i) the Reserve Bank of India in exercise of the powers under Section 6(3)(b) and section 47 had issued the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, vide notification No. FEMA 20/2000 – RB, dated 3 May 2000 (for short **FEMA- 20**), to regulate and restrict the transfer or issue of securities by a person resident outside India. The permission to purchase shares by persons resident outside India in an Indian company was governed by the provisions of Regulation 5 NB:*Permission for purchase of shares by certain persons resident outside India)* of FEMA 20*.* In 2008 when the investment was made by Banyan Tree in the shares/equity of Axiom by virtue of the share subscription agreement, the transaction was governed by Regulation 5 (1) of FEMA 20. Banyan Tree was granted various investors rights in terms of clause 10 of the share subscription agreement read with schedule 16 thereof which interalia included the right to exercise put option. The provisions of regulation 5 (1), FEMA- 20, do not make any mention of permissibility of optionality clauses in such investments made by persons resident outside India. However the RBI by its notification dated 12 November 2013 (2013 RBI notification) amended certain provisions of FEMA 20, whereby a proviso came to be added to regulation 5 (1) of FEMA 20, by which it was

provided that shares or convertible debentures containing an optionality clause but without any option or right to exit at an assured price shall be reckoned as eligible instruments to be issued to a person resident outside India, by an Indian company subject to the terms and conditions as specified in schedule I thereto. This amendment makes it clear that even under the regime of FEMA, optionality clauses were permitted for the 1st time by the RBI only in the year 2013 by the said notification. The impugned award overlooks this aspect and demonstrates a lack of understanding of the Indian law in respect of making investment in equity by foreign residents in India.

The mechanism for the sale of shares of an Indian company held by a non-resident and the valuation of such shares was governed by the provisions of regulation 10 (B) Irani (2) (b) (ii) (c) of FEMA 20. It is submitted that in terms of the said regulation shares of an Indian company held by a non-resident and which are not listed on any stock exchange, cannot be at a price other than in the fair market value arrived at in terms of the mechanism provided in the said regulation. The public policy formulated by the RBI under the regime of FEMA is to prohibit investors reaping assured return on equity investments. The policy of Indian law is that while investing in debt instruments, parties are permitted 'guaranteed assured return', however the same is an anathema to investment in equity instruments, such as shares. It is for this purpose RBI has issued various notifications including FEMA-20 as well as Pricing Guidelines. It is submitted that the investment by non-

residents in debt instruments is governed by the External Commercial Borrowing Guidelines issued by the RBI.

(ii) The regime of FEMA moved in tandem with the changes in the SCRA which is evident from the fact that it is only after the SEBI notification dated 3 October 2013 issued under SCRA permitting put options in shareholders agreements, for the first time on 12 November 2013, the RBI issued the said 2013 notification, amending Regulation 5 of FEMA 20, by adding proviso to Regulation 5 clarifying that *"shares and convertible debentures containing an optionality clause, but without any option/right to exit at an assured price shall be reckoned as eligible instruments to be issued to a person resident outside India..."*.

(iii) It is submitted that the RBI further clarified the FEMA regime by circular dated 9 January 2014 (circular No. 86) (2014 RBI circular), which leaves no room for doubt that option clauses in foreign investments made under the regime of FEMA 20, were "*henceforth be allowed in equity shares and compulsorily and mandatorily convertible preference shares/debentures to be issued to a person resident outside India under the Foreign Direct Investment (FDI) Scheme",* but without any right to exit with an assured return. It is submitted that the said Circular in clause 3 thereof also refers to the fact that the RBI since has amended FEMA 20 by the said 2013 RBI notification. Also a Press Release dated 9 January 2014 which leaves no room for doubt that till October 2013 equity shares which were issued to persons resident outside

India were not permitted to carry optionality clause and the same was allowed for the first time. These developments in law have been completely overlooked by the award.

In short the submission on this count is that the Put Option Deed is contrary to the FEMA-20 and the provision of FEMA.

## 34. Submissions on Fundamental Policy of India

The arbitral award is contrary to the fundamental public policy of India for the following reasons: –

(i) The put option was illegal and prohibited under the SCRA. This firstly for the reason that the arbitral award which concerns the shares of Axiom – respondent No. 1 subject matter of the put option, is being referred as a private company is clear from paragraph 197 and 198 of the award in question. The entire basis of the award proceeds on the footing that Axiom is a private company and it is for this reason the tribunal concludes that the provisions of the SCRA do not apply as shares of such unlisted private companies. Admittedly Axiom is a public company whose shares are the subject matter of the put option. In this context the arbitral tribunal necessarily ought to have taken into consideration the decision of the Supreme Court in **Bhagwati Developers** (supra) and the decision in **Naresh K Aggarwala** (supra), in which the Supreme Court has clearly held that the provisions of the SCRA as a whole apply to the shares of public unlisted companies. Moreover in paragraph 192 of the award the

arbitral tribunal observes that an option in shares of a public listed company would constitute a derivative for the purpose of the SCRA. Once this position is accepted by the arbitral tribunal the provisions of SCRA apply to the shares of Axiom. It is submitted that there is no distinction in the regime that govern shares of an unlisted unlisted public company for the purposes of the SCRA.

(ii) There is no basis for the arbitral tribunal to arrive at a finding in paragraph 194 of the award that the put option deed would not constitute a derivative merely because the same is not capable of being transferred or traded. This firstly is in terms of clause 13 of the put option deed itself, the petitioner could assign the same if it so desired; Secondly there is no such distinction or carving out in the language of section 18A of the SCRA. In fact SEBI's view as set out in this SEBI's 2011 Interpretive Letter is to the contrary. It is submitted that there is no reason to narrow the scope and application of the SCRA as done by the arbitral tribunal. The tribunal’s reasoning is wholly mistaken, since what constitutes a derivative or not must be a certain from the definition of the term' derivative 'as defined under section 2 (ac) of the SCRA, which specifically includes a 'derivative 'that is a security derived from a debt instrument, a share etc. is also a security which derives its value from the prices, or index of prices, of underlying securities. The term 'securities' is defined in section 2 (h) of the SCRA to include shares, debentures or any other marketable security of like nature. Also the term 'option in securities 'means a contract for the purchase or

sale of a right to buy or sell securities in the future and includes a put call option in securities.

(iii) It cannot be denied that Banyan Tree was issued debentures of Axiom which were subsequently converted into equity shares, this being the case, the shares in question clearly fell within the definition of the term 'securities'. It is an admitted position that the put option entitles the petitioner to call upon Responsive to purchase the said shares at a pre-determined price at a future date. That being the case, there is no basis whatsoever for holding that the Put Option Deed does not constitute a derivative. In fact the decision of the Madras High Court in the **Rajshree Sugars** (supra) holds that put options would constitute a derivative in terms of the SCRA. The arbitral tribunal itself in paragraph 192 has come to a categoric finding that an option in shares of public listed company would be a derivative of the purposes of the SCRA. The arbitral tribunal having accepted this legal position which is also clear from the decisions of the Supreme Court in Bhagwati Developers (supra) and Naresh K.Aggrawala (supra), there was no legal basis to distinguish the shares of a public unlisted company and record a finding that shares of an unlisted company would not qualify as derivative under the SCRA is observed in paragraph 193 of the award. The findings of the arbitral tribunal in paragraph 195 of the award are erroneous and contrary to the law laid down in the said decisions.

(iv) The findings of the arbitral tribunal in paragraph 198 of the award are patently erroneous in the arbitral tribunal observing that "options in securities" of a private company are no longer regulated and only options in shares of public listed companies would be regulated, inasmuch as it was not in dispute that Axiom was not a private company.

(v) The findings of the arbitral tribunal in paragraph 200 of the award are also contrary to the law laid down by the Supreme Court in BOI Finance (supra) and Bhagwati Developers (supra), as even in the present case the sale of shares was to take place at a future date for a pre-determined price which was illegal and prohibited by virtue of section 16 of the SCRA. In this context even the findings of the arbitral tribunal in paragraph 201 was contradictory to the findings in the preceding paragraphs 192 to 200.

(vi) The arbitral tribunal has overlooked the policy of the Indian law whereby the FEMA regime in the country, far from operating in diversion to the regime under the SCRA, was carefully engineered to follow the course taken by the SCRA. This is clear from the development of law which took place around October 2013 to January 2014.

(vii) The finding of the arbitral tribunal in paragraph 196 of the award is contrary to the fundamental policy of Indian law in regard to foreign investment and repatriation of funds from India to a person resident outside India, where the tribunal has held that options in shares of an

unlisted company are permitted under FEMA. It is submitted from the RBI circular dated 4 May 2010 up to the issuance of 2013 are in line with the policy under the SCRA, FEMA which also did not recognise optionality clauses in the FDI instruments. Considering the sequence of notifications, the finding of the arbitral tribunal in paragraph 197 of the award is wholly incorrect when it holds that, the legislation such as FEMA and SCRA would not be conflict with each other. This in so far as FEMA permitted put options in shares of a 'private company' and SCRA prohibiting the same, thereby creating an inconsistency. It is evident that FEMA itself recognises the fact that optionality as deployed in shares of public companies was permitted for the first time in October 2013 as reflected in the 2013 RBI notification. Thus the conclusion of the arbitral tribunal in paragraph 197 of the arbitral award that options in shares of private unlisted companies like Axiom, cannot qualify as a derivative for the purposes of the SCRA is erroneous and contrary to the fundamental policy of Indian law, since the law has been consistent and clear not permitting optionality clauses in shares of public companies (listed/unlisted) prior to October 2013. The arbitral tribunal had also lost sight of the fact that even though section 20 of the SCRA was deleted with effect from 25 January 1995, section 18 A was introduced with effect from 16 December 1999. Hence it is not a case that after deletion of section 20, option contracts came to be permitted without any regulation in that behalf. Moreover the 1969 notification issued under section 16 of the SCRA continued to hold the field thereby only

permitting contracts of spot delivery. Further in 1999 upon the introduction of section 18 A, the category of derivative contracts which were permitted under the SCRA were such, as a specified in section 18 A.

(viii) It is submitted that put option is invalid under FEMA. It is submitted that in paragraph 124 of the award while discussing the import of the RBI circular dated 9 January 2014, the arbitral tribunal erroneously records that the said circular clarifies the meaning of regulation 9 (1). This in view of the fact that the opening paragraph of the said circular shows that the said circular is relating to regulation 5 (1) of FEMA 20 and and not to Regulation 9 (1). It is submitted that Regulation 9 (1) of FEMA 20 does not apply to the facts of the present case inasmuch as it applies only in cases where the transfer takes place between one non-resident to another non-resident. It is submitted that the entire issue has been mis-appreciated in paragraph 140 of the award in question, wherein the tribunal has posed an incorrect question as to whether the 2013 RBI notification and 2014 RBI circular have the effect of retrospectively effecting the illegality of the put option deed at the time it was made. The purport of the 2013 RBI notification amending regulation 9 and adding a proviso to Regulation 5 has been completely overlooked in paragraph 145 of the award. The arbitral tribunal ought to have held that the FEMA 20 prohibited assured returns on the sale of shares of an Indian company by non-resident.

(ix) It is submitted that in the put option deed and more particularly as seen from the definitions of the terms '*target value*' and *'put option price*' read with clause 4.5 of the Put Option Deed, it is absolutely clear that the put option deed was geared to ensure that Banyan Tree gets a minimum return of 15%. In fact, when Banyan Tree was aware of the fact that assured return was prohibited by the FEMA regime, at the time of entering into the put option deed, itself, makes it abundantly clear that in the event the fair market value/valuation certificates were to be lower than the target value, the difference between the same would be deposited with the nominee for and on behalf of Banyan Tree at an account in India. This arrangement demonstrated the knowledge that there was an assured return being provided to evade the provisions of law. The findings of the tribunal in this regard based on the decision of the learned single judge of the Delhi High Court in **Cruz City 1 Mauritius Holdings versus Unitech Ltd**[9] are completely misconceived. This decision itself is not applicable to the facts of the present case and is clearly distinguishable. This more particularly as the provisions of the SCRA were not considered by the learned Single Judge in the said decision, at all. Even otherwise this decision does not take into consideration the decision of the Supreme Court in **Dropti Devi &Anr Versus Union of India and others**[10] which holds that even though FEMA has replaced the FERA, the rigors under the FERA, continued to apply in order to preserve the economic fabric of the country and to that extent there is no difference between

9 (2017) 239 DLT 649
10 (2012) 7 SCC 499

the two statutes. Also the decision of this Court in **POL India Projects Limited versus Aurelia Reederei Eugen Friederich GmbH & Anr.**[11], inapplicable in the facts of the present case. Further the decision of the Supreme Court in **IDBI Trusteeship Services Ltd versus Hubtown Ltd**[12] it is also not applicable in the facts of the present case as it is not an authority for an interpretation of the circulars and notifications issued under the laws in question in the present case.

(E ) Banyan Tree's allegation that the respondents are taking a dishonest approach by not returning the investment made by Banyan Tree is belied by the fact that Axiom had repeatedly offered Banyan tree return on investment in the form of the different exits.

35. **Submissions in Rejoinder on Behalf of the Petitioner-Banyan Tree:**

Mr. Aspi Chinoy learned senior counsel has made the following submissions:-

(i) The opposition of the respondents is on the same grounds which were urged before the arbitral tribunal. None of the submissions of the respondents, even on a demurrer raise any question of the award being in conflict with the public policy of India/the fundamental policy of Indian law.

(ii) In regard to the respondents contention as raised in the additional affidavit that the put option deed was not adequately stamped, referring to Banyan Tree's reply to the said affidavit, it is submitted that the SSA and Put Option Deed were adequately stamped

11 (2015)7 Bom CR 757
12 2018 SCC Online SC 2795

by the respondents. The respondents in the SSA expressly represented and warranted that the same were adequately/duly stamped. The respondents had also provided certificate confirming that all taxes including stamp duty payable in connection with SSA and the Put Option Deed were paid. It is submitted that not only throughout the SIAC arbitration proceedings, as also in the Section 9 proceedings before this Court, further also in the detailed counter affidavit filed in the present proceedings setting out grounds to oppose the enforcement of the foreign award in question, the respondents never contended that the Put Option Deed was inadequately stamped. The respondents therefore should not be heard to contend that the enforcement petition should not be heard as the put option deed is alleged to be inadequately stamped by the respondent themselves. This is a dishonest plea as taken by the Respondents. The document at all material times was acted upon. Such an argument on change of legal advice cannot be on the ipse-dixit of the legal advice which the respondent received. In any case there is no material that it is not adequately stamped. Conduct of the parties on this document cannot be ignored.

(iii) The respondents contention in the present facts that the policy underlying section 18A of the SCRA it is to stop speculation/speculative trading is misplaced, as the put option deed can never result in speculation. Moreover, the notification dated 3 October 13 issued under section 16 and 28 of the SCRA, would establish that the policy of the SCRA is to treat as valid and enforceable, contracts for the purchase or sale of securities, pursuant to exercise of an option contained in a contract in shareholders agreements and the notification also expressly clarifies that the same shall be valid notwithstanding anything contained in section 18 A.

(iv) Insofar as the submissions on 'FEMA and FEMA Regulations' are concerned, it is submitted that it has been reiterated by the judgements of the Delhi High Court and this Court that FEMA does not purport to invalidate any agreement or contract and is only concerned with actual transactions involving foreign exchange. A reference is made to the decisions in **SRM Exploration P Ltd versus N & SN Consultants**[13] **; POL India Projects Limited versus Aurelia (supra), Cruz City I Mauritius Holdings (supra).**

(v) The arbitral tribunal has also noted in the award that the put option price was less than the FMV of the put shares at that juncture (computed in accordance with FDI regulations) and that payment of the put option price would accordingly be permissible under the FEMA Pricing Guidelines and the general permission contained therein.

(vi) Even as per the Put Option Deed any amount in excess of the FMV computed as per the FDI Regulations was, (only if the investor (Banyan Tree) so required), to be paid only in rupees and to a nominee account in India. An agreement to make such a payment in India, would not involve any infraction of the FEMA/FEMA Regulations. To support this contention where reference is made to the decision of the Supreme Court in **IDBI Trusteeship Services Ltd versus Hubtown Ltd (supra).**

(vii) In **POL India Projects Limited versus Aurelia (supra), Cruz City I Mauritius Holdings (supra)** this Court has held that an alleged violation of the FEMA would not result in any breach of the fundamental policy of Indian law, so as to enable a party to resist enforcement of a foreign award. A Special Leave Petition filed before the Supreme Court against the decision of the Delhi High Court in **Cruz City I Mauritius Holdings** (supra) has also been dismissed by the Supreme Court. Further the Supreme Court in **Shree Lal Mahal**

13 (2012) 129 DRJ 113

**Ltd.Versus Progetto Grano SPA**[14] has cited with approval the view taken in **Renusagar Power Co.Ltd versus General Electric Co.**[15] that contravention of law alone will not attract the bar of public policy.

(viii) The respondents reliance on the decision of the Supreme Court in **Dropti Devi versus Union of India** (supra) to question the correctness of **POL India Projects Limited versus Aurelia (supra), Cruz City I Mauritius Holdings (supra)** is misplaced. Dropti Devi was the case which dealt with a renewed challenge to the constitutional validity of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) on the ground that FEMA had no provision for prosecution and punishment like Section 56 of the FERA and that under FEMA violations were compoundable civil offences. It is in this context, the Supreme Court observed that the conservation and augmentation of foreign exchange continues to be as important as it was under FERA (para 66), although contravention of its provisions is not regarded as a criminal offence (para 67). The Court rejected the challenge to the legality of COFEPOSA and held that there is no constitutional mandate that preventive detention cannot exist for an act where such act is not a criminal offence and does not provide for punishment (para 70). These observations of the Supreme Court while stressing the continued importance of FEMA, do not detract from the said decisions of the High Court that the foreign award in favour of a foreign investor, cannot be assailed as being contrary to the fundamental policy of Indian law on the ground that the contract under which investment was made and received by the Indian entity, was allegedly contrary to and in breach of FEMA.

(ix) The circumstances of the present case are what are considered by the arbitral tribunal **firstly** that the investment of a substantial sum of USD 5 million, had been made by a foreign

14 (2014) 2 SCC 433
15 (1994) Supp(1) SCC 644

party/Banyan Tree; **secondly** that the respondents being the recipients of the said investment amount, had expressly and specifically represented and warranted to the foreign investor/Banyan Tree that the SSA and the put option deed were valid, legal and enforceable and also had provided a written legal opinion to the foreign party/Banyan tree that the same were valid and enforceable; **thirdly** the respondents recipients of the investment amount, had retained and enjoyed the benefits of the investment made by the foreign party/Banyan tree under such agreements for number of years without any demur; **fourthly** the respondents recipients of the investment amount had raised the alleged invalidity of the agreements under FEMA for the first time, only when they were required to repay the amounts received and written by them;

(x) It is hence submitted that it is not open to the respondents /an Indian party who were recipients of foreign finance from Banyan Tree to resist enforcement of a foreign award, by alleging that the put option deed, was illegal and being in breach of Indian law. This contention of the respondents is clearly contrary to several decisions of the Indian Courts. To support this contention reliance is placed on the observations made by the learned Single judge of the Delhi High Court in **Cruz City** as also on the observations of the division bench of this Court in **Videocon Industries** as referred in **POL Projects.**

(xi) In regard to the respondents submission that the put option deed allegedly constitutes 'contract in derivatives'and is illegal under section 18A of the SCRA and the notifications issued thereunder, it is submitted that this contention of the respondents is ex-facie incorrect. This for the reason that options contract/contract in derivatives, are totally different from the contract between two shareholders containing an option to buy or sell the shares owned by them. Options contract can be sold and traded and the generally

settled by payment of differences. On the other hand contract between two shareholders containing an option to buy or sell their own shares cannot be traded or sold and can never be settled by payment of differences.

(xii) It is submitted that Section 18A of the SCRA deals only with contracts in derivatives, that is 'options contract', which can be traded, brought sold and settled. Section 18A would not have any applicability to a contract between two shareholders, which contains an option for sale or purchase of their own shares. This distinction between an 'options contract' or a 'contract in derivatives' and a 'contract for sale or purchase of securities', pursuant to the exercise of an option contained in shareholders agreement, is also apparent from the notification dated 3 October 2013 issued under Section 16 and 28 of the SCRA, which reads contracts in derivatives (covered by clause (b)) as distinct and different from a contract for sale or purchase of securities pursuant to the exercise of an option contained in a shareholders agreement, which is covered separately by clause (d) of the said notification.

(xiii) It is submitted that the learned Single Judge of this court in **Edelweiss Financial Services Ltd versus Percept Finserve Pvt Ltd** (supra), repelled similar argument that a shareholders agreement containing an option to buy/sell their shares constituted an options contract and was illegal under Section 18A of the SCRA.

(xiv) The respondents submission that the put option deed is not the spot delivery contract and was illegal under the 1969 Notification issued under Section 16 of the SCRA, until the issuance of notification dated 3 October 2013 is also ex-facie incorrect. Also the submission of the respondents that clause (d) of the notification dated 3 October 2013, establishes that shareholders agreement which

contained an option to buy/sell their shares, entered prior to 3 October 2013 is illegal also is misconceived.

(xv) In this context it is submitted that in **MCX Stock Exchange versus SEBI** (supra) Division Bench of this Court held that a contract giving an option to one of the parties to sell or purchase the securities, was a 'mere privilege', that may or may not be exercised, and the same did not constitute a contract for sale of securities falling within the SCRA. A contract for the sale of securities falling within the SCRA would come into existence only pursuant to the exercise of the option. Accordingly, there was no question of the shareholders agreement containing the option to sell securities, falling within the purview of the SCRA, or for such an option being illegal as constituting a forward contract. This legal position is also reiterated in the judgement of the lead single judge in **Edelweiss Financial Services** (supra). Hence the put option deed was not a contract for the sale or purchase of securities falling within the SCRA and thus there is no question of it being illegal under the notification issued under section 16 of the SCRA.

(xvi) It is submitted that a contract for sale or purchase of securities would thus come into existence only in 2015, pursuant to the exercise of the option contained in the put option deed. When the option was exercised and a contract for sale and purchase of securities came into existence in 2015, clause (d) of the notification dated 3 October 2013, was in operation, which expressly permitted such a contract for sale or purchase of securities, subject only to the conditions mentioned in clauses (i) to (iii) thereof, all of which were met.

(xvii) The respondents submission that clause (d) of the notification dated 3 October 2013 covered 'shareholders agreements' containing an option to purchase/ sell their shares is ex-facie contrary

to the language of the notification hence misplaced. It is submitted that the plain language of clause (d) of the said notification, refers only to contracts for the purchase or sale of securities "*pursuant to exercise of an option"* contained in shareholders agreements. Clause (d) did not and could not cover shareholders agreement containing an option, in view of the settled legal position that such an option was a mere privilege and did not constitute a contract for the sale and purchase of securities and would accordingly not be within the purview of the SCRA. It is submitted that only pursuant to the exercise of an option, would a contract for the sale or purchase of securities would arise falling within the SCRA.

(xviii) The respondents submission that the put option deed was illegal and in contravention of the FEMA, as it provided for a fixed and are assured returns at a predetermined rate of 15% also is misconceived and contrary to the legal position. It is submitted that it is well settled that FEMA deals with actual transactions and dealings in foreign exchange, and does not purport to deal with or invalidate agreements or contracts. To support this submission reliance is placed on the decisions in **SRM Exploration P Ltd versus N & SN Consultants** (supra); **POL India Projects Ltd versus Aurelia** (supra); **Cruz City I Mauritius Holdings** (supra).

(xix) The respondents submission that the Put Option Deed provided for an open-ended assured returns is also not correct. It is submitted that the Put Option Deed provides that the put option would expire on the successful completion of the IPO. In similar circumstances in Cruz City 1 Mauritius Holdings (supra) the Court held in para 120 and 122, that as the put option could be exercised only within a specified time and was contingent on the construction

not been commenced within the prescribed period, it was not 'an open-ended assured exit option'

(xx) In fact the put option deed establishes that there was to be no assured return (at 15% per annum) to be paid/remitted in foreign exchange to the investor-Banyan Tree. It is submitted that clause 4.5 of the put option deed provided that on the exercise of the put option, the promoters were to provide valuation certificates from the auditor's of Axiom and a Chartered Accountant, specifying the value of put securities "in accordance with the FDI regulations", and if the Target Value (ie; the yield on 15% basis) was in excess of the value, as per the valuation certificate, only the amount as per the valuation certificate (ie; as per the FDI regulations) would be remitted to the investor/Banyan Tree. It is the submitted that accordingly only the amount permitted by the FDI regulations that is the Fair Market Value, was to be remitted/paid to the foreign investor/Banyan Tree in foreign exchange. The balance/excess amount, if any, was only to the extent requested by the investor/Banyan tree, to be deposited with a nominee at an account in India. In this context it is submitted that the Supreme Court in **IDBI Trusteeship Services Ltd versus Hubtown Ltd** (supra), while dealing with virtually identical circumstances wherein foreign direct investment by foreign investor which assured a return of 14.15%, but payable in India to an Indian company-albeit controlled 99% by the Foreign Investor, it was held that by payment in India to an Indian company, and subsequent utilisation of that amount by the foreign investor in India through the Indian company would not result in any fraction of FEMA.

(xxi) It is submitted that in fact there is no absolute bar or any prohibition to a foreign investor being paid in excess of the fair market value. The FDI scheme and the pricing guidelines provide general

permission to remit/pay to the investor as per the fair market value (FMV) in foreign exchange. Any payment in foreign exchange beyond the fair market value would not be covered by the general permission and would only be made with a special permission of the RBI . This will also precisely the opening given by the respondents advocates M/. Rajani Associates, to Banyan Tree at the time of entering into the SSA and the Put Option Deed.

(xxii) The fourth contention of the respondents that the RBI's press release dated 9 January 2014 and Circular dated 9 January 2014, poisted that agreements for FDI containing optionality clauses, entered prior thereto were illegal and invalid also is misconceived and incorrect. In this context it is submitted that the FEMA does not deal with agreements/contracts or render them illegal and covers only those actual transactions/dealings in foreign exchange. The RBI circular issued under the FEMA as also the regulations framed therein would never have the effect of rendering prior agreements containing optionality clauses, invalid or illegal. Moreover the circular dated 4 January 2014 does not even purport to render invalid or illegal prior FDI contracts containing an optionality clause. In fact Clause 4, of the circular expressly stipulates that " *all existing contracts will have to comply with the above conditions to qualify as FDI compliant".* Hence existing contracts containing optionality clauses, would qualify as FDI compliant, if they comply with the conditions stipulated therein.

(xxiii) The put option deed in fact complied with the conditions provided by the parties, that is the investor should not be guaranteed any assured exit price in foreign exchange and would exit at the price/ fair market value (in foreign exchange) prevailing at the time of exit. The put option deed only provided for an exit that the price/FMV (in

foreign exchange) at the time of the exit. If the target Value (yield at 15%) exceeded the FMV/valuation as per the FDI guidelines, the excess amount was not to be remitted or paid to the investor in foreign exchange, but only if the investor-Banyan Tree requested, it was to be repatriated to a nominee's account in India.

On the above submissions it is submitted that Banyan Tree is entitled for the reliefs as prayed for.

## Reasons and Conclusion

36. On the above backdrop, I have heard the learned counsel for the parties. With their assistance I have perused the impugned award and the relevant record of the proceedings.

37. Considering the tenor of the respondents' circuitous submissions, and the compulsive reply required to be given by the petitioner, as referred above, at the outset it is required to be observed that the scope of the present proceedings being confined to enforcement of a foreign award it would involve a limited enquiry.

38. The parameters/conditions for enforcement of the foreign award are provided in section 47 to section 49 of the A A&C Act . As per the requirement of section 47 the original award is on record, also the certified copy of the agreement for arbitration is also part of the record.

39. The lis between the parties in regard to the enforcement of the arbitral award, is thus what would be the subject matter of Section 48 of the A&C Act,, namely the contention of the respondents, that the contract between the parties namely the 'put option deed' is not a

valid contract {section 48(a)}, hence enforcement of the foreign award be refused, as the enforcement of the award would be contrary to the public policy of India and/or the fundamental policy of Indian law{Section 48(2)(b)(ii)}.

40. The grounds of objections as raised by the respondents are required to be discussed. As noted above in opposing the enforcement of the arbitral award the respondents have raised the following four objections :-

(i) Put option deed is not adequately stamped as per the requirements of the Maharashtra Stamp Act 1958. For this reason this contract itself is illegal. Consequently the arbitration agreement as contained in the 'put option deed' is also illegal. The contract itself being illegal, there arises no question of enforcement of an award which seeks to enforce rights under an illegal contract;

(ii) Put option deed is unenforceable and illegal under the provisions of the Securities Contracts (Regulation) Act 1956 (SCRA) and the notifications issued thereunder.

(iii) Put option deed is unenforceable and illegal also under the provisions of Foreign Exchange Management Act, and the notifications issued thereunder.

(iv) The arbitral award is contrary to the fundamental policy of Indian law.

41. Each of the above objections are being discussed in the ensuing paragraphs.

## (I) Put Option Deed Not Being Adequately Stamped

42. It is not in dispute that the entire adjudication before the arbitral tribunal leading to the award in question, was exclusively and solely on Banyan Tree seeking to enforce its 'exit rights' under the 'Put Option Deed,' being the principal document in question before the arbitral tribunal. Some background in this regard is required to be noted. Banyan Tree is a foreign entity who *interalia* executed with the respondents two basic documents firstly the 'Share Subscription Agreement' (SSA) and as a fallout of the SSA the 'Put Option Deed' both of which are dated 12 September 2008. The parties in clause 19 of the Put Option Deed agreed that the rights and obligations of the parties thereunder shall be governed by and construed in accordance with the laws of India. As per clause 7.3 (e) of the put option deed, stamp duty on the put option deed was payable by respondent No. 2 and 3- Responsive and Wellknown respectively, it was accordingly paid by them.

43. Obviously, when under these agreements, as Banyan Tree was parting with substantial amounts to be invested towards the capital requirements of Axiom, care and caution was exercised by Banyan tree including seeking a confirmation in regard to payment of stamp duty on the put option deed, not only as seen from the document itself and as noted above, but also seeking a letter/certificate dated nil (*annexed as exhibit A to the affidavit of Mr. Abhishek G. Poddar filed on behalf of Banyan Tree dated 1 July 2019)*, provided by Axiom around the closing date, wherein Axiom confirms to Banyan tree as under:

> *" all taxes (including stamp duty) payable in India in connection with the Transaction Documents, Subscription of Shares and Debentures have been paid"*

44. This apart, consistent to the above representation, of the put option deed being adequately stamped, the respondents throughout, that is prior to the commencement of the arbitral proceedings, during the arbitral proceedings and until the arbitral tribunal publishing its award, did not raise any issue, much less any objection in regard to the put option deed being insufficiently stamped, as per the requirements of the Maharashtra Stamp Act. Also as noted the arbitral tribunal was not precluded from not considering any objection which could be raised by the respondents arising under the Indian law.

45. Even before this Court, in the detailed counter affidavit filed in the present proceedings opposing enforcement, the respondents did not raise any contention in regard to this document not being adequately stamped. Banyan Tree has contended only that after this petition was listed for hearing, by an additional affidavit dated 21 June 2019, filed on behalf of the respondents this issue of the document not being sufficiently stamped was raised. Thus according to Banyan Tree this objection is completely an afterthought apart from being untenable in law.

46. Banyan Tree has contested this plea of the respondents by placing on record an affidavit in opposition dated 1 July 2019, inter-alia contending that as a matter of fact and in law the document is adequately stamped, that too at the hands of the respondents at Rupees One Hundred, as per Article 5 (h) (B) of the Maharashtra Stamp Act. It is stated that as the document contained an indemnity by further stamp duty of Rupees Two Hundred was paid on the document. Banyan Tree on all counts has contested this plea of the respondents terming it to be a dishonest plea by the respondents.

47. The respondents response to the aforesaid conduct on their part as set out in Banyan Tree's reply, is quite peculiar as stated in paragraph 7 of the rejoinder affidavit dated 12 July 2019. Respondents contend that in so far as the certificate on stamp duty being paid on the Put Option Deed is concerned, as issued by Axiom, it was issued at that time after obtaining advice from lawyers and consultants, and now the respondents have a new advise that the stamp duty paid on the put option deed is insufficient and not as per the relevant provisions of the Maharashtra Stamp Act. The petitioner has contended that the respondents are not honest in raising such plea and in case such contentions cannot be at the *ipse dixit* of a legal advice.

48. On a perusal of the pleadings on this issue and considering the rival contentions, it is difficult to accept this objection of the respondents that the put option deed is not adequately stamped for more than one reason. It needs to be observed that conduct of a party also creates substantive legal consequences not only in law but also relevant to the adjudication and consequent reliefs in legal proceedings. Firstly it is not in dispute that the obligation of adequately stamping the Put Option Deed under clause 7.3 (e) thereof was on the promoters that is respondent No. 2 and 3. At all material times, that is from the date of execution of the said document till the termination of the arbitral proceedings, in the arbitral tribunal publishing the award, the respondents never had any doubt about their own action and complying their obligation of adequately stamping the said document. As rightly pointed out on behalf of the petitioner neither an issue, in that regard at any point of time was raised by the respondents, nor any objection to that effect was ever taken before the arbitral tribunal when the parties were governed by

the Indian law (clause 19.1 of the put option deed). Hence the respondents are patently incorrect, misguided and misinformed in contending that the respondents could not have raised an objection in this regard before the arbitral tribunal, merely because the proceedings were conducted at Singapore. The respondents contention that for the first time, as a statutory requirement, the original/certified copy of the put option deed was required to be produced in the present proceedings, hence it was appropriate for the respondents to raise such objection in the present proceedings is also wholly untenable. This contention is completely oblivious not only to the clear position taken by the respondents before the arbitral tribunal in regard to the document being adequately stamped, but also admitting to the said document so as to be accepted in evidence, on the basis of which the arbitral tribunal adjudicated the rights and obligations of the parties on the Put Option Deed.

49. Certainly when the arbitral tribunal accepted the put option deed in evidence and proceeded to adjudicate the rights of the parties arising under this document, certain legal consequences have occurred, when they take such position on the document. In this context Section 35 of the Maharashtra Stamp Act becomes relevant, which reads thus:-

> *"Section 35. Admission of instrument where not to be questioned.*
>
> *Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 58, be called in question at any stage of the same suit are proceedings on the ground that the instrument has not been duly stamped."*

50. By application of the above provision the respondents are precluded from raising such an objection having accepted and/or by never raising this issue before the arbitral tribunal. Nothing precluded the respondents from raising any plea before the arbitral tribunal, under any of the provisions of the Indian law. In this context it would be relevant to refer the decision of the Supreme Court in **Javer Chand versus Pukhraj Surana**[16]**,** wherein the Supreme Court has held, that when a document has once been admitted in evidence, such admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument has not been duly stamped. This mandate of law would certainly be applicable even when the Court is concerned with enforcement and execution of an arbitral award.

51. Thus, to my mind, the respondents contention that the put option deed is not adequately stamped, is not only an afterthought but a belated and an untenable attempt, to resist the enforcement of the award. If the respondents were to be bona fide, then certainly as an obligation was cast on the respondents, to make payment of the stamp duty on the put option deed, the respondent would have taken appropriate steps and/or at least informed the petitioner in regard to the legal opinion they have received of the document not being adequately stamped and how the opinion was different from the earlier opinion and consequent position taken by the respondents in this regard right from the execution of the document in 2008 till 2019 when the award came to be published. The respondents would not have preserved such contention by hiding it only to be used as a technical tool to defeat enforcement of the award. This conduct of the respondents speak volumes of their absolute lack of bonafides in raising such plea.

16 AIR 1961 SC 1655

52. For completeness I may observe the objection even on merits is untenable. It is significant that Banyan Tree in the reply affidavit (to the respondents affidavit raising this objection on the document not been adequately stamped), has categorically contended in paragraph 3 (c) that the stamp duty of Rs. 300/- has been paid by the respondents on the put option deed, under which rupees hundred was paid in accordance with Article 5(h) (B) of the Maharashtra Stamp Act and as the document also contained an indemnity a further stamp duty of Rupees two Hundred was paid under Article 35 of the Maharashtra Stamp Act,(as payable in the year 2008). In the rejoinder affidavit of the respondents dated 12 July 2019, the respondents have thought it proper not to deny this assertion of the petitioner as raised in paragraph 3 (c) of the reply affidavit. Hence the petitioner's contention in regard to the put option deed being adequately stamped as per the provisions of Article 5 (h) (B) has also been admitted by the respondents.

53. In any event, respondent No. 2 and 3, on whom an obligation was cast under the put option deed, to pay the requisite stamp duty, when consistently for a substantial period of ten years took a position that the put option deed was adequately stamped at their hands, cannot be heard to say and/ or are estopped in law, to challenge their own action and conduct, in contending that the document is not adequately stamped. Apart from being devastatingly unreasonable, it is too late in time for the respondents to assert such a plea. In fact, it is a frivolous contention. Such contention, in the present facts, cannot be considered, much less accepted to be any ground under Section 48 of the A&C Act, to hold that the put option deed is not valid under law, so as to refuse enforcement of the award.

54. The respondents reliance on the decision of the Supreme Court in **SMS Tea Estates (P) Ltd versus Chandmari Tea Co (P) Ltd** (supra) and **Garware Wall Ropes Ltd versus Coastal Marine Constructions and Engineering Ltd** (supra), which are in the context of section 11 of the Arbitration and Conciliation Act, 1996, in the facts of the present case, is also not well founded. There cannot be any dispute on the principle of law these decisions lay down, namely that in exercising jurisdiction under section 11 of the A&C Act , when the Court is confronted with a document containing an arbitration agreement and the document is not stamped as per law, the document would be required to be held to be illegal and cannot be acted upon, to appoint an arbitral tribunal, till such defect of the document being adequately stamped is cured, by impounding the document and forwarding the same for payment of the proper stamp duty. In the present case we are concerned with enforcement of foreign award under the provisions of section 47 and 48 of the Arbitration and Conciliation Act,1996. In exercising jurisdiction under these provisions, the Court is precluded from adjudicating any factual dispute and more particularly after the parties have take a position on a document in the arbitral proceedings. In the present case, before the arbitral tribunal, the principal document in question was the Put Option Deed, under which disputes had arisen between the parties. The arbitral tribunal admitted the document in evidence, and has adjudicated the rights and obligations arising under the said document interalia by granting claims as made by the petitioner. Accepting such plea in these circumstances would mean that in exercising jurisdiction under Section 48 of the A & C Act the Court would be reopening the trial as need before the arbitral tribunal even on factual issues. This is certainly not the jurisdiction of the Court under Sections 47 to 49 of the A & C Act. In these

circumstances, surely these decisions are of no avail to the respondents.

55. Resultantly, the objection of the respondents to the enforceability /execution of the award on the ground of the put option deed not being adequately stamped stands rejected.

## II Put option deed being unenforceable and illegal under the provisions of the Securities Contracts (Regulation) Act 1956 (SCRA) and the notifications issued thereunder.

56. The respondents contentions on this question have been noted in the prefatory part of this judgement. However it would be necessary to briefly recapitulate, the objections of the respondents. The objections interalia are on the ground that the put option deed is a contract in securities/derivatives and /or a forward contract, hence the regulatory mechanism as postulated under the SCRA and the notifications issued thereunder becomes applicable, which would lead to a conclusion that the put option deed is invalid and illegal under the SCRA. The contention is that it has been the fundamental policy of Indian law to prohibit all contracts in derivatives except those expressly permitted under the provisions of the SCRA. The put option deed was executed on 12 September 2008, at which point of time SEBI notification dated 1 March 2000 was in operation, interalia prohibiting forward contracts and requiring contracts for the sale or purchase of securities to qualify as 'spot delivery contracts'. Thus the SCRA would recognise only spot delivery contracts and derivative contracts. An option agreement in derivatives as contained in the put option deed, can never be permitted as it is not a spot delivery contract. The rigours of Section 18A of the SCRA were clearly attracted. The put option deed when tested by applying section 18A of

the SCRA it is revealed that the same violates the said provision and was prohibited. The legislative intention behind SCRA is to prohibit any fixed return on investment in securities, put option deed by all parameters violates the mandate of not only the statutory notifications issued thereunder but also the provisions of the SCRA. This position is also reflected from the different notifications issued under the SEBI.

57. As opposed to this Banyan Tree has contended that the put option deed has always been a valid and a binding contract, it was not in any manner prohibited by the SCRA and was always capable of being performed. It is not a forward contract within the meaning of the SCRA, but is an option in securities. The SCRA does not apply to put option deed, much less in the manner as contended by the respondents. In any event an option in securities was authorised by the SCRA, following the amendment by the 'Securities Laws (Amendment) Act 1995' which deleted Section 20 of the SCRA. By virtue of this legislative change the legislation expressly permitted dealing in options. It is contended that the put option deed is not a contract in derivatives but an option in securities, these are two distinct concepts under the SCRA. The respondents interpretation of the SCRA and the notifications issued thereunder is incorrect and never intended.

Statutory Backdrop

58. Having briefly summarised the rival contentions on this question, it would be necessary to refer to the legislative intent in enacting the SCRA , its relevant provisions in the context of the present case and the notifications issued thereunder as referred by the parties.

59. The SCRA was brought into force with effect from 20 February 1957. The preamble of the SCRA would provide NB "*it is an act to prevent undesirable transactions in securities by regulating the business of dealing therein [….], by providing for certain matters connected therewith".* There was an amendment to the preamble by Act No. 9 of 1995, by which interalia, the words originally appearing after the word *"therein"* namely *"by prohibiting options and"*came to be deleted. The legislative intent of the SCRA is thus to 'prevent undesirable transactions in securities' and to provide a mechanism for regulating the business of dealing in securities. The emphasis and the intention of the SCRA is to prevent undesirable transactions. By a legislative exercise it was very easy to include shareholders agreement having a Put Option to be categorised as a undesirable transaction under SCRA. However, there does not appear to be any such express bar to such transaction.

60. The following relevant provisions of the SCRA are also required to be noted :-

> **2. Definitions –** In this Act, unless the context otherwise requires,-
> **(a) "contract"** means a contract for or relating to the purchase or sale of securities;
> **… … .. …**
> **[(ac)] "derivative" includes—** (A) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;
> (B) a contract which derives its value from the prices, or index of prices, of underlying securities;]
> (C) commodity derivatives; and
> (D) Such other instruments as may be declared by the Central Government to be derivatives;
> … … .. … …

**(d) "option in securities"** means a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes a *teji*, a *mandi*, a *teji mandi*, a *galli*, a put, a call or a put and call in securities;

... .. ... ...

**(h) "securities" include—**

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;]

(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(54 of 2002;]

(id) units or any other such instrument issued to the investors under any mutual fund scheme;]

(Explanation- For the removal of doubts, it is hereby declared that "securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act,1938 (4 of 1938)

(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable including mortgage debt, as the case may be;

**(ii) Government securities;**

**(iia)** such other instruments as may be declared by the Central Government to be securities; and

**(iii) rights or interests in securities;**

**(ha) "specific delivery contract"** means a commodity derivative which provides for the actual delivery of specific qualities or types of goods during

a specified future period at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyer and the seller are mentioned;

**(i) "spot delivery contract"** means a contract which provides for—

**(a)** actual delivery of securities and the payment of a price therefore either on the same day as the date of the contract or on the next day, the actual periods taken for the despatch of the securities or the remittance of money therefor through the post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality;

**(b)** transfer of the securities by the depository from the account of a beneficial owner to the account of another beneficial owner when such securities are dealt with by a depository;

..... ..... .....

**16. Power to prohibit contracts in certain cases.** - **(1)** If the Central Government is of opinion that it is necessary to prevent undesirable speculation in specified securities in any State or area, it may, by notification in the Official Gazette, declare that no person in the State or area specified in the notification shall, save with the permission of the Central Government, enter into any contract for the sale or purchase of any security specified in the notification except to the extent and in the manner, if any, specified therein.

**(2)** All contracts in contravention of the provisions of sub-section (1) entered into after the date of the notification issued thereunder shall be illegal.

..... ..... ..... .....

**18A. Contracts in derivative –** (1) Notwithstanding anything contained in any other law for the time being in force, contracts in derivative shall be legal and valid if such contracts are—

(a) traded on a recognised stock exchange;

(b) settled on the clearing house of the recognised (stock exchange or),

in accordance with the rules and bye-laws of such stock exchange.

(c) between such parties and on such terms as the Central Government may, by notification in the official Gazette, specify.

(As inserted by Act 9 of 1995 w.e.f. 25 January 1995)

.... ... ... ... .. ... .. ..

**Section 20 as repealed by the Securities Laws (Amendment) Act,1995 (9 of 1995), Sec.22 (w.e.f. 25-1-1995).**

**Prior to omission Section 20 read as under:**

**20. Prohibition of options in securities-**(1)Notwithstanding anything contained in this Act or in other law for the time being in force, all options in securities entered into after the commencement of this act shall be illegal.

(2) Any option in securities which has been entered into before such commencement and which remains to be performed, whether wholly or in part, after such commencement shall, to that extent, become void."

61. A notification dated 27 June 1969 was issued by the Government of India, in its Ministry of Finance under Section 16 of the SCRA, providing that no person in the territory to which the Act extended, shall save with the permission of the Central Government, enter into any contract for the sale or purchase of securities other than 'spot delivery contract' or 'contract for cash' or 'hand delivery or special delivery in any securities as permissible under the SCRA and the rules, by laws and regulations of a recognised Stock Exchange.

62. After almost more than two decades of the above notification, the Securities Laws (Amendment) Act 1995 was brought into effect on 25 January 1995, by virtue of which Section 20 of the SCRA, which

contained prohibition on options in securities came to be deleted. Simultaneously also the words "*by prohibiting options and*" as contained in the preamble of the SCRA came to be deleted. Thus the effect of the Amending Act was to remove the embargo in dealing with options.

63. Thereafter, by virtue of the Securities Laws (Amendment) Act 1999, the SCRA was amended to incorporate the definition of 'derivative', by insertion of section 2 (aa) *[re-lettered as per clause (ac) by Act 1 of 2005 with effect from 12 October 2004]*. Also the definition of 'securities' as contained in section 2 (h) came to be amended by incorporating a reference to 'derivative' in clause (ia). Further section 18A came to be incorporated to provide that contracts in derivatives would be legal and valid notwithstanding anything contained in any other law for the time being in force, if such contracts are traded on a recognised stock exchange and settled on the clearing house of the recognised stock exchange, in accordance with the rules and bye-laws of such stock exchange.

64. SEBI thereafter issued a notification dated 1 March 2000 under section 16(1) of the SCRA, providing that to prevent undesirable speculation in securities in the whole of India, it was declared that in all the territories where the SCRA was applicable, no person except

with the permission of the SEBI shall enter into any contract for the sale or purchase of securities other than such spot delivery contract or contract for cash or hand delivery or special delivery or contract in derivatives as permissible under the SCRA or the Securities and Exchange Board of India Act 1992; and the rules and regulations made thereunder. It is seen that this notification was akin to the 1969 notification (supra), except for the fact that additionally a reference to 'contract in derivatives' came to be incorporated to be dealt in the manner as provided, as also a reference to the Securities and Exchange Board of India Act 1992 came to be made.

65. SEBI on 3 October 2013 issued another notification under section 16 and 28 of the SCRA, interalia rescinding notification dated 1 March 2000, except as respects '*things done or omitted to be done before such recission'* to declare that no person in the territory to which the SCRA extends, shall, except with the permission of the SEBI 'enter into any contract for sale or purchase of securities other than a contract falling under any or more of the contracts as provided for in the said notification. The relevant extract of the notification reads as under :-

> *" In exercise of the powers conferred by sub-section (2) of section 28 and sub-section (1) of section 16 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), read with Government of India notification No. S. O. 573 (E) dated 30 July 1992 issued under section 29A of the said Act, the Securities and Exchange Board of India (hereinafter referred to*

*as 'the Board') hereby rescinds the notification No. S. O. 184 (E) dated 1st March, 2000, except as respects things done or omitted to be done before such rescission,and declares that no person in the territory to which the said Act extends, shall save with the permission of the Board, enter into any contract falling under any one or more of the following, namely:-*

*(a) spot delivery contract;*

*(b) contracts for the sale or purchase of securities or contracts in derivatives, as a permissible under the SCRA or the Securities and Exchange Board of India Act 1992 and the rules and revelations made under such Acts and rules and regulations and bylaws of a recognised stock exchange;*

(c) *contracts in pre-emption including right of 1st refusal, or tag -along or drag-along rights contained in shareholders agreements or articles of association of companies or body corporate;*

*(d) contract in shareholders agreements or articles of association of companies or body corporate, for purchase or sale of securities pursuant to exercise of an option contained therein to buy or sell the securities where:-*

*(i) the title and ownership of the underlying securities is held continuously by the selling party to such contract for a minimum period of one year from the date of entering into the contract;*

*(ii) the price of a consideration payable for the sale or purchase of the underlying securities pursuant to exercise of any option contained therein, is in compliance with all the laws for the time being in force as applicable; and*

*(iii) the contract is settled by way of actual delivery of the underlying securities:*

***Provided** that the contract specified in clause this (a) to (d) above, shall be in accordance with the provisions of the Foreign Exchange Management Act, 1999 and rules or regulations made thereunder;*

***Provided** further that nothing contained in this notification shall affect or validate any contract which has been entered into prior to the date of this notification.*

***Explanation** : It is hereby clarified that the contracts mentioned in clause (c) and (d) above shall be valid notwithstanding anything contained in section 18 A read with clause (d) of sub-section (1) of section 23 of the Securities Contracts (Regulation) Act 1956(42 of 1956);……."*

*(emphasis supplied)*

66. Referring to the statutory provisions of the SCRA and the notifications as noted above, the respondents have contended that the put option deed as executed on 12 September 2008, which is after the SEBI notification dated 1 March 2000 was in operation which prohibited forward contracts and/or permitted sale or purchase of securities interalia only by spot delivery. The respondents contend that the put option deed pertained to the shares/securities of Axiom, an unlisted public company, to be dealt not under a spot delivery or any permissible mode under the SCRA and the notifications issued thereunder. To support this submission a reference is made to different clauses of the put option deed namely definition of put option price; put settlement date; target value and clause 4.5 -settlement of put option.

67. The respondents also contended that if in any such contract there is a put option such contract would constitute a contract in derivatives. Hence these contracts were required to comply with the provisions of section 18A of the SCRA. This as the respondents contend that the put option in question, as contained in the put option deed is a contract in derivatives, attracting section 18A of the SCRA. It satisfies the definition of derivative as the value of the put option is

derived from the value of the underlying shares, as upon the exercise of the option, the shares of Axiom held by Banyan Tree would have to be purchased by respondent No. 2 and 3 (Responsive and Well known respectively) namely the 'derived value'. Also for the reason that there is an exchange fluctuation as the put option would derive its value from the fluctuation in the conversion rates of USD into Indian rupees. In supporting this contention a reference is made to the decision of the learned Single Judge of the Madras High Court in **Rajshree Sugars and Chemicals Limited versus Axis Bank Ltd** (supra).

68. To appreciate the respondents contention on applicability of the provisions of the SCRA and the notifications issued thereunder it would be necessary to examine, as to what is the nature of the contract in question under the Put Option Deed and whether it can be considered to be purely a contract in securities/derivative or a future contract and o such examination whether is it possible to reach a conclusion that the provisions of the SCRA or the notifications notifications issued thereunder would create a consequence of invalidating such a contract.

69. It would be relevant to advert some of the clauses of the put option deed which convenience are extracted hereunder:

> **"Interpretation Clause:**
> … … … … …

**Event of Default** shall have the meaning assigned to it under the Subscription Agreement;
**Exercise Period** means, in relation to a Put Security, the period from the Issue Date to and including the Expiry Date;

**Expiry Date** means the date earlier of the successful completion of the IPO or (ii) September 30,2015;

**Put Exercise Notice** means a written notice given in accordance with Clause 3 (Exercise of the Put Option and substantially in the form of Schedule 2 (Form of Put Exercise Notice);

**Put Option** means the option granted by the Promoters to the Investor under Clause 2 (Grant of the Put Option);

**Put Option Price** means, in respect of any Put Securities on any Put Settlement Date, the Target Value of such Put Securities on that Put Settlement Date;

**Put Securities** means the Subscription Shares, the Series A Debenture and Equity Shares and **Put Security** means any of them;

**Put Settlement Date** means each date specified as such in a Put Exercise Notice, which date shall be a date which falls one month after the date of service of the Put Exercise Notice;
….. …. ….. ...
**Subscription Shares** means the 100 equity shares of the Issuer of a face value of Rs.10 (Rupees Ten only) subscribed to by the Investor under the Subscription Agreement;

**Target Value** means a value that results in an annual yield equal to 15.0% per annum in USD terms on the Total Investment Amount from the Issue Date to the date of exercise of the Put Option or in the event the Issuer is ineligible to come out with an IPO by December 31, 2010 and fails to provide an exit to the Investor through a merger of the Issuer with RIL, an annual yield equal to 20.0% per annum in USD terms on the Total Investment Amount from the Issue Date to the date of exercise of the Put Option. For the purpose of this definition, in computing the yield, all coupon payments made to the Investor(s) before the exercise of the Put Option and the monitoring fees shall be included but without deducting any withholding taxes or other taxes applicable on such payment (excluding taxes on the income of the Investor(s), resulting from such yield and coupon payments);

**Total Investment Amount** means a sum of USD 5,000,000 invested by the Investor towards subscription of the Series A Debentures and a further sum of USD 2,500,000 to be invested by the Investor towards subscription of further securities of the Issuer, as may be reduced or cancelled;

**Transaction Documents** means this Deed, the Subscription Agreement, the Escrow Agreement and all other documents contemplated, required by or referred to in them;

**Valuation Certificates** means, in respect of any Put Securities on any date;

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2. **Grant of the Put Option**

In consideration of the subscription of the Series A Debenture by the Subscriber (which enables to Issuer to fund the capital expenditure necessary for capacity expansion of its existing plants), the Promoters grant to the Investor a Put Option to sell the Put Securities to the Promoters, at the Put Option Price, on the terms and subject to the conditions of this Deed.

**3. Exercise of the Put Option**

**3.1** The Investor shall have the right (but not the obligation), to exercise the Put Option in the Exercise Period in the following manner:

(a) The Investor has the option to put up to 25% of the Put Securities to the Promoters, within 12 to 24 months from the Issue Date;

(b) The Investor has the option to put up another 25% of the Put Securities to the Promoters, within 24 to 36 months from the Issue Date. Provided that the Investor has the option to put 50% of the Put Securities to the Promoters within 24 to 36 months from the Issue Date if the Investor has not exercised his right under Clause 3.1(a) above;

(c) The Investor has the option to put up the balance of the Put Securities until all of the Put Securities have been transferred to one or more of the Promoters, at any time after 36 months from the Issue Date to and including the Expiry Date;

(d) Notwithstanding anything contained in this Clause 3.1, the Investor shall have the option to put all the Put Securities to the Promoters at any time as it may deem fit:

(i) on the occurrence of any Event of Default, if the same has not been remedied within the relevant cure periods, if any, provided in the Subscription Agreement.

(ii) upon the Issuer taking steps in relation to making the IPO.

3.2 The Investor may, from time to time during the Exercise Period, deliver to RIL on behalf of the Promoters a Put Exercise Notice in respect of the Put Securities.

3.3 Exercise of the Put Option shall oblige the Promoters to purchase the Put Securities.

3.4 In the event the Investor does not exercise its right to participate in the initial public offering in the manner provided in Clause 9 of the Subscription Agreement, the Investor shall not have the right to exercise the Put Option on such number of Equity Shares that would otherwise have been eligible to offer by the Investor under the IPO.

## 4. Settlement of the Put Option

4.1 The consideration for the transfer by the Investor to the Promoters of the Put Securities shall be the Put Option Price.

4.2 RIL shall procure the delivery of each Valuation Certificate in respect of the Put Securities to be transferred on the relevant Put Settlement Date, atleast four Business Days prior to that Put Settlement Date.

4.3 The Investor shall calculate the relevant Put Option Price by 3.00 p.m. on the date falling 3 Business Days before each Put Settlement Date.

4.4 The Investor shall notify RIL of the relevant Put Option Price by 3.00 p.m. on the date falling 2 Business Days before each Put Settlement Date (together with supporting calculations in reasonable detail).

4.5 Completion of the sale and purchase of the Put Securities following the exercise of the Put Option shall take place on the Put Settlement Date. The Promoters shall pay the Put Option Price (in Indian Rupees) in respect of that exercise by 2.00 p.m. (Mumbai time) on that Put Settlement Date to the account of the Investor specified in the relevant Put Exercise Notice. Provided that if either of the Valuation Certificates delivered in respect of the Put Securities in respect of any Put Settlement Date show the value of the Put Securities is less than the Target Value, each Promoter shall, on the relevant Put Settlement Date, remit to the relevant account of the Investor specified in the relevant Put Option Notice, the lower of the amounts specified in those Valuation Certificates. The Promoters shall only to the extent requested by the Investor, deposit the remainder of the Put Option Price with the nominee (on behalf of the Investor) at such account in India as may be specified by the nominee to RIL for this purpose.

## 7. Warranties and Undertakings

7.1 The Investor represents and warrants to the Promoters and the Promoters represent and warrant to the Investor that :

(a) it has the power to execute and deliver this deed and to perform its obligations under it and has taken all action

necessary to authorize such execution and delivery and the performance of such obligations;

(b) this Deed constitutes legal, valid and binding obligations on it in accordance with its terms; and

(c) the execution and delivery by it of this Deed and its performance under it do not and will not:

(i) conflict with or constitute a default under any provision of:

A) any agreement or instrument to which it is a party; or

B) its constitutional documents; or

C) any law, lien, lease, order, judgment, award, injunction, decree, ordinance or regulation or any other restriction of any kind or character by which it is bound; and

(ii) relieve any other party to a contract with it of its obligations or enable that party to vary or terminate its rights or obligations under that contract.

7.2 In order to ensure that the Promoters have sufficient liquidity to meet its payment obligations pursuant to this Deed, as and when due, the Promoters agree that they will, on or before the Closing Date, keep in escrow, equity shares owned and controlled by them in RIL in dematerialized firm constituting 26% of the paid-up equity capital of RIL ("RIL Shares") with an escrow agent to be appointed by the Promoters, in consultation with the Investor. The parties shall enter into such documentation and do all acts, deeds and things as may be necessary to give effect to the same.

7.3 The Promoters represent and warrant to the Investor (and the Promoters agree and acknowledge that the Investor is entering into this Deed in reliance on such representations and warranties) that as at the date hereof:

(a) the constitutional documents of the Promoters do not and would not restrict or inhibit in any manner the escrow over the RIL shares in favour of an escrow agent;

(b) the shares of RIL which are expressed to be (or are required by any Transaction Document to be or become) under escrow are issued, fully paid, non-assessable and freely transferable and there are no moneys or liabilities outstanding or payable in respect of any such shares;

(c) except for filings required to be made with the Reserve Bank of India through an Authorized

Dealer in relation to a transfer of the Put Securities, no consent, licence, approval or authorization of or filing or registration with or other requirement of any governmental department authority or agency in India is required by the Promoters in connection with the execution, delivery, performance, validity or enforceability of this Deed;

(d) the payment obligations of the Promoters under this Deed at all times constitute direct, unconditional, unsecured and unsubordinated obligations of the Promoters, and will rank pari passu with all its other unsecured payment obligations, except for obligations mandatorily preferred by law applying to companies generally in India or the jurisdiction of the Promoters;

(e) except for the stamp duty payable by the Promoters upon execution of this Deed, the securities transaction tax (if any) payable by the Promoters and the capital gains tax (if any) payable by the Investor, and no withholding or deduction for any taxes, duties, assessment or governmental charges of whatever nature is imposed or made for or on account of any income, registration, transfer or turnover taxes, customs or other duties or taxes of any kind, levied, collected, withheld or assessed by or within India or the jurisdiction of the Promoters in connection with the sale of the Put Securities;

(f) the execution by the Promoters constitutes, and the exercise of its rights and performance of its obligations under this Deed will constitute, private and commercial acts performed for private and commercial purposes and will not be entitled to claim immunity from suit, execution, attachment or other legal process in any proceedings taken in India in the case of the Promoters in relation to this Deed.

7.4 The Promoters must promptly:

(a) obtain, maintain and comply with the terms of; and

(b) supply certified copies to the Investor,

of any authorization required under any applicable law or regulation to enable it to perform its obligations under, or for the validity or enforceability of, this Deed.

..... ..... .....

21. TERMINATION

This Deed shall terminate on the expiry of the Exercise Period or the exercise of the Put Option in respect of all the Put Securities, whichever is earlier."

70. Considering the clauses of the put option deed, as noted above, it is quite clear that the put option deed is a fallout and consequence of what the parties had agreed in the share subscription agreement (SSA). By entering into the 'put option deed', the parties were giving effect to the agreement as contained in the SSA in which Axiom had agreed to issue to Banyan Tree compulsorily convertible debentures in the capital of Axiom in aggregate amount equivalent to USD 50 million. As a consideration to this subscription by Banyan tree ( as agreed under the SSA) which was for the of capital requirement of Axiom, Responsive and Wellknown agreed to grant to Banyan tree an option to sell the 'put securities', to Responsive and Wellknown on terms as agreed in the put option deed. Clause 2 of the put option deed thus provided for 'Grant of the Put Option', under which the parties clearly record that it is in consideration for the subscription of the Series A Debenture by the subscriber/Banyan tree (which enabled the issuer/Axiom to fund the capital expenditure necessary for capacity expansion of its existing plants) the promoters/Responsive and Wellknown, granted to the investor/Banyan tree a put option to sell the put securities to the promoters/ Responsive and

Wellknown, at the put option price, on the terms and subject to conditions as agreed in the put option deed. Under clause 3 the parties agreed in regard to the manner in which the put option would be exercised. Clause 3.1 clearly provided that the investor/Banyan Tree shall have the right (but not the obligation), to exercise the put option in the exercise period as per sub clauses (a) to (d). On Banyan Tree exercising put option, Banyan Tree was entitled to the put option price, defined as target value of the put securities as on the put settlement date. Target value as noted above was inter-alia defined by the parties to mean a value that results in an annual yield equal to 15% per annum in USD terms on the total investment amount from the issue date to the date of exercise of the put option or in the event the issuer is ineligible to come out with an IPO by 31 December 2010 and failed to provide an exit to the investor/Banyan Tree through a merger of the issuer/Axiom with Responsive, an annual yield equal to 20.0% per annum in USD terms on the total investment amount, from the issue date to the date of exercise of the put option. In Schedule 3 to the put option deed, the parties agreed in regard to the 'valuation process' interalia to include that at the time of exit the statutory auditors/chartered accountant take the average of prices obtained from the following two valuation multiples to arrive at the target value of the put option:

(i) market cap to sales: 2 times

(ii) price to book value per share: 4 times

the schedule also defined as to what is the 'Book Value', 'Book value per share', 'Market cap' and sales.

71. From the tenor of the put option deed, it is quite apparent that the intention of the parties was provide Banayan Tree an 'exit' from the investment it had made towards the capital requirement of Axiom. It is not possible to conceive that the intention of the parties was to indulge into any speculation in the put securities, which is the primary factor to consider the applicability of the provisions of the SCRA and the notifications issued thereunder. Thus, even assuming that the contention of the respondent is to be accepted that the 27 June 1969 notification issued under section 16 of the SCRA, was in operation on the date the put option deed was executed, the said notification would not apply. This for the reason, that this notification was principally intended to prevent undesirable speculation on securities. Merely because the said notification provided that any contract for the sale or purchase of securities interalia cannot be other than spot delivery contracts under the act and rules and bylaws of a recognised stock exchange, that would not mean that the notification in any manner prohibited a put option in a share subscription agreement. This more particularly, as the intention of the parties when they enter into a share subscription agreement is to avail financial assistance from the

investor and at the same time enabling the investor to secure the debt/financial assistance, by providing an agreeable form of security, by offering subscription to the shares/debentures. To categorize such an arrangement between the parties as a speculative trade in securities hit by the provisions of the SCRA and the said notification issued thereunder hence is not well founded.

72. The legislative changes which were brought about in the subsequent years are also progressive and quite significant for the development of the securities market. The Securities Laws (Amendment) Act 1995 was brought into effect on 25 January 1995, by virtue of which Section 20 of the SCRA, which contained prohibition on options in securities came to be deleted. Also the words "*by prohibiting options and"* as contained in the preamble of the SCRA also came to be deleted. Thus, the effect of the Amending Act was to remove any embargo in dealing with options, in the event the options fell under the parameters recognised by the SCRA. Subsequent thereto by the Securities Laws (Amendment) Act 1999, the SCRA was amended to incorporate the definition of 'derivative', by insertion of Section 2 (ac). Also the definition of the word 'securities' as contained in section 2 (h) came to be amended by incorporating a reference to 'derivative' in the clause (ia). Further section 18A came to be incorporated to provide that contracts in derivatives were legal and

valid notwithstanding anything contained in any other law for the time being in force, if such contracts are traded on a recognised stock exchange and settled on the clearing house of the recognised stock exchange, in accordance with the rules and bylaws of such stock exchange. Thereafter, SEBI issued a notification dated 1 March 2000 under section 16(1) of the SCRA, with an intention to prevent undesirable speculation in securities, providing that no person except with the permission of the SEBI shall enter into any contract for the sale or purchase of securities other than such spot delivery contract or contract for cash or hand delivery or special delivery or contract in derivatives as permissible under the SCRA or the Securities and Exchange Board of India Act 1992, and the rules and regulations made thereunder. As noted above this notification was akin to the 1969 notification (supra) except for the fact that additionally a reference to 'contract in derivatives' came to be incorporated to be dealt in the manner as provided, as also a reference to the Securities and Exchange Board of India Act 1992 came to be made.

73. Thus, by virtue of the said amendments and the consequent notification, a statutory regime was introduced under the SCRA by which a prohibition on options was deleted and recognition of contracts in derivatives/forward contracts by introduction of Section 18A came to be inserted. This was the legal position as prevailing on

12 September 2008 when the SSA and the Put Option Deed came to be executed between Banyan Tree and the Respondents. It also needs to be observed that section 18A of the SCRA by virtue of the opening words of the provision NB *"Notwithstanding anything contained in any other law for the time being in force, contracts in derivative shall be legal and valid if such contracts are...."* cannot be construed to mean that it would render illegal or invalidate any contract entered between the parties containing an option to sell securities. Moreover it declares the contracts to be legal and valid in the manner as provided for in sub clauses (a) to (c). Thus this is the statutory foundation in relation to trading/transactions in securities as strictly falling under the purview of the SCRA.

74. The developmental regime continued. Many aspects were required to be notified with a further clarity. Thus subsequent statutory developments are not only relevant but quite significant. SEBI on 3 October 2013 issued a notification under section 16 and 28 of the SCRA, interalia rescinding notification dated 1 March 2000, except in regard to NB: '*things done or omitted to be done before such recission',* to declare that no person in the territory to which the SCRA extended, shall, except with the permission of the SEBI 'enter into any contract for sale or purchase of securities other than a contract falling under any or more of the contracts as provided for in the said

notification. These were interalia spot delivery contracts **(cl.a)**; contracts for the sale or purchase of securities or contracts in derivatives as permissible under the SCRA or the SEBI act 1992 and the rules and regulations made thereunder **(cl.b)**; and most importantly contracts in shareholders agreements or articles of association of companies for purchase or sale of securities pursuant to exercise of an option contained therein to buy or sell the securities **(cl.d).** The **first proviso** to this notification has also recognised that these contracts shall be in accordance with the provisions of the FEMA. The second proviso postulates that nothing contained in the notification shall affect or validate any contract which has been entered into prior to the date of the notification. The **second proviso** is further clarified by the 'explanation' below it, which clarifies, that contracts mentioned in clauses (c) and (d) of the said notification shall be valid notwithstanding anything contained in Section 18A read with clause (d) of sub-section (1) of section 23 of the SCRA. Significantly as seen from clauses (b) and (d) of this notification distinction has been made in regard to a contract in derivatives {clause(b)} and contracts in shareholders agreements for purchase or sale of securities pursuant to exercise of an option contained therein to buy or sell the securities.

75. In my opinion, on a holistic reading of the notification dated 3 October 2013, it is quite clear that there is a complete statutory recognition in regard to shareholders contracts for purchase or sale of securities, containing a put option and permitting an exercise of option under such agreement. Such an agreement can even be an agreement entered prior to the issuance of this notification. The rights of the parties under any such agreement as the notification says shall remain undisturbed notwithstanding the issuance of this notification. It is quite clear, that this notification never intended to either invalidate any existing shareholders agreement containing an option in securities nor it in any manner intends to dilute the rights of the parties under any such agreement. To read this notification in the manner as suggested by the respondents namely to construe that it invalidates the put option deed, would in fact amount to doing violence to the plain language of the notification. In any event in issung this notification it can never be an intention that two classes of shareholders agreements, namely those agreements entered prior to the issuance of the notification and others after issuance of the notification, be created. This would lead to an anomalous position. In any event there was never an express statutory bar pointed out by the respondents to prohibit Put Options in Shareholders agreement.

76. It would be also relevant at this stage to note that the Reserve Bank of India in its Circular No. 4 dated July 15, 2014 issued under the caption "Foreign Direct Investment (FDI) in India – Issue /Transfer of Shares or Convertible Debentures – Revised pricing guidelines"also recognised the following new pricing guidelines in respect of unlisted companies as under:

> " ***(ii) In case of unlisted companies***
> *The issue and transfer of shares including compulsorily convertible preference shares and compulsorily convertible debentures with or without optionality clauses shall be at a price worked out as per any internationally accepted pricing methodology on arm's length basis. Thus, the guiding principle will be that the non-resident investor is not guaranteed any assured exit price at the time of making such investment/agreement and shall exit at a fair price computed as above at the time of exit subject to lock in period requirement as applicable in terms of A.P. (DIR Series) Circular No. 86 dated January 9, 2014.*
> ....."

*77.* The legal position as seen from the various decisions would also support the above observations in regard to the validity of the put option deed in SCRA. In **MCX Stock Exchange Ltd versus Securities & Exchange Board of India& Ors.** (Supra), the Division Bench of this Court was interalia construing the buyback arrangements as contained in the share purchase agreement (SPA) dated 20 August 2009 (date is quite proximate to the Put Option Deed), as entered by the petitioner therein with IL&FS Financial Services Ltd.( IL&FS). IL&FS agreed to purchase shares of the petitioner worth Rs. 159.12 crores from the fourth respondent. On the date of the execution of the SPA a company by name La-Fin Financial Services Pvt Ltd (La-Fin), offered an exit

option to IL&FS. An undertaking was also furnished accepting an obligation to purchase in its sole discretion during the agreed period of all the shares purchased by IL&FS under the share purchase agreement at any time after the completion of one year from the date of investment, but not later than 3 years from the date of investment after which the right of IL&FS would lapse. Accordingly the sale of shares was effected in favour of IL&FS. One of the issues as raised by the SEBI in the show cause notice issued to the petitioner therein, in rejecting the application filed by the petitioner- MCX Stock Exchange Ltd, was to the effect that the buyback arrangement constituted a forward contract and was contrary to the provisions of the SCRA. It is in this context, albeit not directly deciding an issue falling under Section 18A, the Division Bench held that a contract giving an option to one of the parties to sell or purchase the securities was a mere privilege, that may or may not be exercised and did not constitute a contract for the sale or purchase of securities falling within the SCRA. It was held that a contract for the sale of securities falling within the SCRA would come into existence only pursuant to exercise of the option. The Division Bench made the following observations in para 75, 77 and 80 of this judgement which are relevant in the present context :-

> 75. In a buy back agreement of the nature involved in the present case, the promissor who makes an offer to buy back shares cannot compel the exercise of the option by the promisee to sell the shares at a future point in time. If the promisee declines to exercise the option, the promissor cannot

> compel performance. A concluded contract for the sale and purchase of shares comes into existence only when the promisee upon whom an option is conferred, exercises the option to sell the shares. Hence, an option to purchase or repurchase is regarded as being in the nature of a privilege.
>
> …. … … …
>
> 77. The distinction between an option to purchase or repurchase and an agreement for sale and purchase simpliciter lies in the fact that the former is by its nature dependent on the discretion of the person who is granted the option whereas the latter is a reciprocal arrangement imposing obligations and benefits on the promissor and the promisee. The performance of an option cannot be compelled by the person who has granted the option. Contrariwise in the case of an agreement, performance can be elicited at the behest of either of the parties. In the case of an option, a concluded contract for purchase or repurchase arises only if the option is exercised and upon the exercise of the option. Under the notification that has been issued under the SCRA, a contract for the sale or purchase of securities has to be a spot delivery contract or a contract for cash or hand delivery or special delivery. In the present case, the contract for sale or purchase of the securities would fructify only upon the exercise of the option by PNB or, as the case may be, IL&FS in future. If the option were not to be exercised by them, no contract for sale or purchase of securities would come into existence. Moreover, if the option were to be exercised, there is nothing to indicate that the performance of the contract would be by anything other than by a spot delivery, cash or special delivery. Where securities are dealt with by a depository, the transfer of securities by a depository from the account of a beneficial owner to another beneficial owner is within the ambit of spot delivery.
>
> … …. ….
>
> 80. In the present case, there is no contract for the sale and purchase of shares. A contract for the purchase or sale of the shares would come into being only at a future point of time in the eventuality of the party which is granted an option exercising the option in future. Once such an option is exercised, the contract would be completed only by means of spot delivery or by a mode which is considered lawful. Hence, the basis and foundation of the order which is that there was a forward contract which is unlawful at its inception is lacking in substance."

78. In **Edelweiss Financial Services Ltd Versus Percept Finserve Pvt.Ltd & Anr** (supra), the learned Single Judge of this court was considering a similar issue as in the present case namely a share purchase contract in a share purchase agreement under which petitioner therein had an option to either resell the shares held by it to respondent No. 1 , who was bound to purchase the same at the price,

which would give the petitioner an internal rate of return (IRR) of 10% on the original purchase consideration, or to interalia continue as a shareholder of respondent No. 2. The petitioner exercised the put option, requiring respondent no.1 to repurchase the shareholding of the petitioner in the respondent No. 2 for a sum of 22 crores giving an IRR of 10% on the original purchase consideration of ₹ 20 crores. As respondent No. 1 refused to comply, an arbitration was invoked under the SPA. The arbitral tribunal rejected the petitioner's claim on the ground that the transaction of a share purchase option was illegal being in breach of the SCRA. It is in this context, considering the challenge to the arbitral award the learned single judge referring to the decision of the Division Bench in **MCX Stock Exchange Ltd** (supra), held that the arbitral tribunal was in an error when it held that such a contract providing for an option to sell the securities under the SPA would be a forward contract. It was observed that just because the original vendor of securities is given an option to complete repurchase of securities by a particular date, it cannot be said that the contract for repurchase is on any basis other than spot delivery. In regard to the arbitral tribunal's view that the share purchase option as contained in the SPA was in breach of section 18A of the SCRA, the learned Single Judge held that clauses 8.5 and 8.5.1 of the SPA gave the petitioner the right and not an obligation to sell their shares purchased by it under the SPA to respondent No. 1, its vendor, who was obliged to buy

the same, was the right as exercised by the petitioner. It was held that merely because the contract contains a put option in respect of securities, the contract cannot be termed as a contract in derivatives and illegal under the provisions of Section 18A of the SCRA. I am in complete agreement with the view taken by the learned Single Judge in this case. I am thus, unable to subscribe to the respondents submission that this judgement of the learned Single Judge in any manner mis-interprets the notifications and/or the provisions of the SCRA and/or contrary to the laid down by the Supreme Court in **Bhagwati Developers Private Limited versus Peerless General Finance and Investment Company Ltd & Anr** (supra). In making this submission the respondents are completely deviating from the basic premise on which the Put Option Deed is founded, as holistically seen.

79. The above discussion would lead to a conclusion that the put option deed which is a fallout of the SPA is a contract between shareholders which recognises the right of Banyan Tree/petitioner to exercise the put option in regard to the put securities. By itself put option deed is not a speculative contract merely because it involves sale of the Put securities. Only on exercise of the put option by issuance of a put option notice, which was exercised by Banyan Tree in the year 2015, an obligation was created on the promoters/respondents to purchase the securities by payment of the

put option price. Hence a contract for the sale or purchase of securities had come into existence only in the year 2015 when Banyan tree exercised its option. From the terms and conditions of the put option deed it certainly cannot be construed to mean, that there was any such obligation on Banyan Tree to sell the put securities. Thus, the nature of the put option deed is such that it cannot be classified as an exclusive contract in derivatives as understood under the SCRA, although there are some traits creating an impression that the provisions of the SCRA may be attracted, when they are actually not. As the option in favour of the Banyan Tree could neither be dealt nor traded on the stock exchange, being a specific buyback arrangement between the shareholders, there was no question of any speculative transaction between the parties, attracting the provisions of SCRA or the notifications issued thereunder. It is thus not possible to accept the respondents contention that the put option deed fell foul of section 18A of the SCRA, interalia being not traded on a recognised stock exchange.

80. The respondents reliance on the decision of the Supreme Court in **BOI Finance Ltd versus Custodian and others** (supra) would also not assist the respondents. This decision would not be applicable in the facts of the present case. This was the case in which the Custodian was asserting its rights to attach securities which were acquired by the

appellant/BOI Finance Ltd, from brokers who were declared to be notified persons under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (for short "**the Special Courts Act"**). The acquisition of the securities by the appellant was prior to the coming into force of the Special Courts Act which was brought into force on 6 June 1992. The contract entered by the appellant with the brokers was for purchase and sale of certain securities which were not listed on any stock exchange. The transaction consisted of two inter-connected legs, the first leg being the 'ready leg', consisting of sale of securities by the brokers to the banks at a specified price and the second leg was the 'forward leg' consisting of reversal of the transaction after 14 days buy back of the same or similar securities by the banks at a later date and purchase thereof by the brokers at a price determined on the first date. The ready leg of the transactions was completed with the appellant paying the agreed price and receiving the delivery of the securities which were agreed to be purchased. However before the forward leg of the transactions could be completed, an Ordinance of 1992 leading to be the Special Courts Act, came to be issued. It is in these circumstances, the Custodian appointed under the Special Courts Act, filed applications before the Special Court contending that these contracts entered between the banks and the brokers/ notified persons were illegal under the Banking Regulation Act, 1949 and the SCRA, meaning thereby that in

regard to the contract securities the notified persons continued to hold the securities and not the appellant bank and hence the Custodian was entitled to attach such securities. The Special Court accepted the contentions as raised by the Custodian and held the contracts to be void. It is in this context the Supreme Court while upholding the rights created in the appellant/banks in regard to the first/ready leg of the transaction, held that the forward/second leg would not be legal, in view of the notification dated 27 June 1969 issued by the Government under Section 16 (1) of the SCRA which permitted only spot delivery contract and not forward transactions. It was held that, the Custodian was however not entitled to claim the securities as the first leg of the transaction were severable and valid.

81. It is thus clearly seen that the transaction in the said case was a transaction purely dealing with purchase and sale of securities there was only an intention to speculate, which is completely different than what the parties had agreed in the Put Option Deed, the purpose of which was ancillary to the SSA. No doubt that the SCRA would be applicable to securities of companies which are not listed on the stock exchange as also held in **Naresh Aggarwala & Co. versus Canbank Financial Services Ltd & Anr** (supra) and **Bhagwati Developers Private Limited versus Peerless General Finance and Investment Company Ltd & Anr** (supra) however for more than one reason the decisions in **BOI**

**Finance Ltd.** (Supra) would not be applicable. Firstly, the Court in this case was not dealing with a contract akin to the contract in the present case, which is an agreement between shareholders, the genesis of the put option deed being the SSA. The transaction which fell for a consideration of the Supreme Court was purely a transaction dealing in securities with a buyback formula, which was a forward transaction as prohibited under the SCRA and the notification issued thereunder. A distinction would be required to be certainly drawn, between a shareholders agreement containing an option clause, of the nature as contained in the put option deed, and a pure and simplicitor agreement between two parties dealing in securities for the purpose of profits involving speculation. It is in this context the Supreme Court was of the view that the second leg of the transaction was hit by the provisions of the SCRA and the notification issued thereunder. Secondly, in the present case the court cannot be oblivious to the fact that when Banyan Tree in 2015 exercised the put option, the legislative clarification by virtue of the notification dated 3 October 2013 (supra) was already in vogue which substantially cleared any smoke if it existed. As discussed above a shareholders agreement containing a put option was recognised by the said notification. A shareholders agreement containing an option clause would not be a contract of the nature as contemplated by the notification dated 27 June 1969 issued by the Government under section 16 (1) of the

SCRA, which was not the case before the Supreme Court when it held that the appellant/BOI Finance Ltd could not have entered into a forward contract with the brokers to sell the securities except by way of spot delivery.

82. The respondents in the written submissions have referred to the judgment in **Rajshree Sugars and Chemicals Limited versus Axis Bank Ltd (supra)** of the learned Single Judge of the Madras High Court which is in completely in a different context and totally alien to the controversy in the present proceedings. However what is interesting to note is that while discussing on derivates in the facts of the said case it was observed that derivatives are financial instruments used to transfer or hedge the risk. There are four types of derivatives contracts namely forwards, futures, options and swaps. It was observed that they had their origin, perhaps in speculative trading in commodities, several centuries ago and later underwent a metamorphosis to become “futures trading”and “forward trading”a couple of centuries back. It was observed that some trace of their history goes back to 600 BC, when a Greek purchased an option to work on olive presses, while others traced it to the period of William and Mary in the 17$^{th}$ century. It was observed that although the history of futures trading in commodities is fairly long, the history of futures in stocks and securities is shorter and the history of futures trading in foreign

currencies is only a few decades old in our country. The Court held that the transactions in derivatives being age-old insofar as commodities and stocks and securities are concerned, it was futile on the part of the plaintiff to contend that the transactions are either are prohibited by law or opposed to public policy, and that what was expressly permitted by law, cannot be held to be opposed to public policy. It was in fact observed that the Master Circular issued by the RBI from time to time and the regulations framed by the RBI under the FEMA permitted such transactions. Such transactions have the sanction of law the world over. Although the put option deed stricto sensu is not a contract in derivatives however even if it is assumed to have some traits of a contract in derivatives albeit not falling under the SCRA, it cannot be held that the put option deed was not permitted by law or was against the public policy. This was the age old recognition even for contracts in derivatives.

83. Thus there is nothing illegal when the arbitral tribunal holds that section 18 A of the SCRA does not absolutely prohibit put options in the Put Option Deed and that the contract between two shareholders, containing an option in the nature as contained in the put option deed is completely different from options contract or derivatives contemplated by section 18A of the SCRA. In any event it cannot be held that that tribunal's view on this question, which is

arrived at, on interpretation of the terms and conditions of the put option deed, is an impossible view nay illegal.

### (III) Put option deed is unenforceable and illegal under the provisions of Foreign Exchange Management Act, and the notifications issued thereunder.

84. The principal contention of the respondents is that the Reserve Bank of India having issued notification dated 3 May 2000 referred as FEMA-20 to regulate/restrict the transfer or issue of securities by a person resident outside India. It is contended that regulation 5 (1) therein governed the purchase of shares by persons resident outside India in an Indian company, which did not make any mention of permissibility of optionality clauses in investments made by persons resident outside India. The contention is that in 2008 when investment was made by Banyan Tree in the shares of Axiom by virtue of the SSA, the said transaction was governed by regulation 5 (1) of FEMA 20, inasmuch as Banyan Tree was granted investors right in terms of clause 10 of the SSA read with Schedule 16 thereof which interalia included the right to exercise put option. This was contrary to regulation 5 (1). However by virtue of the RBI notification dated 12 November 2013 (2013 RBI notification) the provisions of FEMA 2o were amended by adding a proviso to regulation 5 (1), whereby under the regime of FEMA, optionality clauses were permitted for the first time by the RBI in the year 2013. The second contention is regulation

10 (B) (2) (b) (ii) (c) of FEMA 20 which is in regard to the valuation of shares namely that if the shares are not listed on a stock exchange, sale of such shares cannot be at a price other than the fair market value arrived at in terms of the mechanism provided in the said regulation. It is contended by the respondents that the underlying principle being that the guaranteed assured return on equity instruments such as shares was an anathema to such investment. RBI's further Circular dated 9 January 2014 (2014 RBI Circular) leaves no room for doubt that optionality clauses in foreign investments made under the regime of FEMA 20 were not permitted at the time when the SSA and the put option deed was executed between the Respondents and Banayan Tree. According to the respondents the impugned award completely overlooks these aspects, rendering the award illegal.

85. In my opinion, the above contentions of the respondents proceed on a fundamentally erroneous premise both on facts and on law. At the outset it is required to be noted that on a cumulative reading of clause 12.2.2 of the SSA read with clause 9 under schedule 16 (Investors Right) to the SSA, it is quite clear that the put option deed did not provide for an open-ended assured return to Banyan Tree, as an exit option. It is clear that the put option could be exercised by Banyan Tree within a specified time and was contingent

on the respondents not completing an IPO. Further clause 4 of the put option deed which provides for 'settlement of the put option' in clause 4.5 thereunder, provided that on Banyan Tree exercising put option, the promoters would provide valuation certificates from the Auditor's of Axiom and a Chartered Accountant Specifying the Value of Put Securities in Accordance with the FDI Regulations, as incorporated in the definition of 'valuation certificates' in the put option deed. Thus if the target value namely the yield on 15% basis was to be in excess of the value as per the valuation certificate, only the amounts as per the valuation certificate which was to be as per the FDI regulations would be remitted to Banyan Tree. Accordingly Banyan Tree would be correct in its contention that the amounts permitted by the FDI regulations namely the fair market value was to be remitted to Banyan Tree in foreign exchange. The balance amount if any was to be deposited with a nominee at an account in India as would be requested by Banyan Tree. It is therefore not correct for the respondents to contend that the arrangement between the parties under the put option deed provided for any fixed return to Banyan Tree in violation of FEMA. No doubt when the amount to be remitted materialises, compliances if any required under the FEMA would be made by the Petitioner which the petitioner, is no manner has resisted. It also needs to be noted that the Arbitral Tribunal has observed in the award that the Put Option Price was less than the FMV of the Put shares (computed in accordance

with the FDR Regulations) and that payment of Put Option Price would accordingly be permissible under the FEMA Pricing Guidelines and permissions thereunder. In this context even in the decision in **IDBI Trusteeship Services Ltd versus Hubtown Ltd.** (supra), although dealing with the issue arising under a summary suit, the Supreme Court observed that when the foreign investor (referred as FMO in the said judgment) wished to repatriate the funds then RBI permission would be necessary. It was observed that even if the RBI permission was not granted then again there is no infraction of FEMA Regulations.

86. The arbitral tribunal taking a review of the provisions of the FEMA and the notifications issued thereunder has come to a conclusion that the Put Option Deed was compliant with the provisions of FEMA and the notifications issued thereunder. In paragraph 112 and 114 of the arbitral award, referring to FEMA Regulation 9 (1) which pertained to transfer of shares and convertible debentures of an Indian company by a person resident outside India, and regulation 10 (B) which provided for prior permission of the RBI in respect of transfer by way of sale not covered by Regulation 9 by a person resident outside India ,it is held that the put option deed was made to be compliant with the regime of regulation 9 and/or 10 (B). The tribunal has observed that the question as to which regime of

permission was governing the put option deed had no legal substance or relevance for determining the question of the legality of the put option deed under FEMA, for the reason that FEMA and the subordinate legislation thereunder were not dealing with the legality of the contract like the put option deed, but dealt with the manner in which the contract could be performed from the foreign exchange perspective. I do not see any illegality in the tribunal reaching to this conclusion. This would also be clearfrom the following discussion.

87. FEMA which was brought into force on 1 June 2000 is the successor of the Foreign Exchange Regulation Act 1973 (for short FERA). By the year 1993 significant developments had taken place such as substantial increase in foreign exchange reserves, growth in foreign trade, rationalisation of tariffs, current account convertibility, liberalisation of Indian investments abroad, increased access to external commercial borrowings by Indian corporates and participation of foreign institutional investors in the stock markets (Re: paragraph 2 of the FEMA statement of objects and reasons). It is in this context the Parliament decided to bring a bill to repeal FERA. It is relevant to extract the relevant paragraphs of the 'Statement of Objects and Reasons' leading to the enactment of FEMA which read thus:

> *" The Foreign Exchange Regulation Act 1973 was reviewed in 1993 and several amendments were enacted as part of the ongoing process*

*of economic liberalisation relating to foreign investments and foreign trade for closer interaction with the world economy. At that stage, the central government decided that a further review of the Foreign Exchange Regulation Act would be undertaken in the light of subsequent developments and experience in relation to foreign trade and investment. It was subsequently felt that a better course would be to repeal the existing Foreign Exchange Regulation Act in enacting new legislation. Reserve Bank of India was accordingly asked to undertake a fresh exercise and suggest new legislation. A Task force constituted for this purpose, submitted its report in 1994 recommending substantial changes in the existing Act.*

1. *Significant developments have taken place since 1993 such as substantial increase in our foreign exchange reserves, growth in foreign trade, rationalisation of tariffs, current account convertibility, liberalisation of Indian investments abroad, increased access to external commercial borrowings by Indian corporates and participation of foreign institutional investors in the stock markets.*
2. *…….*
3. *After incorporating certain modifications and suggestions of the Standing Committee on Finance, the Central Government has decided to introduce the Foreign Exchange Management Bill and repeal the Foreign Exchange Regulation Act 1973. The provisions of the Bill aim at consolidating and amending the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange markets in India"*

(emphasis supplied)

88. The preamble of FEMA also throws much light on what the legislation intends. It reads that it is an Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting orderly development and maintenance of foreign exchange market in India. If the legislative scheme emanating from the provisions of FEMA is considered, it is quite clear that it principally concerns regulation and management of foreign exchange and remittances to a foreign country by any entity and the requisite permissions in that regard. There is no provision in FEMA which would void transactions. The regulations framed under

the FEMA advance the purpose as contained in in the substantive provisions as contained in the FEMA. It certainly cannot be accepted as a legal proposition that the provisions of FEMA or the regulations made thereunder would invalidate or render void a contract like the put option deed. In the facts of the present case it may concern Banyan Tree when it remits the award money outside India, which Banyan Tree intends to comply, however this would not mean that merely as some future permissions, may be required to be obtained by Banyan tree under FEMA, it should be held that the enforcement of the foreign award should be refused. Considering the legislative scheme under FEMA it cannot be conceived, that any violation of the provisions of FEMA can either render the put option deed to be illegal or/or the foreign award in question would be rendered unenforceable. In my opinion an unwarranted hair-spitting was resorted in dissecting the notifications when on the basic premise the respondents were not correct, namely to contend that the Put Option Deed would be invalid under the FEMA as the terms thereof offend the notifications.

89. This apart the position in law in this context as seen from the various judgements would clearly support this view, that the respondents contention that the put option deed is illegal under the FEMA and the notifications issued thereunder is an un-stateable and

an untenable proposition. The following decisions would elucidate this legal position.

90. **In POL India Projects Limited versus Aurelia Reederei Eugen Friederich GMBH (supra**) a learned Single Judge of this Court (R.D.Dhanuka. J) also in the context of enforcement of a foreign award was interalia dealing with a similar argument opposing enforcement of an award. The contention of the award debtor was to the effect that under the provisions of Foreign Exchange Management (Guarantees) Regulations, 2000, a letter of guarantee could not have been executed in favour of the award creditor, without the prior permission of the RBI. It was contended that as there was a violation of regulation 3 thereof. The document being entered contrary to law the document itself was illegal and an arbitral award based on an illegal document would be a nullity and in conflict with the public policy of India. The learned Single Judge referring to the decision of the Delhi High Court in **SRM Exploration Private Limited** (supra) as also to the decision of the Division Bench of this Court in **Videocon Industries Ltd versus in Intesa Sanpaolo S.P.A.** rejected the contention of the award debtor interalia holding that even if such letter of guarantee was to be issued contrary to the provisions of the said regulations framed under FEMA, simplicitor violation of the provisions

of the said regulations would not be illegal and contrary to the fundamental policy of Indian law.

91. The Supreme Court by its order dated 19 January 2018 (SLP (C) No. 32244/2017 rejected the challenge to it decision of the learned Single Judge of the Delhi High Court rendered in **Cruz City 1 Mauritius Holdings versus Unitech Ltd** (supra) wherein the Court considering a similar contention as raised by the respondent therein in objecting to the enforcement of the foreign award held that the enforcement of a foreign award cannot be declined on the ground of any regulatory compliance or violation of a provision of FEMA. In paragraph 110 of this decision the learned Single Judge observed as under:

> *" 110. The contention that enforcement of the award against Unitech must be refused on the ground that it violates any one or the other provision of FEMA, cannot be accepted, but any remittance of the money recovered from Unitech in enforcement of the award would necessarily require compliance of regulatory provisions and/or permissions"*

92. In a recent decision of the Supreme Court in **Vijay Karia and others versus Prysmian Cavi E Sistemi SRL & Ors.**[17] the Supreme Court again approved the view of the learned Single Judge of the Delhi High Court in **Cruz City 1 Mauritius Holdings versus Unitech Ltd (supra),** to hold that the Court would not refuse enforcement of a foreign award

17 (2020 SCC Online SC 177)

on the ground of violation of a FEMA regulation and that for any such violation the the award cannot be said to be void.

93. As clearly seen from the authoritative pronouncement of the Supreme Court in **Vijay Karia's case (supra)** a challenge to the enforceability of a foreign award on the ground that the contract violates the provisions of FEMA and regulations made thereunder and/or if the award is enforced it may violate the provisions of FEMA is no more *res integra.* The respondents contentions questioning the enforceability of the arbitral award on the ground of violation of FEMA and/or the regulations made thereunder are thus required to be rejected.

## IV. Objection on the ground that the award is contrary to the fundamental public policy of

94. In raising this objection the principal contention of the respondents is not different from what has been urged by the respondents in questioning the enforceability of the award on the grounds of SCRA and the provisions of FEMA and the notifications issued thereunder. The discussion in the aforesaid paragraphs whereby I have held that the objections of the respondents on both the counts namely under the SCRA and the FEMA are untenable, would apply with all force even to reject this objection. A survey of the recent decisions as to how the Courts have interpreted the concept of public

policy of India and/ or fundamental policy of the Indian law, in the context of enforceability of a foreign award, would aid the conclusion.

95. The decision of the three Judge Bench of the Supreme Court in **Shri Lal Mahal Ltd versus Progetto Grano SPA**[18], has taken a review of the law in the context of what would be meant by the expression public policy of India in its applicability in enforcement of a foreign award. Considering the earlier decisions in **Renusagar Power Co Ltd versus General Electric Co.**[19], **ONGC Ltd versus Saw Pipes Ltd**[20] and several other judgments it was held that for the purposes of Section 48 (2) (b) of the Arbitration and Conciliation Act, the expression 'public policy of India' must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in the decision in **Renusagar's** case (i.e. fundamental policy of Indian law; the interest of India or justice or morality). The application of 'public policy of India' doctrine for the purposes of section 48 (2) (b) would be more limited than the application of the same expression in respect of the domestic award. The Court accordingly confirmed and approved the principles as laid down in Renusagar's case. It would be appropriate to note the following observations of the Supreme Court:

18 (2014)2 SCC 433
19 (1994) Supp. 1 SCC 644
20(2003) 5 SCC 705

23. Of the many questions framed for determination in Renusagar, the two questions under consideration were:

(i) "Does Section 7(1)(b)(ii) of the Foreign Awards Act preclude enforcement of the award of the Arbitral Tribunal, GAFTA for the reason that the said award is contrary to the public policy of the State of New York?", and

(ii) "what is meant by public policy in Section 7(1)(b)(ii) of the Foreign Awards Act?".

This Court held that the words "public policy" used in Section 7(1)(b)(ii) of the Foreign Awards Act meant public policy of India. The argument that the recognition and enforcement of the award of the Arbitral Tribunal, GAFTA can be questioned on the ground that it is contrary to the public policy of the State of New York was negated. A clear and fine distinction was drawn by this Court while applying the rule of public policy between a matter governed by domestic laws and a matter involving conflict of laws. It has been held in unambiguous terms that the application of the doctrine of "public policy" in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when purely municipal legal issues are involved.

24. Explaining the concept of "public policy" vis-a-vis the enforcement of foreign awards in Renusagar, this Court in paras 65 and 66 of the Report stated: (SCC pp.68q1-82)

> "65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Arbitration (Protocol & Convention) Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.
>
> 66. . . . . This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign

awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. **Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.**

….. …..

27. In our view, what has been stated by this Court in *Renusagar* with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must apply equally to the ambit and scope of Section 48(2)(b) of the 1996 Act. In *Renusagar* it has been expressly exposited that the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression "public policy" used in Section 7(1)(b)(ii) was held to mean "public policy of India". A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in Renusagar. For all this there is no reason why Renusagar should not apply as regards the scope of inquiry under Section 48(2)(b). Following Renusagar, we think that for the purposes of Section 48(2)(b), the expression "public policy of India" must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in Renusagar. Although the same expression 'public policy of India' is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the sections but, in our view, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

…. …. …. ….

29. We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in Saw Pipes is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b)."

(emphasis supplied)

96. As noted above, such objection of the respondents also cannot be sustained considering the recent decision of the Supreme Court in **Vijay Karia's** case (supra) which also refers to the decision of the Supreme Court in **Dropti Devi versus Union of India (supra),** as relied on behalf of the respondents to support its contention on FEMA. A contention similar to the one as raised by the respondents on FEMA was not accepted. It would be apposite to note as to what the Supreme Court has held in Vijay Karia's case in rejecting such challenge. The Supreme Court observed thus:-

> 87. It has been argued by the Appellants, based on the Non-Debt Instrument Rules, that a foreign award by which shares have to be purchased at a discounted value, would violate the aforesaid Rules, and therefore, would amount to a violation of the fundamental policy of Indian law. Resultantly, the Appellants contended that as a result of this, the award in the present case would not be enforceable in India.
>
> … … … …
>
> 89. Based on the aforesaid Rules, the Appellants have argued that the transfer of shares from the Karias, who are persons resident in India, to the Respondent No.1, who is a person resident outside India, cannot be less than the valuation of such shares as done by a duly certified Chartered Accountant, Merchant Banker or Cost Accountant, and, as the sale of such shares at a discount of 10% would violate Rule 21(2)(b)(iii), the fundamental policy of Indian law contained in the aforesaid Rules would be breached; as a result of which the award cannot be enforced.
>
> ….. …… ….
>
> 91. This reasoning commends itself to us. First and foremost, FEMA -unlike FERA - refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being the Reserve Bank of India under FERA. It is important to remember that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of the Reserve Bank of India may be obtained post-facto if such violation can be condoned. Neither the award, nor the agreement being enforced

by the award, can, therefore, be held to be of no effect in law. This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law. Even assuming that Rule 21 of the Non-Debt Instrument Rules requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award directs that such shares be sold at a sum less than the market value, the Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach. Further, even if the Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign award on the ground of violation of a FEMA Regulation or Rule would not arise as the award does not become void on that count. The fundamental policy of Indian law, as has been held in *Renusagar* (supra), must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground."

92. The Appellants, however, relied upon certain observations in Dropti Devi V. Union of India (2012) 7 SCC 499. In that case, a challenge was made to the constitutional validity of Section 3 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,1974 (hereinafter referred to as "COFEPOSA"), stating that by reason of the new legal regime articulated in FEMA, in replacement of FERA, the said provision has become unconstitutional in the changed situation. This submission was repelled by this Court stating:

> "66. It is true that provisions of FERA and FEMA differ in some respects, particularly in respect of penalties. It is also true that FEMA does not have provision for prosecution and punishment like Section 56 of FERA and its enforcement for default is through civil imprisonment. However, insofar as conservation and/or augmentation of foreign exchange is concerned, the restrictions in FEMA continue to be as rigorous as they were in FERA. FEMA continues with the regime of rigorous control of foreign exchange and dealing in the foreign exchange is permitted only through authorised person. While its aim is to promote the orderly development and maintenance of foreign exchange markets in India, the Government's control in matters of foreign exchange has not been diluted. The conservation and augmentation of foreign exchange continues to be as important as it was under FERA. The restrictions on the dealings in foreign exchange continue to be as rigorous in FEMA as they were in FERA and the control of the Government over

> foreign exchange continues to be as complete and full as it was in FERA.
>
> 67. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange. The conservation and augmentation of foreign exchange continue to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardising the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-compliance results in civil imprisonment of the defaulter. The whole intent and idea behind Cofeposa is to prevent violation of foreign exchange regulations or smuggling activities which have serious and deleterious effect on national economy."

> 93. It is important to note that this Court recognized that FEMA, unlike FERA, does not have any provision for prosecution and punishment like that contained in Section 56 of FERA. The observations as to conservation and/or augmentation of foreign exchange, so far as FEMA is concerned, were made in the context of preventive detention of persons who violate foreign exchange regulations. The Court was careful to note that any illegal activity which jeopardises the economic fabric of the country, which includes smuggling activities relating to foreign exchange, are a serious menace to the nation and can be dealt with effectively, *inter alia*, through the mechanism of preventive detention. From this to contend that any violation of any FEMA Rule would make such violation an illegal activity does not follow. In fact, even if the reasoning contained in this judgment is torn out of its specific context and applied to this case, there being no alleged smuggling activity which involves depletion of foreign exchange, as against foreign exchange coming into the country as a result of sale of shares in an Indian company to a foreign company, it does not follow that such violation, even if proved, would breach the fundamental policy of Indian law."

97. The above discussion would lead to an irresistible conclusion that all the objections as raised by the respondents opposing the enforceability of the arbitral award are wholly invalid. None of the grounds as raised by the respondents fall into any of the three categories as enumerated in the decision of **Renusagar** (supra) and confirmed in **Shri Lal Mahal** (supra) so as to hold that the arbitral

award is against the public policy of India. The arbitral award thus satisfies all the legal requirements in law so as to be enforced as a decree of this Court. Banyan Tree is correct in its contention that the respondents having accepted investment from Banyan Tree and subsequently being hugely benefited from the same ought to have been fair and honest in their dealing with a foreign party who expected a legitimate exit as explicitly understood and provided for in the Put Option Deed. Banyan Tree is also correct in its contention that the legal pleas apart from being without substance were merely an eye wash so as to make an attempt to deprive Banyan Tree of the fruits of the award. Although the pleas as raised by the respondents can be said to be legal pleas, but the entire approach of the respondents in pursuing the present proceedings was nothing less than converting these proceedings as if it is an appeal knowing well the limited scope of interference under Section 48 of ACA. Taking an overall view of the matter, in my opinion, the respondents in these circumstances cannot deprive Banyan Tree of the fruits of the arbitral award.

98. Resultantly the petition needs to succeed. It is accordingly allowed in terms of prayer clause (a). The Put Award dated January 15, 2019, (as subsequently corrected),in SIAC ARB 37 of 2016 is declared to be binding under section 46 and enforceable as a decree

of this Court, under Part II of the Arbitration and Conciliation Act 1996. Ordered accordingly.

99. In regard to the other prayers the petitioner-Banyan Tree is at liberty to adopt appropriate proceedings as permissible in law.

100. Petition stands allowed in the aforesaid terms. No order as to cost.

## Commercial Arbitration Petition No.475 of 2019

101. This is also a petition filed by Banyan Tree. The parties to this petition are also common to the petition as decided by the above judgment.

102. By this petition Banyan Tree has prayed for enforcement of the Escrow Award dated 15 January 2019 (as subsequently corrected), of the Singapore International Arbitration Centre (SIAC) in Arbitration No. 36 of 2016, as a decree of this Court.

103. This arbitration had arisen under an Escrow Agreement dated 30 September 2008 made between the parties which forms part of the investment transaction also including the Share Subscription Agreement dated 12 September 2008 and Put Option Deed dated 12 September 2008 as discussed and considered in the aforesaid

judgment in the context of the award under the Put Option Deed. The Escrow Arbitration as ordered by the Tribunal was directly connected to the companion arbitration arising under the Put Option Deed and subject matter of the above connected petition leading to the above judgment. Thus challenge to the Award under the Escrow Agreement is not on any ground, different from the challenge as raised by the respondents to the enforceability of the Put Option Award. Hence common arguments were advanced as dealt in extenso in the above judgment.

104. In the above circumstances, in view of the reasons and conclusions in the above companion judgment, this petition also needs to succeed. It is accordingly allowed by the following order:-

**ORDER**

(i) The Escrow Award dated January 15, 2019, (as subsequently corrected), in SIAC ARB 36 of 2016 is declared to be binding under section 46 and enforceable as a decree of this Court under Part II of the Arbitration and Conciliation Act 1996. The petition is accordingly allowed in terms of prayer clause (a). Ordered accordingly.

(ii) In regard to the other prayers the petitioner/Banyan Tree is at liberty to adopt appropriate proceedings as permissible in law.

(iii) Petition stands allowed in the aforesaid terms. No order as to cost.

105. At this stage Mr.Andhyarujina, learned Counsel for the respondents prays for stay of both these judgments. Mr.Rohan Rajadhyaksha, learned Counsel for the petitioners has opposed this prayer as made by Mr.Andhyarujina.

106. Considering that the relief which has been granted to Banyan Tree is to hold that the foreign awards are legal and enforceable and no other relief is granted, the request made by Mr.Andhyarujina for stay cannot be granted. It is also a premature request of the respondents, as the petitioners are yet to file appropriate proceedings to execute the award. As and when such proceedings are filed, surely the respondents can raise pleas as may be permissible to them in law. Mr.Andhyarujina's prayer for stay is accordingly rejected.



[G.S. KULKARNI, J.]