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

Reserved on: 06.09.2017
% Pronounced on: 31.01.2018

\+ O.M.P.(EFA)(COMM.) 6/2016

DAIICHI SANKYO COMPANY LIMITED ..... Petitioner

Through Mr.Gopal Subramanium, Sr. Adv. Mr.Arvind Nigam, Sr.Adv. and Mr.Arun Kathpalia, Sr. Adv. with Mr.Amit Mishra, Mr.Mohit Singh, Ms.Hima Lawrence, Mr.Akshay Puri, Mr.Abhijeet Sinha, Mr.Keshav Raychaudhuri, Mr.Rohan Jaitley, Mr.Aditya Shankar, Mr.Mikhil Sharda, Mr.Jayvardhan Singh, Mr.Shivam Pandey, Ms.Samridhi Hota & Mr.Samaksh Goyal, Advs.

versus

MALVINDER MOHAN SINGH AND ORS. .... Respondents

Through Mr.Harish N.Salve, Sr.Advocate with Ms.Anuradha Dutt, Ms.Fereshte D.Sethna, Ms.Vijaylakshmi Menon, Ms.Ekta Kapil, Ms.Neeharika Aggarwal, Ms.Akanshsa Banerjee, Mr.Anirudh Bakhru & Mr.Chaitanya Kaushik, Advs. for R-1 to 4 & R-13.

Mr.Sandeep Sethi, Sr.Adv. with Mr.Siddharth Aggarwal, Advocates for R-5 and 9 to 12.

Mr.Rohit Chaudhary and Ms.Preeti Kohli, Advs. for R-6 to R-8.

Mr.Neeraj Kishan Kaul, Sr.Adv. with Mr.Varun Mishra, Adv. for R-14.

Mr.Rajeev Nayyar, Sr. Advocate with Mr.Varun Misra, Adv. for R-15 to 19

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition has been filed under Part II of The Arbitration and Conciliation Act,1996 by the petitioner M/s.Daiichi Sankyo Company Limited seeking enforcement and execution of the Foreign Award dated 29th April 2016 passed by the Majority Arbitral Tribunal comprising of Mr.Karyl Nairn QC and Professor Lawrence G.Boo (a dissenting award being given by Justice (Retd.) A.M.Ahmadi). By the present judgment, I will decide the objections under section 48 of The Arbitration and Conciliation Act, 1996 filed by the respective respondents to enforcement of the Award. Separate objections have been filed by Respondents No.1 to 3, Respondent No.4, Respondents No.6 and 7, Respondent No.8, Respondents No.5 and 9 to 12 (minors) and by Respondents No.14 to 19 and Respondent No.20 respectively.

2. The controversy revolves around a Share Purchase and Share Subscription Agreement (hereinafter referred to as SPSSA) dated 11.6.2008 whereby the petitioner agreed to purchase from the respondents their total stake in Ranbaxy Laboratories Limited (hereinafter referred to as 'Ranbaxy') for a transaction valued at INR 198 billion (approximately 4.6 billion US dollars).

3. Disputes having arisen between the parties, in terms of SPSSA, the petitioner invoked the arbitration clause. In terms of the said arbitration agreement the disputes were to be resolved by Arbitration to be administered by the International Chamber of Commerce (hereinafter referred to as ICC).

The place of arbitration was to be Singapore. Each disputing side was to appoint one Arbitrator and the two Arbitrators so appointed were to consult and appoint a third Arbitrator. In case of failure to appoint respective Arbitrators or two party Arbitrators or even to appoint the Chairperson, the ICC was to appoint such Arbitrator or Chairperson, as the case may be. The arbitration proceedings were to be conducted in English.

4. The petitioner nominated Ms.Karyl Nairn QC. Respondents nominated Justice A.M.Ahmadi (Rtd.), former Chief Justice of India. ICC appointed Professor Lawrence, G.S.Boo of The Arbitration Chambers, Singapore as the President of the Arbitral Tribunal. The applicable procedural law of arbitration was to be the International Arbitration Act of Singapore. The governing law was to be the laws of Republic of India.

5. Some of the brief facts as urged by the claimant/petitioner are as follows:-

6. The petitioner by a Share Purchase and Share Subscription Agreement dated 11.6.2008 purchased the respondent's total stake in the company Ranbaxy Laboratories Limited (Ranbaxy) for a value of over INR 198 billion (approximately US Dollar 4.6 billion at the relevant exchange rates). In terms of the SPSSA the respondents received total amount of Rs.9,576.1 crores. In discharge of statutory duty under Security and Exchange Board of India Act the petitioner had to purchase shares from the public. Hence, it spent a total amount of Rs19,804/- crores approximately to complete the transaction. The first installment of the payment was received by the respondents on 20.10.2008 and the final payment was received on 7.11.2008. On 19.12.2008 Dr.Une and Mr.Takshi Shoda were nominated on the Board on behalf of the petitioners. Mr.Malvinder Singh/respondent No.1 continued

to be the CEO of Ranbaxy. Subsequently, on account of differences he resigned on 24.5.2009. The claim of the petitioner arises out of the said SPSSA. It is the case of the petitioner that during the acquisition process of the respondent's shares in Ranbaxy Mr. Malvinder (respondent No.1) and his business associates Mr. Vinay Kaul and Mr.Jay Deshmukh made false representations to the petitioner by concealing a document known as Self Assessment Report (hereinafter referred to as SAR) and also about the genesis, nature and severity of pending investigations by the US Food and Drug Administration (hereinafter referred to as FDA) and Department of Justice (hereinafter referred to as DOJ) against Ranbaxy thereby fraudulently inducing the petitioner to acquire the shares.

7. (a) It is stated that in 2004 Ranbaxy recruited Dr.Rajinder Kumar as the President of the R&D department. Just a few months into the job the said Dr.Kumar reported to the Company's Science Committee that Ranbaxy is engaged in data falsification to obtain regulatory approvals more quickly for hundreds of drug products in dozens of countries around the world. He is said to have prepared this document termed as SAR which had details of the stated falsification. Dr.Kumar is later said to have resigned from the company having complained that the matters addressed in SAR were not being given sufficient attention. It transpired that a former colleague of Dr.Kumar, Shri Dinesh Thakur provided a copy of the SAR to the US authorities, probably around 2005-06. Regulatory investigation is said to have commenced sometimes in February 2006 into the Ranbaxy's facilities. Warning letter is said to have been issued to Ranbaxy on 15.6.2006 which is said to have identified various violations of Good Manufacturing Practices and FDA Regulations. Various other steps are said to have been taken by

DOJ and FDA. It is the case of the petitioner that Mr.Malvinder Singh (Respondent No.1) and his close business and family associates were fully aware that SAR evidenced widespread fraudulent practices at Ranbaxy. The company and its senior management being aware of its practices failed to address its problems for years. It is further the case of the petitioner that Mr.Malvinder Singh acting for himself and agent for other respondents misrepresented and concealed from the petitioner the existence of SAR or any document of that nature reporting that Ranbaxy had intentionally fabricated data for regulatory submissions to various regulators or the fact that the US Government was in possession of such documents. It is pleaded that the respondents kept the SAR as a secret. The respondent misrepresented the ongoing investigation by the US Regulatory authorities as routine regulatory exercise and a meritless fishing expedition launched at the behest of a competitor. It is the case of the petitioner that but for the fraud it would not have acquired Ranbaxy shares at all and has thereby suffered loss and damages.

(b) It is further stated by the petitioner that it first learnt in November 2009 that SAR was the true source of the US authorities concerns. On coming to know about this aspect the petitioner is said to have worked towards addressing the issues and an Agreement was entered into with the US Regulatory Authority. A consent decree was entered into with FDA in December 2011. The cost of complying with the terms of the consent decree was estimated to be US$35-50 million per year. It further entered into a Settlement Agreement with the Department of Justice, agreeing to pay a sum USD$500 million penalty to resolve all potential, civil and criminal liability.

(c) The petitioner claims to have suffered direct and indirect losses as a result of having entered into the SPSSA relying upon the false picture painted by the misrepresentation and active concealment of material facts by Mr.Malvinder Singh/his agents in the course of negotiations.

(d) The petitioners invoked arbitration clause on 14.11.2008 seeking compensatory damages equivalent to US$ 1.4 billion or equivalent in such other currency, pre-Award interest of 10% annually running from 7th November 2008, post-Award interest of 18% annually running from date of Award till the amount is paid and costs.

(e) In April 2014 the petitioner entered into a market transaction with Sun Pharma in which the petitioner agreed to sell all its Ranbaxy shares by means of an arrangement by which Sun Pharma and Ranbaxy would merge on a stock for stock basis with Sun Pharma as the surviving entity. The transaction was finally closed on 25.3.2015 with Sun Pharma. The petitioner is said to have received consideration of Rs.22,679 crores. The majority gave its Award on 29.4.2016. The minority Award came on 30.4.2016.

(f) The respondent raised number of defences before the Arbitral Tribunal. It was the case of the respondent that the petitioner was unable to demonstrate any active concealment. It was the petitioner who had initiated negotiations and was keen to acquire majority stake in Ranbaxy despite the petitioner having knowledge of the ongoing FDA and DOJ investigations in Ranbaxy. While negotiations were going on, a warning letter dated 15.6.2006 was published by FDA on its website.

(g) A DOJ search in the office of Ranbaxy in New Jersey took place on which Ranbaxy issued a Press Statement which was reported online and was publically available. The petitioner had raised queries on the ongoing FDA

and DOJ investigation during February 2008 to May 2008. It is hence pleaded that it is manifest that the petitioner was fully aware about the pending investigations and its ramifications. Further, it is stated by the respondent that the petitioner and his representatives were given access to a "data room" during the negotiations which contained all correspondence and other documents relating to the stated investigation by US Authorities. The claimants/petitioner also had access to publically available information such as announcements by Ranbaxy, relevant stock exchanges, press releases and other announcement made by FDA from time to time which was available on FDA's website. Despite knowledge of all these facts, the petitioner acquired the shareholding of the respondent in Ranbaxy on 'as is where is basis'. In fact the petitioner had specifically asked for representations, warranties and indemnities from the respondent relating to the investigation and it agreed to drop that requirement. Hence, under advice they accepted the risks attendant to and arising from the said investigations including the risk that FDA had the power to bar Ranbaxy's products from entering into the US market and other coercive steps. It is also the case of the respondent that there was no positive duty to inform the petitioner about the SAR inasmuch as SAR was not a material document.

(h) It is also pleaded by the respondent that for the first time the petitioner made assertions of concealment of material information in its purported notice dated 12.9.2012, more than three years after closing of the share purchase transaction under SPSSA. Hence, it was pleaded by the respondent that the claim is time barred under the limitation laws of India. Alternatively, the claimant could have with reasonable diligence discovered the matters complained of after completion of the transaction or any rate, after 24th May

2009 when Mr.Malvinder left Ranbaxy. It is further pleaded that elements of active concealment are not made out in terms of section 17 of the Indian Contract Act, 1872 (hereinafter referred to as The Contract Act). Further, the respondent has suffered no loss direct or indirect as a result of the alleged active concealment and wrong doing. In 2015 the petitioner sold the shares to Sun Pharma at a profit i.e. above the price paid to the respondent.

8. The majority Award in the present case was passed by the two Arbitrators, namely, Ms.Karyl Nairn and Professor Lawrence, G.S.Boo. Justice A.M.Ahmadi (Retired) gave a dissenting Award. The Majority Award grants the following relief to the petitioner:-

> I. The Respondents shall forthwith pay to the Claimant, damages in the sum of INR 25,627,847,918.31.
> II. The Respondents shall pay to the Claimants interest on the sum of INR 25,627,847,918.31 at the rate of 4.44% per annum on a simple basis as from 7 November 2008 to the date of the Award, amounting in aggregate to INR 8,510,692,333.80.
> III. The Respondents shall bear and pay the attorneys' fees and expenses incurred by the Claimant which we fixed at US$ 14,549,684.60.
>
> IV. The Respondents shall reimburse to the Claimant the sum of US$ 599,250.00 for its share of the costs of arbitration as fixed by the ICC Court.
>
> V. The Respondents shall bear and pay interest to the Claimant on all sums (including costs and interest accrued) awarded herein to the Claimant at the rate of 5.33% per annum on a simple basis from the date following the date of the Award until the same is fully and finally paid."

9. The Arbitral Tribunal framed the issues for determination as follows:-

> a. Whether the Respondents have fraudulently misrepresented and/or concealed from the Claimant the source and severity of

the Company's regulatory problems in connection with the Respondents' sale of their interest In the Company to the Claimant pursuant to the SPSSA

b. Whether the Claimant agreed to forego any express representation, warranty or indemnity in the SPSSA by the Respondents and if so, whether that precludes the Claimant from making a case of fraud.

c. Whether the elements of section l7 of the Contract Act have been satisfied.

d. Whether the Claimant's claim is time-barred under the Limitation Act?

{If the Respondents be found liable]

e. Whether the Claimant is entitled in law to recover the damages claimed and/or has standing to advance the claims for damages that have been made and if so, whether the Claimant has suffered any actionable loss, direct or indirect, as a result of the alleged fraud by the Respondents.

f. Whether the Claimant has taken such steps as are necessary and/or appropriate and/or reasonable to mitigate any loss that it may have suffered.

g. To ascertain such proper and appropriate reliefs and remedies to which each Party may be entitled;

h. To ascertain who should bear the costs and expenses of Parties' legal representation and the costs of this arbitration.

10. Issue No.(a) framed by the Arbitral Tribunal is whether the respondents have fraudulently misrepresented and/or concealed from the claimant the source and severity of the Company's regulatory problems. The Majority Arbitral Tribunal (hereinafter referred to as Arbitral Tribunal) first noted the legal position regarding the standard of proof. Relying upon the judgment of the Privy Council in *A.N.Narayanan Chettyar vs. Official Assignee, AIR 1941 P.C.93* the Arbitral Tribunal held that as per the legal position the claimant/petitioner was to discharge the higher burden of proving any element of actual dishonesty by the respondent or the agent

beyond reasonable doubt. Based on the evidence on record the Arbitral Tribunal concluded that at the time of due diligence meeting that took place on 26.5.2008 it was beyond reasonable doubt that Mr.Malvinder, Mr. Kaul and Mr.Deshmukh were aware about SAR and believed that it had triggered both the US investigations and that Ranbaxy was very seriously exposed. It noted that Mr.Kaul was a close family friend of the Singh family who had retired as an Executive but had been asked by Mr.Malvinder to provide guidance to Mr.Deshmukh in handling the US investigations. Similarly, Mr.Deshmukh was employed by Ranbaxy till March 2009 and was Ranbaxy's Director of Intellectual Property and Senior V.P. of Global I.Department. He later acted as General Counsel of Ranbaxy. The Arbitral Tribunal concluded that it is beyond reasonable doubt that Mr.Malvinder, Mr.Kaul and Mr.Deshmukh acted fraudulently and dishonestly misleading the petitioner/claimant about the genesis, nature and severity of the US Regulatory investigations and deliberately concealed SAR from the claimants. The Arbitral Tribunal concludes that the petitioner had established on a preponderance of probabilities that Mr.Malvinder and Mr.Kaul were aware that their representations would be relied upon by the petitioner and would induce it to make a decision to enter into the SPSSA. It also concluded that the petitioner did in fact reasonably rely upon these misrepresentations in making its decision to enter into the SPSSA and that but for those misrepresentations it would not have entered into it.

11. The next issue was issue No.(b) as to whether the claimant had agreed to forego any express representation, warranty or indemnity in the SPSSA by the respondent and if so, whether that precludes the claimant from making a claim of fraud. The Arbitral Tribunal noted the contention of the respondent,

namely, that the petitioner sought warranties from the respondents which were repeatedly refused. Only a limited warranty was expressed in clause 9.1 of the SPSSA.

The Arbitral Tribunal, however, took the view that the respondents cannot hide behind absence of express warranty in relation to accuracy of statements or express immunity provisions. They cannot excuse themselves when they are found to have deliberately misled the petitioner either by way of misinformation or withholding information. The Arbitral Tribunal concluded that as a matter of public policy liability for fraud cannot be simply avoided by express or implied agreement. The Arbitral Tribunal concluded that under section 17 of The Contract Act an act of fraud cannot be avoided by any express or implied agreement. The Arbitral Tribunal also relied upon judgments of the Supreme Court which have enunciated the principle that "fraud unravels all". The Arbitral Tribunal further concluded that the petitioner is not precluded from making a case of fraud notwithstanding the absence of any express representation warranty or indemnity in the SPSSA. Hence, issue No.(b) was answered accordingly.

12. Issue No.(c) relates to whether the elements of Section 17 of The Contract Act have been satisfied. The Arbitral Tribunal concluded that in view of findings in relation to issues (a) and (b) the petitioner has discharged the burden of proof of all the elements of Section 17 of The Contract Act. The petitioner has established that Mr.Malvinder (respondent No.1) and his associates Mr.Deshmukh and Mr.Kaul as agents for all the respondents and Mr.Malvinder as a respondent in his own right made various representations to the petitioner about the genesis, nature and severity of the US investigations including actively concealing information about SAR from the

petitioner. While making these misrepresentations, the said Mr.Malvinder intended to defraud the petitioner to induce them to enter into the SPSSA. The petitioner was induced by the misrepresentations to enter into the SPSSA.

13. Issue No.(d) is as to whether the claimant's claim is time-barred under the Indian Limitation Act? The Arbitral Tribunal relies upon section 17(1) of The Limitation Act, 1963 noting that the period of limitation was taken to start once the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. On the issue of burden of proof the Arbitral Tribunal concluded that the correct approach to burden of proof under section 17(1) of the Limitation Act is that it is on the claimant/petitioner. The Arbitral Tribunal further notes as to when the petitioner discovered the fraud would be purely a factual matter for the Arbitral Tribunal to determine on the basis of relevant evidence. The Arbitral Tribunal noted the plea of the respondent that as early as in July 2008 i.e. before the transaction was closed for a period of over 10 months and thereafter new developments arose almost every one or two months which would, individually, if not cumulatively have alerted the petitioner that the level of risk of regulatory liability is of a high magnitude. The Arbitral Tribunal noted the following events:-

(a) In July 2008, the DOJ filed a public motion to Enforce Subpoenas which made serious allegations against Ranbaxy and which could destroy the company.

(b) On 30.10.2008 the petitioner conducted an internal case study where it concluded 'high risk' facing Ranbaxy in US.

(c) In December 2008 the petitioner assumed majority control of Ranbaxy Board and had total access to all documents and information.

(d) In February 2009, the FDA invoked the AIP against Ranbaxy. It was admitted by the petitioner to be a serious step.

(e) In March 2009 the petitioner sought legal advice from its Indian lawyers about the potential fraud claimed against Mr.Malvinder.\

(f) In April 2009, Dr.Une, the CEO of the petitioner attended a meeting with the FDA wherein he came to know that there was a real risk that Ranbaxy's ability to supply products to the US and rest of the world would be in jeopardy.

14. The Arbitral Tribunal concluded that there was no contemporaneous evidence in any of the documents or warning letters issued by FDA or DOJ on account of which the petitioner could have reasonably discovered fraud as on 30.10.2009.

15. The Arbitral Tribunal also noted various facts and events which as per the respondent triggered the commencement of the limitation period. Each of these were rejected by the Arbitral Tribunal as follows:-

(a)The Arbitral Tribunal noted that it is satisfied from the records that the petitioner did not discover the fraud as a result of its majority control of the Board and could not have with reasonable diligence discover the fraud before November 2009. It noted that this was due to poor communication and management within Ranbaxy under the leadership of Mr.Malvinder and later after his resignation under the leadership of Mr.Sobti the next CEO of Ranbaxy. This is also because of the nature of information and advice being provided to the petitioner by external advisers to Ranbaxy. The Arbitral Tribunal concludes that the petitioner's control of the Board of Ranbaxy by itself does not create a situation in which the petitioner could have in fact discovered with reasonable diligence that the respondents have knowingly or recklessly misrepresented the genesis, nature and severity of the FDA and DOJ investigations.

(b) The Arbitral Tribunal also noted that on 25th February 2009 an Application Integrity Policy (AIP) was imposed by FDA on Ranbaxy. The Arbitral Tribunal concludes that there was no proper basis from which it could be said that by February 2009 the petitioner could have discovered the fraud with reasonable diligence. The petitioner had been in control of the Board only since November 2008 and in three months' time would hardly have taken technical steps to try and obtain information about the FDA or DOJ investigations. AIP letter would not itself trigger the start of the limitation period.

(c)Another plea raised by the respondent was, namely, that legal advice was sought after the AIP in March 2009, which would lead to discovery of the fraudulent misrepresentation. The Arbitral Tribunal rejected the said plea noting that the contemporaneous evidence shows that the petitioners' investigative efforts were leading them to believe that Mr.Malvinder mishandled the FDA investigation and that poor management and quality control within Ranbaxy and poor handling of FDA by Mr.Malvinder lay behind AIP.

(d) Another serious contention raised by the respondent was that in a meeting held on 11.3.2009 the issue of SAR had come up. The Arbitral Tribunal accepts that the issue of SAR was mentioned in the meeting. However, it concludes that the petitioners were unaware of the SAR's true import and significance. The Arbitral Tribunal holds that it is satisfied that the petitioner has discharged its burden to demonstrate that notwithstanding the meeting held in March 2009, in which SAR was mentioned, this was insufficient to fix the petitioner with the requisite knowledge of fraud. The petitioner remained unaware that the respondents had deliberately concealed

from it the existence of highly damaging "confession of wrongdoing" which was in possession of the US Regulators.

The Arbitral Tribunal concludes that from the time the claimant exercised control over the Ranbaxy Board upto 19.11.2009 the claimant acted with reasonable diligence in the way it established and executed its cross corporate committees and sought to become involved directly in the handling of the FDA and DOJ discussions. The Arbitral Tribunal concludes that the petitioner has established that it could not have discovered the fraud earlier without exceptional measures which it could not have been expected to take. The Arbitral Tribunal noted that it was satisfied that the petitioner acted in a way that a company in its position would act if it had adequate but not unlimited staff and resources and were motivated by reasonable but not excessive sense of urgency. The Arbitral Tribunal concludes that the petitioner has satisfied his burden that it did not discover and could not with reasonable diligence have discovered the fraud earlier than 19.11.2009. The arbitration having been initiated on 14.11.2012 was, therefore, held to be not barred by limitation.

16. Issue No.(e) is as to whether claimant/petitioner is entitled to recover the damages claimed/whether he has standing to advance the claims for damages and if so, whether the claimant suffered any actionable loss as a result of the alleged fraud by the respondents. The Award notes that the petitioner did not seek to avoid SPSSA but instead elected to seek damages that would put it in the position in which it would have been had the representations made had been true. The Award further notes that the petitioner measures the damages by reference to the purchase price it paid for the Ranbaxy shares less the benefits received which includes the "true

market value" for the shares being the price at the time when the market was aware of the fraud. The Award also concludes that there is no dispute that under Indian law the measure of damages recoverable by the party defrauded under section 19 of The Contract Act would be similar to those recoverable for fraudulent misrepresentation under general tort principles. It relied upon the judgment of the Gujarat High Court in *R.C.Thakkar vs. Gujarat House, AIR 1973 Gujarat 34.* The Award also relies upon the judgment of the English House of Lords in *Smith New Court Securities Ltd. vs. Scrimogeour Vickers (Asset Management) Limited, 1997 AC 254* to consider the correct measure of damages where a plaintiff has acquired property in reliance of a fraudulent misrepresentation made by the defendant. It notes that both the sides accept that the Arbitral Tribunal should apply the principles stated in the said case. Relying on the said case the Arbitral Tribunal holds that the claimant/petitioner is entitled to recover damages in a sum equal to the difference between what it paid for the Ranbaxy shares and any other direct losses, less any benefits it had received. The object was to restore the claimant/petitioner to its position before the acquisition.

The award noted the submissions of the respondent that the petitioner has failed to show that it suffered any loss caused by misrepresentation. It also noted the plea of the respondent that there is no justification to make a claim based on the subsequent sale of its shares to Sun Pharma. It was pleaded by the respondent that the petitioner was not purchasing shares over-the-counter from the general stock market as in the *Smith New Court Case*. Therefore, the market price of Ranbaxy's shares at that time would be irrelevant. It was seeking to control Ranbaxy for which it was prepared to pay a premium. Further, the price was negotiated premised on limited due

diligence. The petitioner was aware that there was future US Regulatory liability which could result in potential claim of over a hundred million dollars. The petitioner was ready to take the risk of huge potential liability.

It also noted the plea of the petitioner that it had been totally misled, given limited due diligence, inaccurate, insufficient information, assurances that all would be well and that the DOJ investigations were merely "fishing expeditions" or prompted by rival competitors. It turned out that Ranbaxy had a culture of regulatory corruption, falsification of records and had much larger exposures for regulatory fraud than what has been disclosed to the claimant.

The Arbitral Tribunal rejected the contentions of the respondent. It concluded that the respondent's representation during the due diligence period fraudulently induced the petitioner to enter into the SPSSA. It accepts the petitioner's plea that it would not have entered into the SPSSA had it not believed and relied upon the respondent's representations and assurances. The existence of SAR in the hands of the US authorities meant that Ranbaxy's shares were pregnant with disaster. Hence, the Arbitral Tribunal concluded that the petitioner suffered losses caused by the respondent's fraud which led to the claimant's entry and closing of the SPSSA. Issue (e) was accordingly disposed of.

17. Coming to issue (g), namely, to ascertain the appropriate reliefs and remedies, the Arbitral Tribunal noted that the guiding principle from the case of *Smith New Court Securities Ltd.* is that it needs to determine what damages, if any, would be required to place the petitioner in the position it was in before the acquisition occurred. Noting that the losses suffered by the petitioner must not be too remote and the petitioner must have acted to

mitigate its loss the Arbitral Tribunal notes that the petitioner paid for its stake in Ranbaxy Rs.198,040,245,051. The Arbitral Tribunal notes that in assessing the loss, account must be taken of the value the petitioner recovered from the Sun Pharma transaction which was closed on 23.3.2015, the benefits the petitioner received by way of dividends; and the present day value of money keeping into account the period of six years when it was holding the Ranbaxy shares. It noted that the petitioner paid Rs.737 per share and sold the same to Sun Pharma at Rs.844/- per share. It did not affix any value for the claim of the respondent about positive synergies and other benefits resulting to the petitioner from the Ranbaxy acquisition. The Arbitral Tribunal noted that the petitioner would have received Rs.226,792,356,612 for its disposal of the Ranbaxy shares to Sun Pharma. Further, it had received dividends of Rs.537,422,646/-. The Arbitral Tribunal chose to resort to the "present value" method of calculation. The Arbitral Tribunal accepted the plea of the petitioner that it intended to receive a return equal to average return it receives on its capital (WACC). It took the WACC rate of 4.44% for purpose of giving effect to the present value of the amount received from Sun Pharma transaction. The amount received from Sun Pharma was discounted by 4.44% per annum to obtain the present value (as on November 2008) of the amount received which was assessed at Rs.172,412,397,132/-. The petitioner had paid Rs.198,040,245,051/- for the Ranbaxy deal. Based on the above calculations, namely, claimant's loss of opportunity, the Arbitral Tribunal concludes the loss to be Rs.25,627,847,918.31 (2,562 crores). It noted that it was conscious that it shall not award punitive, exemplary, multiple or consequential damages.

For benchmark purposes two alternative methods of computing damages are considered. The plea of the respondent that the losses suffered by the petitioner be calculated by measuring the incremental effect that SAR would have on the price of Ranbaxy's shares was considered. The Arbitral Tribunal noted that the main factor that resulted in the penalty of USD 500 million was the effect of SAR being in the hands of the DOJ. But for the SAR, the penalty would not have reached a figure beyond USD 100 million. The Arbitral Tribunal, therefore, noted that SAR had an incremental effect of about USD 400 million which itself translates to loss of INR 8060 million after discounting with weighted cost of capital of 11.95% for 4.95 year. It also noted a second formula of calculating damages by taking the daily closing prices of shares of Ranbaxy from 13 to 31 May 2013 (i.e. around the time Ranbaxy entered into a plea Agreement with DOJ). The average share price of Ranbaxy shares at NSC was Rs.423. Applying a premium of 47.3 % on account of the fact that the controlling interest of Ranbaxy had been purchased the price was pegged at Rs.622. Based on this, the damages were noted to come to Rs.30,364.379,499 (Rs.3,360.43 crores). The Arbitral Tribunal accepted the methodology of petitioner's present day value of money and pegged the damages at Rs.25,627,847,918.31.

18. On issue No.(f) as to whether the petitioner has taken steps to mitigate any losses suffered, the Arbitral Tribunal held in favour of the petitioner.

Legal costs and expenses of USD 14,549,684.60/- were imposed on the respondent. On pre-Award interest the Arbitral Tribunal noted that it had powers under section 20 of the International Arbitration Act of Singapore to award both pre-award and post-award interest. The Arbitral Tribunal awarded interest @ 4.44% per annum on a simple basis commencing from

7th November 2008 until the date of the Award being a total of Rs.8,510.692,333.80. Post-Award Simple Interest of Rs.5.33% per annum was also awarded on the sums awarded including interest and costs until the same are fully and finally paid.

DISSENTING AWARD

19. For the purpose of completeness I may also mention the findings recorded by Justice Ahmadi (retired) in the dissenting Award. On issue No.(a), namely, whether the respondents have fraudulently misrepresented, the dissenting Award notes that the respondents could not have concealed the severity of the company's regulatory problems. Dr.Une (CEO of the petitioner) from the very beginning was cautioned and advised by Mehta Partners, the firm which introduced the parties, about the substantial risk in undertaking this transaction, seriousness of the matter and that the mess that Ranbaxy was in public domain. Hence the Minority Award concluded that the respondents have not fraudulently misrepresented to the petitioner.

20. On issue No.(b) whether the petitioners agreed to forego any express representation/warranty, the minority Award answers that from the evidence the petitioner did agree to forego representations and warranties. On issue No.(c) as to whether the elements of Section 17 of the Indian Contract Act, 1872 have been satisfied the Minority Award holds in the negative. On issue No.(d) as to whether the claimant's claim is time barred under the Indian Limitation Act, 1963, the Minority Award holds that the claim is time barred. The said Award states that even if we ignore that the petitioner knew from beforehand, the documentary evidence shows that Dr.Une was contemplating fraudulent action from March 2009 itself. The SAR also finds a mention in the Lavesh Santani's minutes of the meeting of March 2009.

Ranbaxy had been already acquired by the petitioners and the knowledge of SAR can be attributed to the petitioner. Similarly, other issues are also answered against the petitioner further reiterating that the petitioner has not been able to show any actual losses suffered.

21. Learned senior counsel for the parties have pointed out that apart from resisting the enforcement of the Award in the present court the respondents have also challenged the Award in the proceedings before the Court in Singapore. However, both the senior counsel stated that the pendency of the proceedings in Singapore would not in any manner prevent this court from adjudicating the present objections filed by the respondents.

SUBMISSIONS

I have heard Mr.Harish N.Salve, senior Advocate appearing for respondents No.1 to 4 and 13, Mr.Sandeep Sethi, senior Advocate appearing for respondents No.5 and 9 to 12, Mr.Neeraj Kishan Kaul, Senior Advocate appearing for Respondent No.14 and Mr.Rajiv Nayar, Senior Advocate appearing for Respondents No.15 to 19. I have also heard Mr.Gopal Subramanium, Senior Advocate, Mr.Arun Kathpalia, Senior Advocate and Mr.Arvind Nigam, Senior Advocate for the petitioner. I have also pursued the written submissions filed by the parties.

SUBMISSIONS OF RESPONDENT

22. Mr.Harish N. Salve, learned Senior Advocate, appearing for respondents No.1 to 4 and respondent No.13 has pleaded as follows in support of the objections under section 48 of The Arbitration and Conciliation Act, 1996:-

(I) There is no Fraudulent Representation for grant of any relief under section 19 of the Contract Act.

It is stated that SAR was an error ridden self assessment report made by Dr.Rajender Kumar in 2004. The Award holds that the existence of SAR was concealed and further that oral representations were made by respondent No.1, which were untrue. It is pleaded that SAR does not relate to USA and could never constitute a false representation about the genesis, nature and severity of FDA and DOJ investigations. In any case, SAR was remedied by 2008. Even otherwise large number of documents pertaining to the pending investigation by DOJ/FDA were in public domain. Petitioner cannot plead ignorance of the same. Hence, section 19 of the Contract Act was not attracted as there was no fraudulent representation.

(II) The Award Grants Consequential Damages which were Beyond the Jurisdiction of the Arbitral Tribunal and the award cannot be enforced under section 48(1)(c) of the Arbitration Act.

In support of the above plea, the following submissions were made:

(a) Learned senior counsel has relied upon clause 13.14.1 of the SPSSA to contend that under the said Clause pertaining to resolution of disputes by arbitration, the clause specifically prohibits the Arbitrators to Award Punitive, Exemplary, Multiple or Consequential damages. He also pleads that under clause 13.15 of the SPSSA, the governing law was Law of India. He relies upon the definition of consequential damages as explained by McGregaor on damages (19th Edition) whereby it is stated that in contract, normal loss is generally the market value of the property that the claimant should have received under the contract, less the market value of what he does receive but for the breach. Consequential losses are anything beyond this normal measure and are recoverable, if not too remote. Hence, it is pleaded that the normal loss would have been the market value of shares that

the petitioner paid under SPSSA, less the actual market value of shares on the date of acquisition. The sale price of the share if it is on a date approximate, and in the course of events that continues may reflect the price of the share on the date of execution of the Agreement. The logical exercise for the arbitral tribunal would have been to ascribe the negative value to SAR and determine how the market would have priced the shares with the knowledge of SAR. It is pleaded that the arbitral tribunal however made no endeavour to look in this direction but on the contrary rejected the said procedure.

(b) It was pleaded that in the present case the share prices of Ranbaxy were on record. There was nothing to suggest that the disclosure of the Settlement with DOJ/FDA had any significant effect on the listed price of the shares meaning thereby that the petitioner suffered no losses. However, the Arbitral Tribunal wrongly awarded the difference between the original price paid to the respondent and the sale price of the shares received from Sun Pharma after discounting the sale price by a rate equivalent to Weighted Average Cost of Capital (WACC).

It is further pleaded that reducing the amount received on the sale of shares by the weighted average cost of capital on the principle that the amount spent by the petitioner would have earned a return no less than the WACC is a case of awarding restitution of loss of opportunities. This is purely a consequential loss. Reliance was placed on various judgments to contend that awarding loss of opportunity is consequential damages including the judgments in *Smith New Court Securities Ltd. vs. Scrimgeour Vickers (Asset Management) Ltd. (1997) AC 254; Tennessee Gas Pipeline*

vs. Technip USA Corporation and Technip, [2008 WL 3876 141 (Tex. App. 2008]

(c) It is further urged that damages have been awarded on an amount of Rs.19,804 crores whereas the amount paid to the respondents was only Rs.9,576.1 crores. Under SEBI Take Over Code, moneys were paid to the public for acquisition of shares which element/component has wrongly been added for the purpose of computing the damages. Shares purchased from the public were in discharge of statutory obligations laid down by the Securities and Exchange Board of India Act, 1992 and clearly grant of such damages are consequential damages and were beyond the jurisdiction of the Arbitral Tribunal.

(d) It is also pleaded that what has been awarded are consequential damages arising from the tort of deceit which could only have been granted by the court of law and not by the arbitral tribunal.

(e) It is also pleaded that a Arbitral Tribunal has the right to decide on its own jurisdiction in the first instance but the said decision is not final. The jurisdictional challenge ultimately will have to be decided by the court in the proceedings where the award is challenged or the award is sought to be enforced. It was pleaded that this Court has the jurisdiction to go into the said issue i.e. whether the Arbitral Tribunal had jurisdiction to award the damages as done. Reliance was placed on the following judgments to support the said proposition:-

(i) *Dallah Real Estate and Tourism Holding Co. Vs. Ministry of Religious Affairs of the Government of Pakistan (2011) 1 AC 76,*

(ii) Cruz City 1 Mauritius Holdings vs. Unitech Limited (2017 SCC Online Del 7810) and

(iii) M/s. Value Advisory Services vs. M/s.ZTE Corporation Ex.P.198/2012

(III) The Arbitral Tribunal has awarded damages beyond Section 19 of the Contract Act and is hence contrary to the provisions of codified law of India, The Fundamental Policy of Indian Law, morality and justice and, therefore, against the public policy of India. The following submissions were made to support the above contention.

(a) Even assuming the contention of the petitioner that the consent was induced by fraud or fraudulent misrepresentation is believed, the petitioner has elected to affirm the contract and has, therefore, insisted to be put in a position as if the representations made had been true. An issue was posed as to what damages can arise in the second limb of section 19 of the Contract Act to place an innocent party in the position as if the representations were true. Reliance was placed on the judgment of the Nagpur High Court in *Prem Chand vs,. Ram Sahai, AIR 1932 NAGPUR 148* to plead that in the absence of recession of contract the plaintiffs could not claim damages or compensation but can only plead that it should be put in the position he would have been if the representation made had been true. Similarly, reliance was placed on judgment of the Bombay High Court in *Sorabshah Pestonji vs. The Secretary of State for India, AIR 1928 Bom 17* and judgment of Delhi High Court in *Gaurav Monga vs. Premier Inn India Pvt. Ltd. and Ors. 237(2017) DLT 67*. It is stated that the only damages that could be awarded to the petitioner under section 19 of the Contract Act were to compensate the petitioner for the impact of SAR on the penalty paid by Ranbaxy to DOJ and the consequent impact on the petitioner's investment in Ranbaxy. In other words, the loss in value of the investment of the petitioner caused by the

incremental sum paid as damages on account of the SAR could alone have been awarded. It is pleaded that the Award has wrongly rejected this method of computing damages and has wrongly applied "but for" test which is applicable to Section 73 of the Contract Act where damages are awarded for breach. Such a test it is pleaded could only apply to a recession occasioned by fraud. Hence, the Award grants damages contrary to the principles of Section 19 of the Contract Act

(b) It is further pleaded that the arbitral tribunal has wrongly applied the dicta of the judgment of the House of Lords in *Smith New Court Securities Ltd. vs. Scrimgeour Vickers (Asset Management) Ltd. (supra)*.

(c) It is further stated that Award of damages has been done which were never claimed in the Statement of Claim i.e. the trade loss.

(d) It is also pleaded that the alleged fraud became known to the public on 15th May 2013 when an article called dirty medicine was published in Fortune Magazine. The price of Ranbaxy shares did not fall but in fact rose. It was only when news of suing the erstwhile owners of Ranbaxy came in public domain that the prices fell. Damages have been awarded when no actual loss was suffered by the petitioner.

(e) It was pleaded that rejection of the principles of Section 19 of the Contract Act for determining damages was contrary to the provisions of law in India and is also contrary to the fundamental policy of Indian Law, morality, justice and is, therefore, against public policy of India. Award of damages beyond the second limb of Section 19 of the Contract Act is also unenforceable under section 48(1)(c) of the Act. The damages awarded also suffer from absurdities and perversities and would shock the conscience of the Court.

(f) Reliance is placed on *Agritrade International Pte. Ltd. vs. National Agricultural Co-operative Marketing Federation of India Ltd. (2012) 187 DLT 510 and Xstrata Coal Marketing AG vs. Dalmia Bharat (Cement) Ltd. (2016 SCC Online Del 5861)* to hold that where damages are awarded without any basis the foreign Award is liable to be set aside.

(IV) The claim of the petitioner was barred by limitation.

It is pointed out that the petitioner pleaded that concealment of SAR came to its knowledge only on 19th November 2009 and hence invocation of Arbitration on 14th November 2012 was within the limitation period. It was pleaded that in a claim of fraud, time period for limitation not being specifically provided in the schedule to Limitation Act the limitation would be three years. However, under Section 17 of the Limitation Act the limitation period would be taken to run from the date from which the petitioner became aware of SAR or could have with reasonable diligence discovered SAR. It was further pleaded that a meeting was held between Guiliani Partners a consulting firm engaged by Ranbaxy and Ranbaxy which was attended by the Sr.Management including Dr.Une (CEO of the petitioner) on 11.3.2009. Mr. Hess from Guiliani partners had categorically mentioned that the Government has a document called SAR which is like a whistle blowing document against Ranbaxy. Petitioner was then in control of the Board. The petitioner with reasonable diligence could have discovered the alleged fraud of concealment of SAR. Therefore, the arbitration proceedings filed in November 2012 were barred by limitation. It is pleaded that the Award comes to a finding that the minutes of the meeting of 11th March 2009 were accurate and mentions SAR. However, it does not accept the said date to be the starting point of limitation on the ground that the

officers of the petitioner had not seen SAR and did not understand the true merit and significance of SAR. It is pleaded that the said finding recorded by the Award is perverse and shocking.

It is further pleaded that limitation under the Indian Law is a jurisdictional issue and goes to the root of the matter. Reliance is placed on the following judgments to support the above contention:-

(a) *Noharlal Verma vs.Disst. Coop.Central Bank Limited, (2008) 14 SCC 445*

(b) *Kamlesh Babu vs. Lajpat Rai Sharma, (2008) 12 SCC 577 and*

(c)*Amar Nath Satya vs. Union of India, 55 (1994) DLT 683)*

It was stated that the attempt of the petitioner to argue that limitation is a procedural issue and is a mixed question of law and fact and cannot be revisited by this court is an incorrect submission.

(V) The Majority Award has awarded Multiple Damages by way of Award of Interest.

It has been pleaded that grant of pre award interest on damages and post award interest by the award is beyond the jurisdiction of the arbitral tribunal. It is pleaded that damages calculated represent time value of money arrived at by calculating and discounting at the rate of 4.44% which is in the nature of interest. The pre award interest on damages as granted by the Arbitral Tribunal tantamounts to grant of damages on damages. It was urged that this is beyond the jurisdiction of the arbitral tribunal as Article 13.14.1 of SPSSA prohibits the Arbitral Tribunal from granting multiple or consequential damages. Even otherwise, it is pleaded that pre-award interest could not have been granted as damages were determined on the date of the decree or award. Interest can at best run after such adjudication culminates in a

decree/award of damages. It is further pleaded that the pre-award interest was awarded on a reasoning or basis which was never put to the respondents and the respondents were unable to present their case.

(VI) Tax Benefit received by the petitioner has been Ignored.

It is pleaded that the quantum of damages is shocking as it refused to take into account the benefit already received by the petitioner by way of tax benefits. It is pleaded that the petitioner had to be put back to the same position as on the date of acquisition of shares. All benefits received by the petitioner would have to be quantified and deducted. Tax advantage was one such benefit which had to be taken into account. It was pointed out that the respondent had filed application IA No.3488/2017 where it was specifically pleaded that Daiichi received monetary benefits as a result of various tax filing from 2008-09 to 2013-14 in excess of Rs.8,000/- crores on account of the SPSSA. It is pleaded that like dividend this would also be a benefit received by the petitioner. The refusal of the Arbitral Tribunal to accept this as a benefit received is shocking and would shock the conscience of the Court.

23. Mr.Rajiv Nayyar, learned senior counsel appearing for respondents No.14 to 19 has made the following submissions:-

(i) He submits that the claim of the petitioners was barred by Limitation as per applicable law in India. He relies on Section 17 of the Limitation Act to state that under section 17 the period of limitation does not begin to run until the plaintiff/applicant has discovered the fraud or with reasonable diligence could have discovered it.

(ii) He submits that the relevant starting point of limitation as per facts concluded by the learned Arbitral Tribunal would be 11.3.2009 when the

Minutes of Meeting that took place termed as "Internal Ranbaxy Report Meeting" whose minutes were also prepared by the joint counsel Mr.Lavesh Samtani. In the said meeting Mr.Brian Tempset who was then on the Board of Directors of Ranbaxy was also present. He submits that Minutes specifically refers to the SAR Report. He further submits that the Arbitral Tribunal in its Award in para 744 records that SAR was discussed in a meeting held on 11.3.2009. The Arbitral Tribunal wrongly ignored the said date for the purpose of computing limitation.

(iii) He further submitted that the Minutes of the said meeting dated 11.3.2009 were prepared by Mr.Samtani who was the best witness to depose on the same. Yet, he submits that his best evidence has been withheld by the petitioners deliberately.

(iv) He relied upon judgments in the cases of *Noharilal Verma vs. District Cooperative Central Bank Limited, Jagdalpur (supra); Shri Amar Nath Satya vs. Shri Amar Nath Satya (supra) and Kamlesh Babu and Others vs. Lajpat Rai Sharma and Others (supra)*to contend that limitation goes to the root of the matter and that if a suit or proceeding is barred by limitation a court or adjudicating authority has no jurisdiction, power or authority to maintain such suit or appeal and to decide it on merits.

24. Mr.Sandeep Sethi, learned senior counsel who appeared for respondent No.5 and 9 to 12 the minors submitted as follows:-

(i) He submits that the parties he represents are minors and no guardian was ever appointed to defend them before the arbitration proceedings. It is stressed that counsels did appear for the said minor respondents but the Arbitral Tribunal in its wisdom chose not to appoint any guardian which vitiates the Award.

(ii) It is stressed that the petitioners had notice that the said parties were minors. Reliance is placed on SPSSA dated 11.6.2008 where it is pointed out that Shri Malvinder Singh has signed as Guardian on behalf of his daughter Nimrita Singh and Shri Shivender Mohan Singh has signed as guardian of respondents No.9 to 12. Despite this, the petitioners in their statement of claim did not chose to sue the minors in the manner described as per law and filed no application for appointment of a guardian to defend the said minors. It was further pointed out that this court while dealing with the present petition on 4.11.2016 had appointed guardians for the said minors.

(iii) Reliance is also placed on the arbitration clause between the parties whereby Applications under section 9 of the Arbitration Act have been saved. It is pointed out that under section 9 of the Arbitration Act, a party can before the arbitral proceedings apply to a court for appointment of a guardian for a minor for the purpose of arbitral proceedings. It is urged that despite application of this statutory provision the petitioners failed to do the needful. It is further submitted that even if for a moment it is presumed that section 9 of the Arbitration Act is not applicable, the provisions of CPC including order 32 would apply. Reliance is placed on judgments of this court to submit that though provisions pertaining to Order 32 may not be contained in the Arbitration and Conciliation Act but such principles would be applicable to arbitration proceedings. Reliance is placed on the following judgments:-

Aspire Investments Pvt.Ltd. vs. Nexgen Edusolutions Pvt. Ltd., 2015(149) DRJ 332; Goel Associates vs. Jivan Bima Rashtriya Avas Samati Ltd., 114(2004) DLT 478 (DB).

Hence, it is pleaded that non-compliance of these statutory provisions vitiates the Award.

(iv) It is further stressed that out of the total sale consideration the four minors received a total consideration of only about Rs.14 lacs. They have now been saddled by an Award with the liability of about Rs.3,500 crores which abundantly shows how unjust and unfair the said Award is.

(v) It is further stressed that the so-called misrepresentation which is the foundation of the arbitration proceedings is said to have been done by Mr.Malvinder Singh. It is stated that under section 183 of the Contract Act it is only a person who is of the age of majority can employ an agent. Reliance is placed on paragraphs 383 to 385 of the award where the Arbitral Tribunal has noted that the petitioner has commenced the proceedings against respondents asserting that Mr.Malvinder has acted as agent for all the other 19 respondents. The Award further notes the assertion of the petitioner that Mr.Jay Deshmukh and Mr.Vinay Kaul acted as agents for all the other respondents. Hence, it was the case of the petitioners that the respondents would be vicariously liable for any fraudulent representation of any or of Mr.Malvinder, Mr.Kaul and Mr.Deshmukh who induced the petitioner to enter into the SPSSA. It is urged that the entire foundation of the case is misplaced as none of the said minor respondents could have appointed an agent in law.

(vi) Learned Senior counsel has relied upon the following judgments to contend that a minor cannot be saddled with a penalty or liability for any omission committed by others acting on behalf of the minor. Reliance is placed on the following judgments:-

Ritesh Agarwal and Another vs. Securities and Exchange Board of India and Others, (2008) 8 SCC 205; Commissioner of Income Tax vs. Master Sunil R.Kalro, [2007] 292 ITR 86 (KAR); Commissioner of Income Tax vs. R.Srinivasan, (1997)228 ITR 214 (MAD); Mt.Mariam and another vs. Mt.Amina and others, AIR 1937 Allahabad 65; Imperial Bank of India vs. P.L.A.Veerappa, AIR 1934 Madras 595;

(vii) Hence, it is urged that in terms of section 48(2) of the Arbitration and Conciliation Act the enforcement of the Award would be contrary to the public policy of India and also in contravention of the fundamental policy of Indian law. He stressed that Indian courts have always afforded protection to the interests and rights of minors.

25. (i) Mr.N.K.Kaul learned senior Advocate appearing for respondent No.14 has reiterated the submissions made by Mr.Harish Salve, learned senior counsel appearing for respondents No.1 to 4 and 13. He has pleaded that the Award has awarded consequential damages which were beyond the jurisdiction of the arbitral tribunal. Other than para 1081 of the Award it is pleaded that the Award does not deal at all with its jurisdiction to award consequential damages. It is stressed that consequential damages are unknown to section 19 of the Contract Act.

(ii) It is further pleaded that the claimant/petitioner failed to lead evidence to show the effect SAR had in any way on its investments. There is also no proof given as to the effect of SAR on the DOJ settlement. Hence, it is pleaded that the arbitral tribunal has awarded damages without any cogent basis. The damages have been awarded completely alien to the provisions of section 19 of the Contract Act and also contrary to the Arbitration and

Conciliation Act.

(iii) The plea of limitation is reiterated pleading that the issue of limitation is a jurisdictional issue.

SUBMISSIONS OF THE PETITIONER

26. (i) Mr.Arvind Kumar Nigam, the learned senior counsel for the petitioner has made submissions to rebut the contentions of respondent Nos.5 and 9 to 11 (minors) regarding illegality of the Award on account of the said respondents being minors. Reliance is placed on the SPSSA dated 11.06.2008 to contend that Sh.Malvinder Mohan Singh and Sh.Shivinder Mohan Singh have respectively signed as guardian of their children. It is urged that despite a lapse of almost 9 years since the execution of the agreement, no steps have been taken by any of the parties to repudiate the said agreement and repatriate the benefit gained by the minors.

(ii) It has further been urged that, in any case, under Section 8 of the Hindu Minority & Guardianship Act, 1956, a natural guardian of a Hindu minor has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate. It is urged that sale of shares by the natural guardian is legal and valid. Reliance has been placed on the instructions of Security & Exchange Board of India which permits operation of a Demat Account by a natural guardian without any order of the court. It is also pointed out that shares in the present case, which belonged to the minors, were in demat account and had been operated by their natural guardians.

It has also been urged that in all the proceedings, the lawyers have specifically warranted as representatives of all the parties, including the

minors. Reliance was placed on communication dated 21.09.2012 of Vaish Associates Advocates, where they categorically stated that they were submitting on behalf of the sellers. Reliance is also placed on communication dated 20.12.2012 of Drew & Napier LLC where again it is manifest that the said lawyers were representing all the respondents. Similarly, reliance is placed on an answer to the request for arbitration dated 06.02.2013, which has also been filed on behalf of all the minor respondents. Based on these communications and other such communications on record, it has been pleaded that all along all the respondents were being represented and at no stage sought to argue that the minors were not being represented.

(iii) Reliance is also placed on para 19 of the award to point out that so far as procedures are concerned, the International Arbitration Act of Singapore was applicable where the proceedings were being held. Reliance is also placed on the Arbitration & Conciliation Act, 1996 to contend that the parties had agreed upon the arbitration rules. It is urged that provisions of Order 32 of CPC which are relied upon by the respondents have no application in the International Arbitration Act or the Arbitration Rules and Mediation Rules of the International Chamber of Commerce. Hence, it is pleaded that the reliance of the respondents on the alleged non-compliance of Order 32 of the CPC has no meaning.

(iv) The learned senior counsel has relied upon the judgment of the Privy Council in *Sr.Kakulam Subrahmanyam & Anr. v. Kurra Subba Rao, (1948) 61 LW 441*; and judgments of various High Courts in the case of *Vadakattu Suryaprakasam v. Ake Gangraju & Others, AIR 1956 AP 33* and; *N.B. Sitarama Rao v. Venkatarama Reddiar & Ors.(Full Bench, Madras High*

Court), AIR 1956 Mad. 261 to contend that under Hindu Law a natural guardian is empowered to enter into a contract on behalf of the minor and the contract would be binding and enforceable on the minor. It was also stated that in view of these judgments, a party cannot approbate reprobate at the same time. The respondents at the time of execution of the agreement enjoyed the fruits, but now are trying to plead that minors are not bound by the terms of the agreement and the arbitration proceedings.

(v) Mr. Nigam, has further argued relying upon judgment of the Bombay High Court in *Popat Namdeo Sodanvar v.Jagu Pandu Govekar, AIR 1969 Bombay 140* that a contract can be specifically enforced by or against a minor.

(vi) It was also pointed out that the reliance of learned senior counsel for the respondent on the judgment of the Supreme Court in *Ritesh Agarwal and Another vs. Securities and Exchange Board of India and Others, (supra)* was misplaced. It is urged that that was a case in which the father was shown to be a promoter in the brochure issued by the company. The two minor sons were said to have made contributions. The company came out with a public issue. The company and its promoters played a fraud on the public. The Board debarred the promoters and the company from having access to the Capital Market for a period of ten years. It was in these facts the court had held that the minors could not have been proceeded against strictly in terms of the Contract Act. It is urged that the facts of this case do not lead to any proposition of law that a guardian cannot enter into a contract for sale of moveable properties on behalf of a minor. Similarly, it was pointed out that the judgment relied upon by the learned counsel for the minor respondent in

Commissioner of Income-Tax vs. R.Srinivasan (supra) and *Commissioner of Income-Tax vs. Master Sunil R.Kalro (supra)* do not lay down any proposition that guardian of a minor cannot sell shares of a company owned by the minor.

27. Mr.Gopal Subramanium, learned senior Advocate appearing for the petitioner has made the following submissions:-

(i) He has vehemently submitted that review of a foreign award on merits or re-assessment of evidence is not permissible under Section 48 of the Arbitration Act. He relies upon the judgment of the Supreme Court in *Renusagar Power Company Limited vs. General Electric Company, 1994 Supplementary 1 SCC 644* to contend that the scope of enquiry before a Court in which an Award is sought to be enforced is limited and does not enable a party to the said proceedings to impeach the Award on merits. The Supreme Court in the said judgment explained that the expression public policy as used in Section 7(1)(b)(ii) of the Foreign Awards Act (which was then applicable) has to be construed to the effect that the said expression public policy would mean only if such an enforcement would be contrary to fundamental policy of Indian law, the interest of India or justice and morality. The said interpretation it is urged continues to be applicable in the Arbitration Act. He also relies upon the judgment of the Supreme Court in *Shri Lal Mahal Limited vs. Progetto Grano Spa 2014(2) SCC 433* to contend that the doctrine of "public policy of India" for the purpose of Section 48(2)(b) of the Act is more limited in its application than the same expression in respect of domestic arbitral Tribunal. The wider meaning of the expression "public

policy of India" as stated in the judgment of the Supreme Court in *Oil and Natural Gas Corporation Ltd. vs. SAW Pipes Ltd., 2003 (5) SCC 705* would have no application to foreign Awards. Reliance was also placed on judgments of this court in *Cruz City 1 Mauritius Holdings vs. Unitech Limited,(supra); Xstrata Coal Marketing vs. Dalmia Bharat (Cement) Ltd, (supra)*. Hence, it was urged that patent illegality of an Award may be a ground for setting aside a domestic award without going into the merits of a dispute but patent illegality cannot be considered as a ground for refusing enforcement of a foreign award under section 48 and nor can there be a review of the merits of the dispute. Hence, it has been urged that the submissions of the respondent pertaining to computation of damages and the contention that the claim is barred by limitation are beyond the scope of review under section 48 of the Act.

(ii) On the issue of limitation it has been strongly urged that the plea of limitation cannot be a bar to the enforcement of a foreign award. It was further stated that determination of an issue of limitation is a mixed question of law and fact neither of which is reviewable under section 48 of the Act. Hence, findings of the arbitral tribunal on this aspect are conclusive and cannot be impeached. It is also pleaded that even on facts, the arbitral tribunal rightly found that the petitioner did not know and could not have known about the true impact of SAR until 19th November 2009.

(iii) It is further pleaded that the damages awarded to the petitioner are consistent with the Contract Act. It was stressed that under section 19 of the Contract Act the contract was voidable on account of the fraud. The section, it is pleaded enables the defrauded party to insist that the

contract be performed and the defrauded party be put in the position he would have been if the representations made were true. It is urged that the petitioner was sought to be put back in the same financial position by the Arbitral Tribunal. It was stressed that the arbitral tribunal was aware that ordinarily the measure of damages would mean the difference between the price paid by the plaintiffs and the actual market value of the shares purchased by them. However, there can be instances where there can be no market value of the security. In such circumstances, the arbitral tribunal can proceed to determine the intrinsic value of shares. It is further pleaded that the scope of awarding damages under section 19 of the Contract Act is wider than damages awardable under section 73 of the Act. It is stressed that the general principle cannot be laid down for measuring damages and every case must to some extent depend on its own circumstances. Reliance is placed on the judgments of the Supreme Court in *Trojan and Company Ltd. vs. N.N. Nagappa Chettiar, 1953 SCR 789* and *McDermott International INC vs. Burn Standard Co. Ltd. and ors., (2006) 11 SCC 181.* It is urged that the arbitral tribunal has chosen to award damages based on the following factors:-

(a) Damages on account of payment of 500 million USD

(b) Drop in share price on publication of the article dirty medicine in Fortune Magazine on 15.5.2013

(c) The steps taken by Ranbaxy to remedy defects

(d) Attempts to mitigate damages were made which is evident from the sale of the company after taking arbitral measures.

(iv) It is further pleaded that the manner of computation of damages is within the scope of the Arbitral Tribunal and the damages awarded were

within the jurisdiction of the arbitral Tribunal. It has been pleaded that the respondents have waived the submission that the damages awarded were beyond the jurisdiction of the arbitral tribunal. The respondents themselves submitted before the arbitral tribunal evidence on the petitioner's mode of quantification including using a discount rate. Hence, it is urged that the respondent cannot now plead that the said method accepted by the Arbitral Tribunal suffers from any jurisdictional error.

(v) It is reiterated that the damages awarded by the Arbitral Tribunal are neither consequential nor exemplary nor punitive nor multiple damages. It is also pleaded that on a proper construction of the exclusion clause as contained in clause 13.14.1 of SPSSA the parties intended to exclude punitive damages not direct or restitutionary damages that would put the petitioner in the same position it would have occupied had the respondent's fraudulent misrepresentation been true. Reliance is placed on the judgment of *Common Cause A. Registered Society vs. Union of India & Ors, (1999) 6 SCC 667* to explain punitive and exemplary damages.

It is further urged that application of the discount rate in the Award cannot be held to be consequential damages. It was merely compensatory in nature meant to put the petitioner in the same position as if representation by the respondent made had been true.

(vi) It is reiterated that mistake of fact or law is not a ground for non-enforcement of the award under section 48 of the Act.

(vii) It has further been pleaded that the arbitral tribunal rightly rejected the submission of the respondent that the tax benefits accruing to the petitioner after execution of SPSSA should be reduced from the damages awarded. It is urged that this plea has been taken in the rejoinder in this court claiming that

the petitioner received significant monetary benefit as a result of various tax filing, which factor it is pleaded has been ignored by the arbitral tribunal. It is stated that respondents cannot now tender new evidence, at this stage. The arbitral tribunal has rejected this plea and hence is of no consequence.

(viii) The Award of interest it is pleaded is within the jurisdiction of the arbitral tribunal. Reliance is placed on clause 13.14.4 of the SPSSA which expressly requires award of interest running from the date when the loss occurs. It is urged that the arbitral tribunal correctly determined that the award of interest was a question of Singapore Law as Singapore was the seat of arbitration. Reliance is also placed on the judgment of the Supreme Court in *Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa, 2015 2 SCC 189* to contend that an arbitral tribunal can award interest upon interest, if so required.

28. Keeping in view the submissions of learned senior counsel for the parties following propositions need to be considered by this Court:-

(i)The relevant applicable parameters of section 48 of the Arbitration Act for refusing to enforce the present Award.

(ii)Whether the Award cannot be enforced as damages awarded are contrary to section 19 of the Contract Act and would shock the conscience of the court?

(iii) Whether the award cannot be enforced as it grants consequential damages which are beyond the jurisdiction of the arbitral tribunal?

(iv) Whether the Award cannot be enforced as claim of the petitioner is barred by limitation?

(v) Whether the Award cannot be enforced as Award of interest on the awarded damages amounts to award of multiple damages.

(vi) Whether the Award of damages against the minor respondents, namely, respondent No.5 and 9 to 12 is illegal, non est and void and cannot be enforced being in conflict with Public Policy of India.

The relevant applicable parameters of Section 48 of The Arbitration Act for refusing to enforce the present Award.

29. Section 48 of the Arbitration and Conciliation Act reads as follows:-

"48. Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i)the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.]

[Explanation -2 For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute]

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause(e) of sub-section(1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming

enforcement of the award, order the other party to give suitable security."

30. The respondents have pleaded that Section 48(1)(c) and Section 48 (2)(b) are attracted in this case.

31. Regarding Section 48(2)(b) the Supreme Court in ***Renusagar vs. General Electric, (supra)*** held as follows:-

> "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 Protocol & Convention Act of 1837 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.
>
> .....
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> 92. This would show that award of interest on damages or interest on interest i.e. compound interest is not regarded as being against public policy in these countries."

32. The above proposition was reiterated by the Three Judge Bench of the Supreme Court in ***Shri Lal Mahal Ltd. vs. Progetto Grano Spa, (supra).*** While interpreting Section 48 of the Arbitration and Conciliation Act, 1996 the Supreme Court held as follows:-

"25. In Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] the ambit and scope of the Court's jurisdiction under Section 34 of the 1996 Act was under consideration. The issue was whether the court would have jurisdiction under Section 34 to set aside an award passed by the Arbitral Tribunal, Gafta which was patently illegal or in contravention of the provisions of the 1996 Act or any other substantive law governing the parties or was against the terms of the contract. This Court considered the meaning that could be assigned to the phrase "public policy of India" occurring in Section 34(2)(b)(ii). Alive to the subtle distinction in the concept of "enforcement of the award" and "jurisdiction of the court in setting aside the award" and the decision of this Court in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , this Court held in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] that the term "public policy of India" in Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it becomes final. Having that distinction in view, with regard to Section 34 this Court said that the expression "public policy of India" was required to be given a wider meaning. Accordingly, for the purposes of Section 34, this Court added a new category — patent illegality — for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against public policy. Award could also be set aside if it was so unfair and unreasonable that it shocks the conscience of the court.

.....

27. In our view, what has been stated by this Court in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] 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 [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] 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 [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . For all this there is no reason why Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] should not apply as regards the scope of inquiry under Section 48(2)(b). Following Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , 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 [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . 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 (1) 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 [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).

....

45. Moreover, Section 48 of the 1996 Act does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

46. In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report obtained by the buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12-5-1994 and wrongly rejected the report of the contractual agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal.

47. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b)."

33. In ***Xstrata Coal Marketing vs. Dalmia Bharat (Cement) Ltd. (supra)*** this court held as follows:-

> "42. In the circumstances, the finding as to the quantum of damages cannot be stated to be perverse. The measure of damages adopted by the Arbitral Tribunal is also not alien to Indian law and in the given circumstances, a party is entitled to claim loss of profits resulting from a breach of contract on the part of the other party. There is much merit in Mr. Banerji's contention that objections as raised by Dalmia would not be sustainable even under Section 34 of the Act as the conclusion of the Arbitral Tribunal is neither perverse nor patently illegal.
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> ….
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> 52. Plainly, the expression "fundamental Policy of Indian law" does not mean the provisions of Indian Statutes. The key words are Fundamental Policy; they connote the substratal principles on which Indian law is founded."

34. Similarly, in ***Cruz City 1 Mauritius Holdings vs. Unitech Limited, (supra)*** this court held as follows:-

> "97. It plainly follows from the above that a contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression "fundamental policy" connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.

Hence, under section 48(2)(b) enforcement of a foreign award can be only refused is if such an enforcement is found to be contrary to (a)

fundamental policy of Indian Law (b) interest of India and (c) justice or morality. "Fundamental Policy of Indian Law" does not mean provisions of the statute but substratal principles on which Indian Law is founded.

Whether the Award cannot be enforced as the damages awarded are contrary to Section 19 of the Contract Act and the Damages awarded would shock the conscience of the Court.

35. The common case of both the parties is that damages, if fraud was proved, had to be quantified as provided under Section 19 of the Indian Contract Act, 1872.

36. Section 19 of the Contract Act reads as follows:-

> "19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion, 1[***] fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.
> A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true."

37. It is also a position accepted by the parties that the petitioner has chosen not to avoid the contract and hence, damages have to be quantified under part two of the above Section, namely, he shall be put in the position, in which he would have been if the representations made had been true. What are the aspects to be considered while awarding damages under the Second Part of Section 19?

38. The Supreme Court has dealt with the second part of Section 19 of the Contract Act in the case of ***M/s.Trojan and Company vs. Nagappa Chettiar (supra).*** That was a case in which the plaintiff had come into possession of

property. In the hope of obtaining quick gain by speculating on the stock exchange through certain stockbrokers he entered into a series of speculative transactions. Actual facts had been misrepresented to the plaintiff on account of which the prices of shares fell drastically. The Supreme Court held as follows:-

> **"**15. Now the rule is well settled that damages due either for breach of contract or for tort or damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. Difficulty however arises in measuring the amount of this money compensation. A general principle cannot be laid down for measuring it, and every case must to some extent depend upon its own circumstance. It is, however, clear that in the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the represented. It can only be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided of course that there was a fair market then. The question to be decided in such a case is what could the plaintiff have obtained if he had resold forthwith which he had been induced to purchase by the fraud of the defendants. In other words, the mode of dealing with damages in such a case is to see what it would have cost him to get out of the situation i.e. how much worse off was his estate owing to the bargain in which he entered into. The law on this subject has been very appositely stated in *McConnel* v. *Wright* [1903 1 Ch 546] by Lord Collins in these terms:
>
> > "As to the principle upon which damages are assessed in this case, there is no doubt about it now. It has been laid down by several Judges, and particularly by Cotton, L.J. in *Peek* v. *Derry* [37 Ch D 541] ; but the common sense and principle of the thing is this. It is not an action for breach of contract, and, therefore, no damages in respect of prospective

> gains which the person contracting was entitled by his contract to expect to come in, but it is an action of tort — it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate final, highest standard of his loss. But, insofar as he has got an equivalent for that money, that loss is diminished; and I think, in assessing the damages, prima facie the assets as represented are taken to be an equivalent and no more for the money which was paid. So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged.

16. The sole point for determination therefore in the case is whether the shares handed over to the plaintiff were an equivalent for the money paid or whether they fell short of being the equivalent and if so, to what extent. Ordinarily the market rate of the shares on the date when the fraud was practised would represent their real price in the absence of any other circumstance. If, however, the market was vitiated or was in a state of flux or panic in consequence of the very fact that was fraudulently concealed, then the real value of the shares has to be determined on a consideration of a variety of circumstances disclosed by the evidence led by the parties. Thus though ordinarily the market rate on the earliest date when the real facts became known may be taken as the real value of the shares, nevertheless, if there is no market or there is no satisfactory evidence of a market rate for sometime which may safely be taken as the real value, then if the representee sold the shares, although not bound to do so, and if the resale has taken place within a reasonable time and on reasonable terms and has not been unnecessarily delayed, then the price fetched at the resale may well be taken into consideration in

determining retrospectively the true market value of the shares on the crucial date. If there is no market at all or if the market rate cannot, for reasons referred to above, be taken as the real or fair value of the thing and the representee has not sold the things, then in ascertaining the real or fair value of the thing on the date when deceit was practised subsequent events may be taken into account, provided such subsequent events are not attributable to extraneous circumstances which supervened on account of the retaining of the thing. These, we apprehend, are the well settled rules for ascertaining the loss and damage suffered by a party in such circumstances."

39. A learned Single Judge of this Court in the case of ***Gaurav Monga vs. Premier Inn India Pvt.ltd. & Ors. (supra)*** held as follows:-

"9. Thus, as far as India is concerned, the aforesaid provisions provide for the consequences of a pre-contract misrepresentation, which is the basis of the plaintiff's suit. Such misrepresentation makes the contract voidable at the option of the party whose consent to the contract was caused by misrepresentation and entitles that party to insist that the contract be performed and he should be put in a position in which he should have been, if the representation made had been true. However, the exception to Section 19 clarifies that if the party, whose consent to contract was caused by misrepresentation, had the means of discovering the truth by ordinary diligence, the contract is not voidable. It thus follows that even if the plaintiff's consent to accepting employment with the defendant No. 1 was caused by representations made by the defendants to the plaintiff as reproduced in the plaint and which at this stage have to be accepted as true and which have turned out to be misrepresentation, under the Indian Law, such a contract is voidable at the instance of the plaintiff and the remedy of the plaintiff is to rescind the contract of employment in accordance with Section 66 of the Contract Act or to insist that the contract be performed and that the plaintiff be put in the position in which he would have been, if the representation made had been true."

xxx

"23. The field of pre-contract misrepresentation having been covered by Section 19 of the Contract Act, there can be no claim in tort on the basis thereof. Supreme Court in Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum, (1997) 9 SCC 552 was concerned with a claim for damages in tort on account of death owing to a roadside tree falling on the pedestrian on the way to his office. It was held that if the statute creates a right and remedy, damages are recoverable by establishing the breach of statute as the sole remedy available under the statute; but where a statute merely creates a duty without providing any remedy for breach, appropriate remedy, is inter alia the action for damages in respect of special damage suffered by an individual. It was further held that where special remedy is expressly provided, it is intended to be the only remedy and by implications excludes the resort to common law and that an action for damages will not lie if the damage suffered is not a type intended to be guarded against. A claim in tort cannot, in my opinion, be contrary to the statutory law of the land. The Legislature of our country having provided for the remedy for precontract representation, no claim for damages for pre-contract misrepresentation can be maintained under the law of tort. A Division Bench of High Court of Bombay also, in Sorabshah Pestonji v. The Secretary of State for India: AIR 1928 Bom 17 (followed by me in Sikka Promoters Pvt. Ltd. v. National Agricultural Co-operative Marketing Federation of India Ltd.: (2013) 202 DLT 49, appeal where against was dismissed by Division Bench of this Court vide National Agricultural Cooperative Marketing Federation of India Ltd. v. Sikka Promoters Pvt. Ltd. held that the only remedy of a party to a contract for omission of a material fact is one under Section 19 of the Contract Act and finding that the plaintiff therein had waited too long, the remedy of rescission was held to be no longer available and finding that the plaintiff had already been put in a position as if the representation had been true, the plaintiff was also not held entitled to relief in that regard. The

judgment of the Supreme Court of Canada in Douglas J. Queen supra on which strong reliance was placed by the counsel for the plaintiff does not show the existence, in law prevalent in Canada, of a provision as Section 19 of the Contract Act. Douglas J. Queen supra turned on a finding of existence of duty. However because of Section 19 of Contract Act there is no such duty qua matters which could have been discovered with ordinary diligence."

40. Similarly, the Nagpur High Court in ***Premchand vs. Ram Sahai & Anr. (supra)*** held as follows:-

"5. It remains however to be considered whether such misrepresentation gives the plaintiff, appellant in the present case any cause of action. I am of opinion that it does not, for two reasons : firstly, because I do not think that Ballulal was deceived by the misrepresentation and, secondly, even if he was actually deceived, I am of opinion that the exception to S. 19, Contract Act, would apply, as Ballulal had the means of discovering the truth with ordinary diligence. I would here note that under the Contract Act no distinction has been drawn as regards remedies between fraud and misrepresentation. Fraud has been defined in S. 17 of the Act and misrepresentation has been defined in S. 18 of the Act, but the remedy for both is given by the same S. 19. In English law there is a distinction between innocent misrepresentation and willful misrepresentation or fraud: as a general rule, innocent misrepresentation never gives a cause of action for damages, but it is ground for resisting an action for breach of contract or for specific performance and also for asking to have the contract set aside: see Newbigging v. A. Adam and R.S. Adam [1887] 34 Ch. D. 582 and Derry v. Peek. In the case of willful misrepresentation or fraud the injured party has two remedies: one of action for damages for deceit, which is an action in tort or ex delicto, and the other on the contract. In the second case he may treat the contract as binding and may demand fulfillment of those terms which misled him, or damages for such loss as he has sustained by their non-fulfillment, or he may

avoid or repudiate the contract by taking steps to get it cancelled on the ground of fraud. He will not have any remedy however unless it can be proved that he was actually deceived.

6. Under S. 19, Contract Act, the remedy of avoiding the contract is given, and further there is a remedy that the party whose consent was caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed, and that he shall he put in the position in which he would have been if the representations made had been true. These remedies, in substance, are the two remedies given in English law on contract in a case where consent has been induced by fraud; but both under English and Indian law it must be proved that the consent of the party who claims to avoid the contract was caused by fraud or misrepresentation and that he was actually deceived……"

41. A Division Bench of the Bombay High Court in ***Sorabshah Pestonji & Others vs. The Secretary of State for India (supra)*** held as follows:-

"13. It is, however, unnecessary for us to go into authorities on English law for it all comes back to this that under Section 19 of the Indian Contract Act the plaintiffs at most can only be entitled to be put in the same position as if the representation that was made had been true, supposing, as here, rescission is no longer open to them. In my judgment the plaintiffs had already been put in that position by Government before this suit, was ever brought. Consequently it follows that in ray judgment the conclusion arrived at by the learned District Judge was correct, and that this appeal must be dismissed with costs."

42. It would follow that the provisions of Section 19 of the Contract Act does not need much elaboration. In ***Gaurav Monga vs. Premier Inn India Pvt.Ltd. & Ors.(supra)***, this court has held that if damages are recoverable by establishing a breach of statute that would be the sole remedy available.

Hence, there can be no claim in tort in a case of fraud in view of the fact that the field is covered by Section 19 of the Contract Act. As this is a judgment of a Coordinate Bench of this court, it would be binding on this court.

43. Similarly, the Division Bench of the Bombay High court in ***Sorabshah Pestonji vs. The Secretary of State of India (supra)*** has stated it all comes back to Section 19 of the Contract Act, and it is unnecessary to go to the authorities in English Law.

44. However, Section 19 of the Contract Act does have a grey area. The learned author *Pollock and Mulla* has opined that there is a lack of clarity in the said section where restitution is not literally possible.

45. This aspect was noted by the Law Commission of India in its 13th Report as follows:

> "Section 19.- The second paragraph of the section merely states what is involved in the conception of a contract being voidable. *Pollock and Mulla* opine that the thought underlying this paragraph is not really clear and point out cases in which restitution is not literally possible, for example, if the owner of an estate subject to a lease for an unexpired term, contracts to sell it to a purchaser who requires immediate possession and conceals the existence of the lease, the purchaser cannot be put in the same position as if the representation that there was no lease, had been true, or where *A* sells a house to *B* and by some blunder of *A's* agent, the annual value is represented as being Rs.2,000 when it is in truth only Rs.1,000. According to the letter of the present paragraph, so say the learned authors, we may insist on completing the contract and on having the difference between the actual and the stated value paid to him by *A* and *A's* successor-in-title for all time. Obviously, such could not be the intention of the Legislature. In order to clarify the intention, we suggest that a qualification be added so that the power of restitution be limited to the extent considered reasonable by the Court. In the

consideration of the this question the Court, of course, will examine, *inter alia*, whether it is in the power of the party against whom the contract is voidable to perform it fully."

46. Pollock & Mulla on The Indian Contract & Specific Relief Acts (15th Edition, 2017) in latest edition states as follows:

> "Damages can be awarded in lieu of completion or enforcement. If the default is wholly or partly due to the non-existence of facts which the defaulting party represented as existing, this party can obviously not set up the falsity of his own statement by way of defence or mitigation, and, if the case is a proper one for specific performance and if it is in his power to perform the contract fully, though with much greater cost and trouble than if his statement had been originally true, he will have to perform it accordingly. Is anything more than this meant by the declaration of the affirming party's right to 'be put in the position in which he would have been if the representations made had been true.'?
>
> The earlier editors have opined that it is not certain that the present enactment can be literally relied upon. *A* sells a house to *B*, and by some blunder of *A*'s agent, the annual value is represented as being Rs.2000/- when it is in fact only Rs.1000/-. According to the letter of the present paragraph, *B* may insist on completing the contract and the difference between the actual and the stated value being paid to him and his successors in title by *A* and *A'*s successors in title for all time. Nothing short of that will put him 'in the position in which he would have been if the representations made had been true.' This, they had said, is not the intention of the enactment. In response to this view, the Law Commission of India recommended that the power of restitution must be limited to the extent considered reasonable by the court. It also recommended that it should be open to the Court to award compensation if it refuses to enforce the contract. While the (English) Misrepresentation Act gives power to award damages

in lieu of rescission, the recommendation of the Law Commission of India has been to award compensation in lieu of performance."

47. Chitty on Contracts (32nd Edition 2015) states the principles for computation of damages by English Courts as follows:-

"Unforeseeable losses. In Doyle v. Olby (Ironmongers) Ltd., it was held that in cases of fraud the plaintiff was entitled to damages for any such loss which flowed from the defendants' fraud, even if the loss could not have been foreseen by the latter. Thus the claimant may recover not only the difference between the price paid and the value of what he received but also expenditure wasted in reliance on the contract and compensation for other opportunities passed over in reliance on it.

In Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd. Lord Browne-Wilkinson described Doyle v. Olby (Ironmongers) Ltd. as restating the law correctly. He stated the principles applicable in assessing damages where a party has been induced by a fraudulent misrepresentation to buy property as follows:

"(1) The defendant is bound to make reparation for all the damage directly flowing from the transaction;

(2) Although such damage need not have been foreseeable, it must have been directly caused by the transaction;

(3) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;

(4) As a general rule, the benefits received by him include the market value of the property acquired at the date of the transaction; but such general rule is not to be inflexibly applied

where to do so would prevent him obtaining full compensation for the wrong suffered;

(5) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property.

(6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction;

(7) The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

Lost Opportunity. The points that damages for fraud will not compensate the claimant for loss of bargain but may cover loss caused by passing up other profitable opportunities are well illustrated by East v. Maurer. The plaintiffs bought a hairdressing business in reliance on a false representation that the defendant had no intention of working regularly at a second hairdressing business he owned in the same town. In fact he continued to work at the second business and the plaintiffs were forced to resell the business they had bought at a substantial loss. They were awarded damages for the difference between the price they had paid and the price they received on resale, plus expenditure wasted in attempting to improve the business and in other ways. They were also awarded the sum they could have expected to make as profit had they bought another similar business in the same area. However, they were not entitled to the higher amount they might have earned from the actual business bought had the defendant kept to his stated intention; he had not

warranted that they would keep all his old customers or that he would not compete…."

48. I may however add here that the Supreme Court in ***Superintendence Company of India (P.) Ltd. vs. Sh.Krishan Murgai, (1981) 2 SCC 246*** has clarified that the Contract Act is not a complete code dealing with the law relating to contracts. However, to the extent it deals with a particular subject, it is exhaustive and it is not permissible to import the principles of English Law de hors the statutory provisions unless the statute is such that it cannot be understood without the aid of English Law. The Court held as follows: -

> "25. While the Contract Act, 1872, does not profess to be a complete code dealing with the law relating to contracts, we emphasise that to the extent the Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law de hors the statutory provision, unless the statute is such that it cannot be understood without the aid of the English law. The provisions of Section 27 of the Act were lifted from Hom. David D. Field's Draft Code for New York based upon the old English doctrine of restraint of trade, as prevailing in ancient times. When a rule of English law receives statutory recognition by the Indian Legislature, it is the language of the Act which determines the scope, uninfluenced by the manner in which the analogous provision comes to be construed narrowly, or, otherwise modified, in order to bring the construction with the scope and limitations of the rule governing the English doctrine of restraint of trade.
>
> 26. It has often been pointed out by the Privy Council and this Court that where there is positive enactment of Indian Legislature the proper course is to examine the language of the statute and to ascertain its proper meaning uninfluenced by any

> consideration derived from the previous state of the law — or the English law upon which it may be founded. In *Satyabrata Ghose* v. *Mugneeram Bangur,* Mukherjee, J. while dealing with the doctrine of frustration of contract observed that the courts in India are to be strictly governed by the provisions of Section 56 of the Contract Act and not to be influenced by the prevailing concepts of the English law, as it has passed through various stages of the development since the enactment of the Contract Act and the principles enunciated in the various decided cases are not easy to reconcile. What he says of the doctrine of frustration under Section 56 of the Contract Act, is equally true of the doctrine of restraint of trade under Section 27 of the Act."

49. What follows from the above judgments is that a Court while awarding damages under the Second Part of Section 19 of the Contract Act would have to take care to award reasonable compensation to ensure that the plaintiff is put in the same position he would have been if the representation had been true. The loss awarded must be a natural and direct consequence of the illegal acts done by the defendant. Remote damages suffered cannot be awarded. The plaintiff would have a duty to mitigate the damages. No general principles can be laid down for quantifying damages and every case must to some extent depend, on its own circumstances.

50. I may add here regarding the reliance of the award on a judgment of the Division Bench of the Gujarat High Court in ***M/s. R.C.Thakkar vs. The Gujarat Housing Board, (supra).*** The Arbitral Tribunal has concluded based on this judgment that the damages recoverable by a party defrauded under Section 19 of the Contract Act would be similar to those recoverable for fraudulent misrepresentation under general tort principles. The

respondent had pleaded that this judgment of the Gujarat High Court had been overruled by the Supreme Court in Civil Appeal No. 2652/1972 dated 18.11.1986.

In my opinion, this controversy is not relevant. It is true that the judgment of the Division Bench of the Gujarat High Court was set aside by the Supreme Court as noted above. However, the judgment of the Supreme Court was confined to overturning the findings on facts of the Gujarat High Court that a fraud had been committed. The Arbitral Tribunal has noted that the measure of damages recoverable by a defrauded party under Section 19 would be the same as those recoverable for fraudulent misrepresentation under general tort principles. This position adopted by the Arbitral Tribunal is no doubt contrary to the judgment of this court in ***Gaurav Monga v. Premier Inn India Pvt. Ltd. & Ors (supra)*** where this court has taken a view that a case seeking damages on fraud and misrepresentations would be covered by Section 19 of the Contract Act and no claim for damages can be maintained under law of torts. The award, however also notes that the plaintiff is entitled to be put back in the position he would have been, had the wrong not been committed i.e. if the representations were true. It also concludes that in most cases, the measure of damages will effectively result in the same quantification as breach of torts claims. Hence, this controversy need not detain me as the Arbitral Tribunal has kept in view the provisions of section 19 of The Contract Act.

51. The Arbitral Tribunal in the present case used the principles enunciated by the House of Lords in ***Smith New Court Securities Ltd. v. Scrimgrean Vicky (supra)*** as a guiding principle to determine the damages.

It also noted that the petitioner was required to be placed in the position as it was before the acquisition of shares occurred being mindful of the need to ensure that the losses suffered by the claimant were caused by fraud and must not be too remote and that the claimant must have acted to mitigate its loss. The Arbitral Tribunal accepted the claimant's approach in using the Sun Pharma transaction stating that it has the advantage of providing a number of actual benefits which the petitioner realized in selling the shares which it would otherwise have not acquired if the misrepresentation had not been made. To this amount, it noted that the claimant had added the benefit of dividends received by the claimant during the time it owned the shares and that the claimant then set off the acquisition price with appropriate adjustments for "the time value of money". It noted that there were some difficulties in the method suggested by the petitioner. One of them was the transaction date being April 2014 as opposed to the closing date of the Sun Pharma transaction of March 2015. It also noted that the criticism of using Sun Pharma transaction to measure possible loss as there is a more than six years time gap between the acquisition and the sale which is a significant one. There was a possibility of many intervening events in which benefits or loss could accrue which events have not occurred as a result of any fraud.

52. The Arbitral Tribunal rejected the plea of the respondent that the petitioner suffered no loss as a result of the transaction. It noted that this proposition does not take into account the element of time, cost and the rehabilitative work carried out by the petitioner's officers in order to assist Ranbaxy. It does not take into account various other issues including reputational issues faced by the Daiichi by entering into a transaction to acquire a tainted generic company, it does not take into account the

opportunity cost of six years of the claimant not entering into a transaction with different generic companies, etc.

53. The Arbitral Tribunal noted that the petitioner bought the shares in Ranbaxy for Rs.198,040,245,051 (Rs.19,804/- crores approx.). The Sun Pharma deal was closed in March 2015 when the petitioner received Rs.226,792,356,612/- (Rs.22,679/- crores approx.) for its entire stake in Ranbaxy. Another amount of Rs. 2/- per share as dividend was declared on 16.05.2011. Hence, the petitioner received a dividend of Rs.53.74 crores. Hence, a net amount of Rs.227,329, 779,258/- (Rs.22,732/- crores approx.) was received by the petitioner.

54. The Arbitral Tribunal noted that there is a gap of six years between acquisition of the shares and the sale thereof making it difficult to assess whether the benefits and losses experienced by the claimant from holding the Ranbaxy shares were properly those flowing from the fraudulent actions of the respondents. The Arbitral Tribunal chose to accept the plea of the petitioner that it intended to receive a return equal to average return it receives on all its investments as represented by weighted cost of capital (WACC). The award accepted WACC at a rate of 4.44%. The amount received by the petitioner from the Sun Pharma transaction was accordingly sought to be discounted by the said figure of 4.44% per annum to obtain the present value (as on November 2008) of the amount received from Sun Pharma Transaction which was assessed at Rs.172,412,397,132/-. This amount was less than the amount i.e. (Rs.198,040,245,051/-) paid by the petitioner to acquire Ranbaxy Shares in November 2008 by Rs.25,627,847,918/-. The said amount i.e. Rs.2562.78/- crores was the damages that the Arbitral Tribunal awarded in favour of the petitioner.

55. Two other methods to calculate damages payable to the petitioner were noted by the Arbitral Tribunal which it did not accept but mentioned them for the purpose of being a bench mark for cross-checking. Regarding the first method, it noted that the respondents experts calculated losses suffered by the claimant by using the Incremental Effects of SAR on the price of Ranbaxy shares. It sought to compare the prices of the Ranbaxy Shares with and without SAR. But the Arbitral Tribunal did not accept this method to be a fair application of the principle as the claimant was entitled to recover all direct losses from the transactions. Such a approach would, it held, ignore other losses suffered by the petitioner including the four years spent on negotiations with the US Authorities. The Arbitral Tribunal however took the view that the SAR had an incremental effect of about US $400 million which translates to about INR 8,060 million as petitioner's loss after discounting with WACC of 11.95% for 4.95 years.

56. Regarding the second method, the Arbitral Tribunal sought to compare the share prices as on date of sale of shares by the respondents and as on 13.05.2013, the date when DOJ made its public statement on Ranbaxy's plea of guilt. The petitioner had paid a price of Rs.737/- per share to the respondent and the public in November 2008. It noted that between 13 to 31 May 2013, the average share price of Ranbaxy works out at Rs.423. Applying the same level of premium of 47.3% over i.e. the premium the petitioner had paid when acquiring the shareholdings of Ranbaxy the price works out to Rs.622/- with the premium (for the period 13 to 31 May 2013). The Arbitral Tribunal assessed the damages on this formulation at Rs.30,364,379,499/-.

57. The Arbitral Tribunal however noted that the above two approaches were at best a helpful cross check to the Arbitral Tribunal to benchmark its calculation of the claimant's losses. The Arbitral Tribunal hence held that the damages calculated, namely, Rs.25,627,847,918/- represents the appropriate compensation for the claimant's loss.

58. The respondents have severally criticized the above method adopted by the Arbitral Tribunal to compute the alleged loss suffered by the petitioner. The respondent argues that the Award suffers from absurdity and/or perversity which ought to shock the conscious of the court. The respondent pleads as follows:-

a. Loss of opportunity has been awarded as damage which is based on the principles of "but for" i.e. as if the petitioner has not entered into a SPSSA. It is urged that this is an absurd basis to award damages as the petitioner chose not to rescind the contract but affirmed the same.

b. Instead of awarding damages under the second limb of Section 19 of the Contract Act, the Award grants damages under Section 73 of the Contract Act which would have been awarded in a case of breach of contract claim.

c. No examination was undertaken to see the impact of SAR on the settlement agreement made with DOJ or the payment of 500 million USD that was paid as penalty by Ranbaxy to DOJ. The Arbitral Tribunal ought to have examined that out of 500 Million USD, how much was attributable to SAR and then proceed to compute damages payable to the petitioner.

d. It is the fundament policy of Indian Law not to grant damages where there has been no loss suffered by the innocent party. It is an admitted

position that the petitioner made a profit on the sale of shares in 2015 to Sun Pharma. There cannot hence be any award of damages.

e. The value in 2015 discounted by WACC cannot reflect the true value of 2008 in the facts and circumstances of the case where the petitioner has been in management and enjoying voting rights on shares for seven years.

f. The respondents also attack the method of computation of the damages stating that in effect the petitioner has been awarded refund of the entire sale price of Rs.19,804/- crores along with simple interest @4.44% being a total of Rs25,627/- crores. Hence, the petitioner retains the full company and also has received back the entire consideration paid for purchase of the shares of Ranbaxy along with interest for the period its money remained locked in the shares.

59. On the first blush it may appear that the criticism of the respondent has some force. The petitioner had bought the shares of Ranbaxy for Rs.19,804/- crores in 2008. Out of this amount only about Rs. 9,576.1 crores was paid to the respondent and the balance had been paid to the general public in terms of the statutory regulations pursuant to a public offer of purchase of shares. The petitioner pursuant to the Sun Pharma Deal closed in March 2015 received Rs. 22,679/- crores for the sale of its entire shares of Ranbaxy. In addition, a dividend of Rs.53.74 crores was also received. Hence, the petitioner in all received a sum of Rs. 22,732/- crores. The petitioner did not suffer a loss.

60. The question that arises is has the Arbitral Tribunal come to a palpably wrong computation of damages to warrant a conclusion that the Award is in contravention of the fundamental policy of Indian Law and hence, its enforcement may be refused.

61. Regarding the plea that the petitioner did not suffer a loss, the Arbitral Tribunal rejects the said plea pointing out that there are various other aspects including reputational issues faced by the petitioner from acquiring a tainted generic company, opportunity cost of six years of the petitioner not entering into the transaction with a different generic company or opportunities which it could have availed of, diminution in Ranbaxy dividends, the onerous costs faced by Ranbaxy in addressing the US investigations including 500 million USD paid as a settlement money, the business opportunities lost by Ranbaxy as a result of taking so long to resolve the various US regulatory issues. It also noted that some of the synergies that the petitioner received from Ranbaxy may also not get noticed. However, the Arbitral Tribunal did not accept the so called benefits received on account synergies inasmuch as the negative effects of the acquisition upon the petitioner as a breach could also not be ignored. The Arbitral Tribunal concluded that if the synergies received by the petitioner from acquisition of Ranbaxy were compared to the negative effects, the negative impact of the petitioner's acquisition far outweigh the positive synergy in favour of the petitioner. The above reasoning of the Arbitral Tribunal cannot be faulted in these proceedings under Section 48 of the Arbitration Act.

62. Regarding the plea of the respondent regarding quantification of damages, Section 19 of the Contract Act, provides that a party shall be put in the same position in which he would have been if the representations made have been true. Hence, the petitioner had to be put in the same position as in 2008 when it paid for the shares purchased, had there been no SAR in existence.

63. Keeping in view the above legal position, the Arbitral Tribunal concludes that the use of Sun Pharma transaction to be more workable than the approach suggested by the respondent. Based on the price of Sun Pharma transaction, it quantifies the damages by discounting the amount received from the Sun Pharma transaction by WACC of 4.44% to obtain the present value as on November 2008 so as to put the petitioner back into the same position as if the representations made by the respondent were true. WACC of 4.44% was taken being the average return that the petitioner received on all its investments.

64. It is quite clear that Section 19 envisages taking into account various facts including cost and damages that the petitioner incurred and various benefits which would have flowed in favour of the petitioner had there not been any misrepresentations to the petitioner. The quantification of the damages and the various factors that would have to be taken in account in the facts and circumstances of a case would necessarily be a fact based enquiry and would necessarily be within the domain of the Arbitral Tribunal. The method used by the Arbitral Tribunal to quantify the damages to put the petitioner in the same position it would have been had the fraud not been played cannot be faulted with in these proceedings. It is not for this Court to dwell deep into these aspects while considering objections under Section 48 of the Arbitration Act.

65. The legal position regarding quantification of damages is well settled. Different formulas or methods can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula having regard to the facts and circumstances of a particular case would fall within the domain of the Arbitrator.

66. Reference may be had to the judgment of Supreme Court in the case of ***McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors. (supra)*** where the Court held as follows:-

> "100. While claiming damages, the amount therefore was not required to be quantified. Quantification of a claim is merely a matter of proof.
>
> 101. In fact BSCL never raised any plea before the arbitrator that the said claim was arbitrary or beyond its authority. Such an objection was required to be raised by BSCL before the arbitrator in terms of Section 16 of the 1996 Act. It may also be of some interest to note that this Court even prior to the enactment of a provision like Section 16 of the 1996 Act in Waverly Jute Mills Co. Ltd. v. Raymon & Co.: [1963]3SCR209 ; Dharma Prathishthanam v. Madhok Construction: AIR2005SC214 clearly held that it is open to the parties to enlarge the scope of reference by inclusion of fresh dispute and they must be held to have done so when they filed their statements putting forward claims not covered by the original reference.
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> METHOD FOR COMPUTATION OF DAMAGES
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> 102. What should, however, be the method of computation of damages is a question which now arises for consideration. Before we advert to the rival contentions of the parties in this behalf, we may notice that in M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co. and Anr.: AIR1972SC696 , this Court held that the method used for computation of damages will depend upon the facts and circumstances of each case.
>
> 102-A. In the assessment of damages, the court must consider only strict legal obligations, and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.[See Lavarack v. Woods of Colchester Ltd (1967) 1 QB 278]

103 The arbitrator quantified the claim by taking recourse to the Emden formula. The learned arbitrator also referred to other formulae, but, as noticed hereinbefore, opined that the Emden Formula is a widely accepted one.

104. It is not in dispute that MII had examined one Mr. D.J. Parson to prove the said claim. The said witness calculated the increased overhead and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled 'Change Orders, Overtime, Productivity' commonly known as the Emden Formula. The said formula is said to be widely accepted in construction contracts for computing increased overhead and loss of profit. Mr. D.J. Parson is said to have brought out the additional project management cost at US$1,109,500. We may at this juncture notice the different formulas applicable in this behalf.

(a) Hudson Formula: In Hudson's Building and Engineering Contracts, Hudson formula is stated in the following terms:

In the Hudson formula, the head office overhead percentage is taken from the contract. Although the Hudson formula has received judicial support in many cases, it has been criticized principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.

(b) Emden Formula: In Emden's Building Contracts and Practice, the Emden formula is stated in the following terms:

Using the Emden formula, the head office overhead percentage is arrived at by dividing the total overhead cost and profit of the contractor's organization as a whole by the total turnover. This formula has the advantage of using the contractors actual head office and profit percentage rather than those contained in the contract. This formula has been widely applied and has received judicial support in a number of cases including Norwest Holst

Construction Ltd. v. Cooperative Wholesale Society Ltd., decided on 17 February, 1998, Beechwood Development Company (Scotland) Ltd. v. Mitchell, decided on 21 February, 2001 and Harvey Shoplifters Ltd. v. Adi Ltd., decided on 6 March, 2003.

(c) Eichleay Formula: The Eichleay formula was evolved in America and derives its name from a case heard by Armed Services Board of Contract Appeals, Eichleay Corp. It is applied in the following manner:

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overheads during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. The Eichleay formula is regarded by the Federal Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses.

105. Before us several American decisions have been referred to by Mr. Dipankar Gupta in aid of his submission that the Emden formula has since been widely accepted by the American courts being Nicon Inc. v. United States, decided on 10 June, 2003 (USCA Fed. Cir.), Gladwynne Construction Company v. Balmimore, decided on 25 September, 2002 and Charles G. William Construction Inc. v. White 271 F.3d 1055.

106. We do not intend to delve deep into the matter as it is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages

should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the Arbitrator.

107. If the learned Arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by this Court.

ACTUAL LOSS : DETERMINATION OF

108. A contention has been raised both before the learned Arbitrator as also before us that MII could not prove the actual loss suffered by it as is required under the Indian law, viz., Sections 55 and 73 of the Indian Contract Act as Mr. D.J. Parson had no personal knowledge in regard to the quantum of actual loss suffered by the MII. D.J. Parson indisputably at one point of time or the other was associated with MII. He applied the Emden Formula while calculating the amount of damages having regard to the books of account and other documents maintained by MII. The learned Arbitrator did insist that sufferance of actual damages must be proved by bringing on record books of account and other relevant documents.

109. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India**."**

67. The above judgment of the Supreme Court was again reiterated by the Supreme Court in ***Associate Builders. vs. DDA., (2015) 3 SCC 49.*** The Court held as follows:-

> "22. In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held:

"58. In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] (for short 'ONGC'). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression 'public policy' on the touchstone of Section 23 of the Contract Act, 1872 and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Contract Act, 1872. In *ONGC* [(2003) 5 SCC 705 : AIR 2003 SC 2629] this Court, apart from the three grounds stated in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the

applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government."

68. The Supreme Court has clearly held in ***Shri Lal Mahal Ltd. vs. Progettor Grano Spa, (supra)*** that enforcement of a foreign award would be refused only if such enforcement would be contrary to the fundamental policy of Indian Law. While considering enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether while rendering the foreign award some errors have been committed. In ***Associate Builders. vs. DDA (supra),*** the Supreme Court clarified that the patent illegality must go to the root of the matter.

69. In the light of the legal position as stated above, it was clearly within the domain of the Arbitral Tribunal to assess damages. The award has given various reasons for having rejected the suggested formula/computation by the respondent. The respondent received Rs.9,576.1 crores for sale of their shares. Damages have been assessed at Rs.2,562 crores plus interest and costs. The plea of the respondents cannot be accepted.

70. It is not possible to come to a conclusion that the computation done by the Arbitral Tribunal is in complete breach of statutory provisions or is

contrary to fundamental policy of Indian Law inasmuch as the said computation suffers from patent illegality going to the root of the matter.

Whether the Award Cannot be enforced as it Grants Consequential Damages which are beyond the Jurisdiction of the Arbitral Tribunal and hit by Section 48(1)(c) of the Act.

71. It has been pleaded by the respondents/objectors that the award grants consequential damages which were beyond the jurisdiction of the Arbitral Tribunal. Reliance is placed on Clause 13.14.1 of the SPSSA to contend that the Arbitral Tribunal could not award punitive, exemplary, multiple or consequential damages. It is urged that the Arbitral Tribunal has wrongly awarded consequential damages.

It was further pleaded that when a jurisdictional issue is raised before the Arbitral Tribunal, it would have the powers to adjudicate upon the said jurisdictional issue but the same is not binding on this court and this court can go into the said issue. Reliance is placed on *Dallah Real Estate and Tourism Holding Co. Vs. Ministry of Religious Affairs of the Government of Pakistan, (2011) 1 AC 763* and the judgments of this court being *Cruz City 1 Mauritius Holdings vs. Unitech Ltd.,(supra) and M/s. Value Advisory Services vs. M/s. ZTE Corporation, 2017 Indlaw Del 1852* to contend that this court has the powers to go into the jurisdiction of the Arbitral Tribunal to award what are consequential damages.

72. Clause 13.14.1 of the SPSSA reads as follows:-

> "13.14.1 Any and all claims, disputes, questions or controversies involving the Sellers (or any of them) and the Company on the one hand and the Buyer and/or its Affiliates on the other hand (together, the "**Disputing Sides**" and each individually a "**Disputing Side**") arising out of or in connection

with this Agreement, or the execution, interpretation, validity, performance, breach or termination hereof (collectively, "Disputes") which cannot be finally resolved by such Parties within 60 (sixty) calendar days of the arising of a Dispute by amicable negotiation and conciliation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the "**ICC**" in accordance with its commercial arbitration rules then in effect (the "Rules"), provided that following the Subsequent Sale Shares Closing, the Sellers on the one hand and the Company and the Buyer on the other hand shall be considered as separate Disputing Sides. The place of arbitration shall be Singapore. Each Disputing Side shall appoint 1 (one) arbitrator and the 2 (two) arbitrators so appointed shall together select and appoint the third arbitrator. If either of the Disputing Sides, fail to appoint their respective arbitrator within thirty (30) days after receipt by respondent(s) of the demand for arbitration or if the two party appointed arbitrators are unable to appoint the chairperson of the arbitral tribunal within thirty (30) days of the appointment of the second arbitrator, then the ICC shall appoint such arbitrator or the chairperson, as the case may be, in accordance with the listing, ranking and striking provisions of the rules. The arbitration proceedings shall be conducted in English. The arbitrators shall not award punitive, exemplary, multiple or consequential damages. In connection with the arbitration proceedings, the Disputing Sides hereby agree to cooperate in good faith with each other and the arbitral tribunal and to use their respective best efforts to respond promptly to any reasonable discovery demand made by such party and the arbitral tribunal."

(emphasis added)

It is clear from a reading of the above clause that the Arbitral Tribunal has no powers to award "punitive, exemplary, multiple or consequential damages". According to the respondents, the Arbitral Tribunal has awarded consequential damages.

73. I may now look at the judgments relied upon by the respondents to plead that this court has jurisdiction to deal with the said objections of the respondents.

74. In ***Dallah Real Estate and Tourism Holding Co. Vs. Ministry of Religious Affairs of the Government of Pakistan(supra),*** the Court held as follows:-

> 26. An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996, just as he would be entitled under s.72 if he had taken no part before the arbitrator: see e.g. Azov Shipping Co. v Baltic Shipping Co. [1999] 1 Lloyd's Rep 68. The English and French legal positions thus coincide: see the Pyramids case.
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> xxx
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> 29. None of this is in any way surprising. The very issue is whether the person resisting enforcement had agreed to submit to arbitration in that country. Such a person has, as I have indicated, no obligation to recognise the tribunal's activity or the country where the tribunal conceives itself to be entitled to carry on its activity. Further, what matters, self-evidently, to both parties is the enforceability of the award in the country where enforcement is sought. Since Dallah has chosen to seek to enforce in England, it does not lie well in its mouth to complain that the Government ought to have taken steps in

France. It is true that successful resistance by the Government to enforcement in England would not have the effect of setting aside the award in France. But that says nothing about whether there was actually any agreement by the Government to arbitrate in France or about whether the French award would actually prove binding in France if and when that question were to be examined there. Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see The Sennar (No. 2) [1985] 1 WLR 490). But that is a matter for the French courts to decide.

30. The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal - a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's "eminence", "high standing and great experience". The scheme of the New York Convention, reflected in ss.101-103 of the 1996 Act may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s.103. But that is as far as it goes in law. Dallah starts with advantage of service, it does not also start fifteen or thirty love up.

75. Similarly this court in ***Cruz City 1 Mauritius Holdings vs. Unitech Ltd.(supra)*** held as follows:-

> "52. It stands to reason that where the inherent jurisdiction of the arbitral tribunal to render an award is challenged, the enforcing Court would have to examine the challenge raised and it would not be open for the Court to simply rely on the finding of the arbitral tribunal. Where the authority of the arbitral tribunal to make an award is challenged, its decision would not have any evidential value. However, once it is accepted that the arbitral tribunal had the jurisdiction and was competent to decide the issues between the parties, no challenge to the merits of the decision ought to be entertained. In such cases, the arbitral tribunal's decision on the issues having a bearing on the grounds set out in Section 48(1) of the Act also cannot be ignored."

76. A similar view has been taken by this court in ***M/s. Value Advisory Services vs. M/s. ZTE Corporation(supra)*** holding as follows:-

> "55. There is much merit in Mr. Ganju's contention that the finding of an arbitral tribunal regarding its own jurisdiction is not final and binding on this Court while considering an application under Section 48 of the Act. This is also the consistent view expressed by this Court (See: Sudhir Gopi v Indira Gandhi National Open University and Anr; 2017 SCC OnLineDel 8345, Falcon Progress Ltd. v. Sara International Ltd: 238 (2017) DLT 565 and Cruz City 1 Mauritius Holdings v. Unitech Limited 239 (2017) DLT 649). Thus, the party against whom a foreign award is sought to be enforced is to be provided full opportunity to provide evidence to show that the arbitral tribunal lacked the jurisdiction to make the foreign award. In Shin-Etsu Chemical Co. Ltd. (supra), the Supreme Court held that a finding regarding an arbitration agreement rendered under Section 45 of the Act would only be a prima facie finding and would not preclude a full examination at the post award stage. There can be no quarrel to this proposition. However, the onus to prove that the arbitral tribunal lacked

> jurisdiction or that any of the other grounds as set out under Section 48(1) of the Act are attracted, lies squarely on a party challenging the enforcement of the foreign award. Thus, ZTE was required to provide all material necessary for establishing that enforcement of the impugned awards ought to be declined as the arbitral proceedings were not in accordance with the Agreement. The only material referred to by ZTE is the arbitration clause (Clause 8) as well as the decision of the Singapore High Court in Insigma Technology Co. Ltd. (supra). Accordingly, this Court has independently examined the contentions regarding the interpretation of the arbitration agreement (Clause 8) and finds no reason to differ with the view taken by the arbitral tribunal."

77. Clearly, in view of the above stated legal position, the findings of the Arbitral Tribunal in this regard, namely, that the damages awarded are not punitive, exemplary, multiple or consequential damages would not bind this court. This court would have to go into the issue raised namely whether the damages awarded by the Arbitral Tribunal are consequential damages and beyond the jurisdiction of the Arbitral Tribunal.

78. It may also be noted that this plea that the Arbitral Tribunal has awarded consequential damages has not been dealt with by the Arbitral Tribunal. In fact it is the plea of the petitioner that the respondent had not made any such submission before the Arbitral Tribunal about stated damages being beyond the jurisdiction of the Arbitral Tribunal. Before the Arbitral Tribunal, it is pleaded that the respondents had submitted evidence on the petitioner's suggested mode of quantification of damages including use of the discounted rate. Meaning thereby that they never objected to the damages claimed by the petitioner on the ground that the same amount to consequential damages. The respondents have however denied that they have

not raised this argument before the Arbitral Tribunal about the damages being awarded being the consequential damages. Reliance is placed on para 1081 of the Award of the Arbitral Tribunal to plead that this plea has been raised by the respondent.

79. Para 1081 of the Award merely notes that the Tribunal is conscious that the arbitration agreement provides that punitive, exemplary, multiple and consequential damages cannot be awarded. The Arbitral Tribunal also noted that it is fully satisfied that the quantum awarded is the fairest amount which can reasonably be awarded on the evidence available to it given the limitations of the methods proposed by the experts.

80. Coming now to the main issue raised by the respondents i.e. as to whether the damages awarded by the Arbitral Tribunal are consequential damages. The objectors/respondents pleaded that the loss, at best, that could have been awarded to the petitioner would be the value of the shares that the petitioner paid under SPSSA less the actual market value of the shares on the date of acquisition. It is pleaded that the appropriate method for calculation would have been to determine how the market would have apprised the shares with the knowledge of SAR. However, it is stressed that no such endeavour was made by the Arbitral Tribunal. It is urged that the method that was adopted by the Arbitral Tribunal was to award the difference between the original price of the shares and the sale price of the shares as sold to Sun Pharma after discounting the said sale price by applying rate equivalent to the Weighted Average Cost of Capital. It is urged that this was clearly a case of awarding consequential damages. Reliance is placed on 'McGREGOR ON DAMAGES' (19th Edition) to contend that consequential

losses are the losses which are more than normal losses. Reliance was placed on following passage:

> "The normal loss is that loss which every claimant in a like situation will suffer; the consequential loss is that loss which is related to the circumstances of the particular claimant. In contract the normal loss can generally be stated as the market value of the property, money or services that the claimant should have received under the contract, less either the market value of what he does receive or the market value of what he would have transferred but for the breach. Consequential losses are anything beyond this normal measure and are recoverable if not too remote."

81. Reliance is also placed on the judgment in the case of ***Smith New Court Securities Ltd. v. Scrimgrean Vicky (supra)*** to plead that an Award based on hypothetical profit is a case of consequential loss.

82. Mr.Gopal Subramanium, learned senior counsel for the petitioner has however argued that the phrase "consequential damages" in Clause 13.14.1 of SPSSA has to take its flavour from other phrases in the said clause, namely, punitive, exemplary, multiple. Hence, "consequential" as used in Clause 13.14.1 would necessarily mean damages akin to punitive, exemplary or multiple damages. Reliance is placed on the doctrine of "*noscitur a sociis"* to contend that meaning of a word must be determined from its context. To support this submission, reliance is placed on the judgments in the case of *Compania Naviera Aeolus SA vs. Union of India, (1964) AC 868* and *Watchorn vs. Langford (1813) 3 Campbell 422* and *Letang vs. Cooper, 1965(1) QB 232*. It was reiterated and stressed that the said clause intends to exclude punitive damages not direct or restitutionary damages which would

put the petitioner in the same position as it would have occupied had the respondents' fraudulent representations not existed.

83. The distinction sought to be raised here between normal damages and consequential damages does not follow from Section 19 of the Contract Act. As noted by the Division Bench of the Bombay High Court in ***Sorabshah Pestonji & Others vs. The Secretary of State for India (supra),*** it is unnecessary to go to authorities on English Law as it all comes back to Section 19 of the Contract Act. The Supreme Court in ***Superintendence Company of India (P.) Ltd. vs.Sh.Krishan Murgai(supra)*** has held that it is not permissible to import the principles of English Law *de hors* the statutory provisions unless the statute is such that cannot be understood without the aid of English Law.

84. Keeping in view the above caveat, I may deal with the submissions of the respondents on the issue of 'consequential losses'.

85. The respondents have relied upon McGREGOR ON DAMAGES (19TH EDITION) to contend that consequential losses are the losses which are more than the normal losses as already stated above. The learned Author has further explained the distinction between normal damages and consequential damages as prevalent in UK as follows:

> "As for the field of tort, it is clear that there is an acceptance of the same meaning as between normal measure and consequential loss in torts causing damage to property and in the tort of deceit also.
>
> By contrast, in the context of contractual exclusions of liability for consequential loss or damage, the courts have consistently seen the distinction between normal loss and consequential loss

> differently, as that between losses falling within the first and the second rules in Hadley v. Baxendale respectively. There is today a vast array of authorities, mainly in the Court of Appeal, which hold an exclusion clause to be inapplicable because the damage or loss does not fall within the second rule in Hadley v. Baxendale. The present law therefore being entirely clear on this, it seems no longer necessary to set out the cases in any detail and simply naming them in the footnotes should suffice. The authorities start with two Court of Appeal cases of some time ago, are followed by a series of four cases at the turn of the century, and continue up to the present. In addition, there are a number of first instance decisions covering the same period. All these cases support giving to the term consequential loss the meaning which confines it to loss or damage within the second rule in Hadley v. Baxendale."

Hence, the learned author concludes that as far as UK is concerned, all cases support giving to the term 'consequential damages' the meaning which is confined to the loss and damage within the second rule stated in Hedley v. Baxendale.

86. In Hadley v. Baxendale, 156 English Report 145, the court had held as follows:

> "Now we think the proper rule in such a case as the present is this:- Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably

> contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

87. In the facts of the present case, the Arbitral Tribunal has not awarded any damages pertaining to any special circumstances which under the contract were communicated and were known to both the parties. Hence, based on the explanation of consequential damages as given by the learned author McGREGOR, relied upon by the respondents it cannot be said that the Arbitral Tribunal has awarded the consequential damages as pleaded by the respondents.

88. Even otherwise, in my opinion, the phrase 'consequential damages' would have to be read co-jointly with the other phrases used in the clause, namely, punitive, exemplary and multiple. It could not have been intended to exclude damages to put the petitioner in the same position.

89. I may look at the aforesaid judgments relied upon by the learned senior counsel for the petitioner to plead that the phrase 'consequential damages' will take its meaning from the context it has been used. Reliance was also placed on the doctrine of "Noscitur a Sociis".

"Noscitur a Sociis" is a Latin phrase which means that meaning of a word may be known from accompanying words.

90. In ***Compania Naviera Aeolus SA vs. Union of India (supra),*** the court was dealing with a bill of lading which was covering a cargo of bulk wheat shipped for delivery at Bombay. The bill of lading and the charter party also incorporated a strike clause which provided that if the cargo could not be loaded or discharged by reason of a number of causes, including a strike of any class of workmen essential to the loading or discharging "the time for loading or discharging, as the case may be, shall not count during the continuance of such causes. "It also provided that a strike of the shippers' and/or receivers' "men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour."

It further provided in a third part of the clause: "In case of any delay by reason of the before mentioned causes, no claim for damages or demurrage, shall be made by the charterers, receivers of the cargo, or owners of the steamer."

A strike broke out at the discharging port after the expiry of the lay days. It continued for eight days, and during that time the cargo could not be discharged as no other suitable labour was available. On a claim by the respondents, the holders of the bill of lading and receivers of the cargo, for a declaration that they were not liable to pay the ship owners additional demurrage in respect of the strike period by virtue of the third part of the clause, Lord Gest noted as follows:-

> ".... The doctrine noscitur a sociis is exemplified in the dictum of Lord Halsbury L.C. in Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co. 35: "words, however general, may be limited with respect to the subject matter in relation to which they are used." Parts 1, 2 and 4 of the "Centrocon" strike clause are concerned with the situation arising during the lay days, and I conclude from the fact that part 3 is to be found in

> the middle of the clause that part 3 is also limited in its application to lay days. I therefore read this part as referring to a strike during the lay days and not to a strike which commenced after the expiry of the lay days."

91. Similarly, in ***Inglewood Investment Co.Ltd. v. Forestry Commissioners, (1988) 1 W.L.R.959*** the case related to an indenture granting a lease to the respondents on certain lands. The issue there was a construction of reservation of sporting rights which contained in the indenture. The question that arose is as to whether deer are covered in the phrase, "all games woodcocks snipe and other wild fowl Hares rabbits and fish."

92. The court held has as follows:

> "In my view, in the end, having tried to bear in mind what in 1921 a man might be thinking when he sat down to draft this appointment and to make this reservation, I have to go back to the precise words of it and try to understand those words in the light of such general history as I can gather and the natural meaning of the words. The phrase, I repeat, was "all game woodcocks spine and other wild fowl Hares rabbits and fish." To my mind, there was a plain implication in the first eight words of noscitur a sociis, that the phrase "other wild fowl," attached as it is to the end of the phrase "game woodcocks spine," gives a feeling that in that collocation of words the draftsman was speaking about feathered creatures. The way he goes on by referring next to "Hares rabbits," being things which are mammals as apart from "game woodcocks snipe and other wild fowl," gives to my mind a flavour that the whole of the first phrase of that reservation has to do with birds."

93. Keeping in view the above legal position and the doctrine of Noscitur a sociis, in my opinion, the word "consequential" would have to take its colour from other phrases used in the clause, namely "punitive, exemplary

and multiple". A simple reading of the clause shows that is what was intended.

In any case the clause could not have intended to oust/exclude award of damages as stated in Section 19 of the Contract Act. I have already concluded above that it is not possible to say in these proceedings that damages have been awarded beyond Section 19 of the Contract Act. Hence, the plea of the respondents that the damages awarded are consequential damages and was beyond the jurisdiction of the Arbitral tribunal does not have any basis. This would also follow from a reading of the said clause. The damages awarded cannot be said to be beyond the jurisdiction of the Arbitral Tribunal.

Whether the Award cannot be enforced as the Claim of the Petitioner is barred by limitation:

94. The next issue pertains to the issue of limitation raised by the respondents. The petitioner's case was that it became aware of the concealment of SAR only on 19.11.2009. Hence, the invocation of Arbitration on 14.11.2012 was within limitation.

However, Mr.Harsh Salve, learned senior counsel appearing for the respondents has urged that the claim of the petitioner was barred under The Limitation Act, 1963. Serial No. 113 of Part X of the Schedule to the Limitation Act provides that where no period of limitation is provided elsewhere, the period of limitation is three years. Section 17 of the Limitation Act provides that where a suit is based on fraud by the defendant, the period of limitation shall not begin until the plaintiff has discovered fraud, etc. or with reasonable diligence could have discovered it. Hence, it is

pleaded that the period of limitation would commence when the petitioner became aware of SAR or could have with reasonable diligence discovered SAR. It is urged that apart from various other events that would have alerted the petitioner, the respondent stresses that during a meeting held with Guiliani Partners a Consulting Firm of Ranbaxy and Ranbaxy which was also attended by Dr.Une (CEO of the petitioner) on 11.03.2009 a question was raised as to why DOJ had carried out the raid at Princeton. In response, Mr.Samtani from Giuliani Partners categorically stated that the Government had a document called SAR prepared by Dr. Kumar. It is urged that as the petitioner was then in majority of the Board of Ranbaxy, it became aware of SAR on 11.03.2009 and with reasonable diligence, could have discovered the alleged fraud or concealment of SAR. Hence, the invocation of Arbitration done in November 2012 is barred by limitation. It is urged that the Award wrongly rejects the limitation argument holding that when SAR was mentioned in the meeting on 11.03.2009, the officers of the petitioner had not seen SAR and they did not understand its true significance and import. It is urged that such a finding is perverse and shocking. It is further pleaded that an issue of limitation under Indian Law is a jurisdictional issue. Reliance is placed on *Noharlal Verma vs. District Co-Operative Central Bank Ltd. Jagdalpur (supra)* and *Kamlesh Babu and Ors. vs. Lajpat Rai Sharma & Ors.(supra)* to plead that limitation is a jurisdictional issue.

95. I may look at the award to see how the Arbitral Tribunal has dealt with the contentions of the respondents. The Arbitral Tribunal concludes that the burden of proof under Section 17 of the Limitation Act would lie on the petitioner. The Arbitral Tribunal also concludes that the appropriate test is that limitation period starts when the petitioner could have with reasonable

diligence discovered facts which gave it sufficient confidence to justify mounting a claim against the respondents.

The Arbitral Tribunal noted the submission of the respondents that the petitioner was aware of potential risk of future regulatory liability in the US. The Award notes that it was urged by the respondents that over a period of 10 months, new developments arose in frequent intervals which would individually, if not cumulatively, have alerted the petitioner that the level of risk of regulatory liability was not low or immaterial. The Arbitral Tribunal noted the following subsequent events which as per the respondents could have alerted the petitioner.

a. In July 2008, the DOJ filed a public Motion to Enforce Subpoenas which made serious allegations against Ranbaxy and which, Daiichi's own witness recognised, could "destroy a company

b. On 30 October 2008, Daiichi conducted an internal case study in which it concluded that there was a "high risk" facing Ranbaxy in the US

c. In December 2008, Daiichi assumed majority control of the Ranbaxy Board and thereafter Daiichi was given unhindered access to Ranbaxy's documents and information;

d. In February 2009, the FDA invoked its Application Integrity Policy (AlP) against Ranbaxy. Daiichi's own witnesses recognised that that was a very serious step by the FDA, and the evidence shows that Daiichi's representatives knew, when the FDA took that step, that there would be "serious consequences" for Ranbaxy;

e. In March 2009, Daiichi sought legal advice from its Indian lawyers about a potential fraud claim against Mr. Malvinder, and was advised to engage an expert to investigate and interview ex-Ranbaxy employees; and

f. In April 2009, Dr. Une attended a meeting with FDA at which the FDA representative declared that they "suspect(ed) every bit of information

submitted in every single submission" by Ranbaxy, and Dr.Une admitted that he knew by the end of that meeting that there was a "real risk" that Ranbaxy's ability to supply products to the US and the rest of the world would be in jeopardy."

96. The Arbitral Tribunal rejects each of the above events as being a trigger for the petitioner to discover or with reasonable diligence to discover SAR.

The Arbitral Tribunal notes that the burden was on the claimant/petitioner to establish that once it obtained majority control of the Board it was unable before 19.11.2009 with reasonable diligence to obtain information about SAR to appreciate fraud had been committed by the respondent. The Arbitral Tribunal notes that there are two aspects which the petitioner needs to establish. Firstly, that he took steps to find out about FDA and DOJ investigations with reasonable diligence and secondly, the reason that it was not able to discover the relevant information earlier because of factors which are exceptional, namely, that the existence of SAR was actively concealed from the petitioner. The Arbitral Tribunal concludes that the petitioner instituted many lines of inquiry when it took control of the Ranbaxy Board. Going through all the evidence available on record, the Award concludes that the petitioner considered by April 2009 that Mr.Malvinder's Management of Ranbaxy was ineffective and he had not successfully transited from owners to professional CEO. He needed to be replaced and the replacement was done. The Arbitral Tribunal notes that between July 2008 to 19.11.2009, the petitioner had various opportunities to have learnt about SAR from Ranbaxy and/or from its advisory. It was in touch with various persons including (a) Ranbaxy in-house counsel

Mr.Deshmukh until March 2009 and thereafter, Mr. Samtani, both of whom had knowledge of SAR' (b) the petitioner was in direct contact with senior officers of Ranbaxy and staff who knew about SAR including CEO Mr.Malvinder and Mr.Sobti as well as other officers like Mr.Kaul, Ms.Pant, Mr.Sood, Mr.Puri and Dr.Chandrashekhar; (c) the petitioner had a meeting with Giuliani Partners where SAR was mentioned; (d) Mr.Hamel Venabel had intimate knowledge of SAR and its significance. The Arbitral Tribunal concludes on facts that none of these persons deliberately gave necessary information to the petitioners and deliberately withheld the information about SAR.

97. The Arbitral Tribunal finally recorded a finding of fact that since the time the petitioner exercised control on the Ranbaxy or Board up to 19.11.2009, the petitioner acted with reasonable diligence. It also noted that the petitioner had established that it could not have discovered SAR without taking exceptional measures which it could not reasonably have expected to take. The petitioner has acted in a way that a company in its position would act if it had adequate but not unlimited staff and resources and motivated but not excessive sense of urgency. The plea of the respondents that the minutes of meeting dated 11.03.2009 definitely triggered the period of limitation has been rejected on facts. It has been concluded by the Arbitral Tribunal that there is no evidence to suggest that by 11.03.2009, the petitioner had sufficient basis to mount a fraud plea against the respondents. The Arbitral Tribunal concludes in paragraphs 752 and 753 of the Award as follows:-

> "752. Not even Mr. Sood, however, suggests that the actual content of the SAR or the fact that it was in the possession of the regulators was conveyed to the Claimant at this meeting. The Tribunal agrees with the Claimant that mere knowledge of

a whistle blowing document called the SAR, if it is mentioned only in the context of being "historical" or something which had already been addressed or something unimportant, cannot, of itself. equate to knowledge of a fraud in connection with its suppression during the acquisition process. The Tribunal does not accept the Respondents' suggestion that the mention of a whistleblower, against the background of all the other events, should have rung alarm bells and set in motion a fraud investigation against Mr. Malvinder. This is particularly so if those who mentioned the SAR did not regard it as having any contemporaneous relevance. The Respondents are right that the reference must be assessed in the full context The Respondents' context, however, is incomplete. The most important context to consider is that of the meeting itself in which the SAR is mentioned. As previously noted, on 11 March 2009, Giuliani Partners briefing was to Daiichi and they plainly pitched their presentation in the terms set out in their power point presentation. The SAR was insufficiently important in the eyes of Giuilani Partners to warrant a mention in either their minutes or power point. The Tribunal has already found that any mention by Mr Hess is likely only to have been in passing. Similarly, in the meeting with Mr. Sood, it is not suggested by the Respondents' own evidence that the SAR was given any prominence there either.

753. In the circumstances, therefore, the Tribunal is satisfied that the Claimant has discharged its burden to demonstrate that, notwithstanding 2 meetings in March 2009 at which the SAR was mentioned, this was insufficient to fix the Claimant with the requisite knowledge of the fraud. Specifically, following those meetings, the Claimant remained unaware that the Respondents had deliberately concealed from it the existence of a highly damaging "confession of wrongdoing" that was in the possession of the US regulators and that had likely triggered the FDA/DOJ investigations in the first place and would likely drive their ultimate resolution."

98. The Arbitral Tribunal has concluded on facts that there was nothing in the meeting on 11.03.2009 to ring alarm bells or to attract Section 17 of the Limitation Act. Hence, it holds that the limitation period would commence only in November 2009 and accordingly, held that the proceedings commenced within the period of limitation. The above view is a finding of fact recorded by the Arbitral Tribunal based on evidence placed before it. The Arbitral Tribunal, as is settled law, is the master of quantity & quality of evidence. Finding of facts recorded by the Arbitral Tribunal cannot be challenged.

99. Further, it is settled legal position that limitation is a mixed question of law and fact. In ***Panchanan Dhara & Ors. v. Monmatha Nath Maity (Dead) Through LRs. & Another, (2006) 5 SCC 340***, the Supreme Court held as follows:

> "20. Contention of Mr.Mishra as regards the applicability of the first or the second part of Article 54 of the Limitation Act will have to be judged having regard to the aforementioned findings of fact. A plea of limitation is a mixed question of law and fact. The question as to whether a suit for specific performance of contract will be barred by limitation or not would not only depend upon the nature of the agreement but also on the conduct of the parties and also as to how they understood the terms and conditions of the agreement….."

100. The Supreme Court in ***Ramesh B.Desai & Ors. v. Bipin Vadilal Mehta & Ors., AIR 2006 SC 3672***, held as follows:

> "19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a

question of facts. A plea of limitation is a mixed question of law and fact……"

101. The plea of the respondent that the claim was time barred and that this plea has wrongly been rejected cannot be accepted as a ground to hold that the award is not enforceable. This Court cannot go into the finding of fact recorded by the Arbitral Tribunal. The findings recorded by the Arbitral Tribunal cannot be said to be contrary to Fundamental Policy of Indian Law. This plea is rejected being without merit.

Whether the Award cannot be enforced as Award of Interest on Awarded Damages Amounts to Award of Multiple Damages.

102. The next plea pertains to interest. The Arbitral Tribunal has awarded pre-award interest @ 4.44 % per annum on a simple basis commencing from 07.11.2008 till the date of the Award computing the amount at Rs.8,510,692,333.80/- (i.e. Rs.851 crores).

103. Learned senior counsel for the respondent has argued that this amounts to award of multiple damages. It is urged that the said award of interest was beyond the jurisdiction of the Arbitral Tribunal. It is further urged that the said award is in violation of the public policy of India as the awarded amount was given without any opportunity to the respondent to rebut the reasoning contained in majority award.

The essential plea of the respondent is that pre-award interest on damages constitutes grant of damages on damages which is beyond the scope of jurisdiction of Article 13.14.1.

104. The matter hardly requires any detailed consideration. Clause 13.14.4 of SPSSA reads as follows:-

> "13.14.4 Each Party shall bear its own arbitration expenses, and each Disputing Side, shall pay one-half of the ICC's and the chairperson's fees and expenses, unless the arbitrators determine that it would be equitable if all or a portion of the prevailing party's expenses should be borne by the other party. Unless the Award provides for non-monetary remedies, any such Award shall be made and shall be promptly payable in Indian Rupees or other applicable currency net of any tax or other deduction. The Award shall include interest from the date of any breach or other violation of this Agreement and the rate of such interest shall be specified by the arbitral tribunal and shall be calculated from the date of any such breach or other violation to the date when the Award is paid in full.

Hence, the SPSSA provides for interest from the date of breach at such rate as specified by the Arbitral Tribunal.

105. The petitioner have also relied upon Section 20(3) of the International Arbitration Act stating that award of interest would be a question of Singapore Law as Singapore was the seat of arbitration. In the present case, the quantification of the damage is w.e.f. 2008. The interest has been awarded from the said date as per SPSSA and cannot be held to be contrary to public policy of India.

106. I may also note that the Supreme Court in the case of ***Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa (supra)*** has also upheld the award of interest holding as follows:-

> "13. Thus, it is apparent that vide Clause (a) of Sub-section (7) of Section 31 of the Act, Parliament intended that an award for payment of money may be inclusive of interest, and the "sum" of the principal amount plus interest may be directed to be paid by the Arbitral Tribunal for the pre-award period. Thereupon, the Arbitral Tribunal may direct interest to be paid on such "sum" for the post-award period vide Clause (b) of Sub-section (7) of Section 31 of the Act, at which stage the

> amount would be the sum arrived at after the merging of interest with the principal; the two components having lost their separate identities.
>
> 14. In fact this is a case where the language of Sub-section 7 Clause (a) and (b) is so plain and unambiguous that no question of construction of a statutory provision arises. The language itself provides that in the sum for which an award is made, interest may be included for the pre-award period and that for the post-award period interest up to the rate of eighteen per cent per annum may be awarded on such sum directed to be paid by the Arbitral Award.

107. The Arbitral Tribunal by using the procedure as stated above has computed damages. This figure necessarily relates back to 2008 when the transactions took place. Having computed the said figure by awarding interest on the same for the period prior to award cannot be said to be a case of multiple damages.

108. I may look at the judgment of the Supreme Court in ***Renusagar Power Company Limited vs. General Electric Company (supra)*** where the Court held as follows:-

> "92. This would show that award of interest on damages or interest on interest i.e. compound interest is not regarded as being against public policy in these countries.
>
> 93. We may now examine the law governing award of interest in India. Shri Venugopal has placed reliance on the provisions of Section 3(3)(c) of the Interest Act, 1978. Section 3 empowers a court to allow interest and sub-section (3) of the said section provides exceptions to the main provision. In clause (c) of sub-section (3) it is laid down that nothing in this section shall empower the court to award interest upon interest. Shri Venugopal has also placed reliance on the decision of the Judicial Committee of the Privy Council in

Bengal Nagpur Rly. Co. Ltd. v. Ruttanji Ramji [AIR 1938 PC 67 : 65 IA 66 : (1938) 1 MLJ 640] and the decisions of this Court in Union of India v. West Punjab Factories Ltd. [(1966) 1 SCR 580 : AIR 1966 SC 395] ; Union of India v. Watkins Mayor & Co. [AIR 1966 SC 275] ; Union of India v. A.L. Rallia Ram [(1964) 3 SCR 164 : AIR 1963 SC 1685] and Thawardas Pherumal v. Union of India [AIR 1955 SC 468 : (1955) 2 SCR 48] . The decision of the Judicial Committee of the Privy Council in Bengal Nagpur Rly. Co. v. Ruttanji Ramji [AIR 1938 PC 67 : 65 IA 66 : (1938) 1 MLJ 640] is based on London Chatham & Dover Rly. Co. case [1893 AC 429 : (1891-94) All ER Rep Ext 1610] and following the said decision, it has been laid down that "interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or in the provision of any substantive law entitling the plaintiff to recover interest". The said decision of the Privy Council has been followed by this Court in Thawardas Pherumal v. Union of India [AIR 1955 SC 468 : (1955) 2 SCR 48] , Union of India v. Rallia Ram [(1964) 3 SCR 164 : AIR 1963 SC 1685] , Union of India v. Watkins Mayor & Co. [AIR 1966 SC 275] and Union of India v. West Punjab Factories [(1966) 1 SCR 580 : AIR 1966 SC 395] and it has been held that in the absence of any agreement, express or implied, or any provision of law, it is not possible to award interest by way of damages. This would show that there is no absolute bar on the award of interest by way of damages and it would be permissible to do so if there is usage or contract, express or implied, or any provision of law to justify the award of such interest. Merely because in Section 3(3)(c) of the Interest Act, 1978, the court is precluded from awarding interest on interest does not mean that it is not permissible to award such interest under a contract or usage or under the statute. It is common knowledge that provision is made for the payment of compound interest in contracts for loans advanced by banks and financial institutions and the said contracts are enforced by courts. Hence, it cannot be said that award of interest on interest, i.e.,

compound interest, is against the public policy of India. We are, therefore, unable to accept the contention that award of interest on interest, i.e., compound interest is contrary to public policy of India and the award in respect of compensatory damages awarded under item Nos. 2, 4 and 6 cannot be enforced under Section 7(1)(b)(ii) of the Act. d) Damages on Damages

There is clearly no merit in the said plea of the respondents

Whether the award of damages against the minor respondents, namely, respondents no.5 and 9 to 12 is illegal, non est and void and cannot be enforced being in conflict with Public Policy of India.

109. It has been pleaded by Mr.Sandeep Sethi, learned senior counsel appearing for the minor respondents that the aforesaid respondents being minors, the petitioner had to take steps to appoint a guardian *ad litem* to defend the interests of the respondents. Reliance was placed on Section 9(1)(i) of the Arbitration and Conciliation Act and Order 32 of Civil Procedure Code. It is pleaded that the procedure was mandatory. It has further been stressed that as per the Award passed by the Arbitral Tribunal the petitioners were misled by the assertions of Mr.Malvinder Singh respondent No.1, Mr.Deshmukh and Mr.Kaul who induced the petitioner to enter into SPSSA. It is urged that a minor cannot act through an agent under the Contract Act. The transaction having taken place on account of alleged false representations made by the natural guardian of the minor respondents, they could not be saddled with any liability. It is also pleaded that the minors in all received a sum of Rs.14,37,150/- and have been saddled with a liability of about Rs.3,500 crores.

110. As far as the plea about non-appointment of the guardian is concerned the petitioners have pleaded that as the arbitration proceedings were held in Singapore the International Arbitration Act was the applicable procedure and the provisions of Order 32 CPC or Section 9 of the Arbitration Act would have no application.

111. However, I need not go into the above controversy regarding Order 32 CPC or Section 9 of The Arbitration Act. The admitted fact is that in all the proceedings the minor respondents were specifically represented by counsels. Vaish and Associates Advocates, Drew & Napier LLC have been representing the said respondents. The respective fathers i.e. natural guardians, namely, respondent No.1 and respondent No.6 have been taking steps to defend the litigation on behalf of the minors.

112. The Supreme Court in a recent judgment titled as **Nagaiah and another vs. Smt.Chowdamma (dead) by LRs, MANU/SC/0014/2018** has interpreted Order 32 CPC as follows:-

> "8…..However, even in respect of minor Defendants, various High Courts are consistent in taking the view that the decree cannot be set aside even where certain formalities for the appointment of a guardian ad litem to represent the Defendant have not been observed. The High Courts have observed in the case of minor Defendants, where the permission of the Court concerned Under Order XXXII Rule 3 of the Code is not taken, but the decree has been passed, in the absence of prejudice to the minor Defendant, such decree cannot be set aside. The main test is that there has to be a prejudice to the minor Defendant for setting aside the decree. For reference, see the cases of Brij Kishore Lal v. Satnarain Lal and Ors. AIR 1954 All. 599;, Anandram and Anr. v. Madholal and Ors. AIR 1960 Raj. 189; Rangammal v. Minor Appasami and Ors. AIR

1973 Mad. 12; Chater Bhuj Goel v. Gurpreet Singh : AIR 1983 Punjab 406 and Shri Mohd. Yusuf and Ors. v. Shri Rafiquddin Siddiqui : ILR 1974 (1) Delhi 825."

113. Hence, merely because the petitioners took no steps in terms of Order 32 Rule 3 CPC or Section 9 of the Arbitration and Conciliation Act would not be a ground to conclude that the Award now passed in favour of the petitioner cannot be enforced. The only exception to this rule is in case prejudice was caused to the minor respondents.

114. I may now look at the basis of the award against the minor respondents. A perusal of the Award shows that the Tribunal has concluded that it has been proved beyond reasonable doubt that the respondents through Mr.Malvinder, Mr.Deshmukh and Mr.Kaul have fraudulently misrepresented/deliberately withheld/concealed information from the petitioner. The conclusion in this regard is stated in paragraphs 362 and 363 of the Award as follows:-

"362. The Tribunal finds that the Claimant has fully discharged its burden in proving beyond reasonable doubt that the Respondents through Mr Malvinder, Mr. Deshmukh and Mr. Kaul had fraudulently (and/or recklessly) misrepresented the genesis, nature and severity of risk to Ranbaxy arising from the DOJ and FDA investigations by making express misrepresentations coupled with the deliberate withholding or concealing of information relating to the SAR and its connection to the *DOJ* and *FDA* investigations.

363. The Claimant has also established on the preponderance of probabilities that:

a. Mr Malvinder and Mr Kaul were aware that their representations would be relied upon by the Claimant and would induce it to make its decision to enter into the SPSSA.

b. Mr Deshmukh was aware on the preponderance of probabilities that benefit would accrue to Ranbaxy and hence its shareholders (including the Respondents) if the Claimant were misled by him as to the source, nature and severity of the US investigations and if the Claimant relied upon his misrepresentations in making its commercial decisions regarding Ranbaxy.

c. The Claimant did in fact reasonably rely upon those misrepresentations in making its decision to enter into the SPSSA and that, but for those misrepresentations, it would not have entered into it."

115. Mr.Malvinder Singh/respondent No.1 is the natural guardian of respondent No.5 Ms.Nimrita Singh. Regarding respondents No.9 to 12 the aforenoted persons who have played the fraud, namely, Mr.Malvinder, Mr.Deshmukh and Mr.Kaul are at best in the capacity of an agent for the said respondent.

116. Fraud is defined in Section 17 of the Contract Act as follows:-

"17. 'Fraud' defined—'Fraud' means and includes, any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) The active concealment of a fact by one having knowledge or belief of the fact;

(3) A promise made without any intention of performing it;

(4) Any other act fitted to deceive;

(5) Any such act or omission as the law specifically declares to be fraudulent."

117. Hence, acts committed by a party to a contract in connivance with or by his agent with intent to deceive another party etc. are the relevant ingredients for fraud. On agent Section 183 of the Contract Act states as follows:-

> "183. Who may employ agent.—Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent."

118. Clearly, a minor is incapable of carrying out a fraud through an agent. As per Section 183 of the Contract Act a minor cannot employ an agent. In the facts and circumstances, it is manifest that respondents No.9 to 12 could not employ Mr.Malvinder, Mr.Deshmukh or Mr.Kaul as an agent and could not have committed a fraud through the said alleged agents.

119. The Privy Council in ***Mohori Bibee & Anr. vs. Dhurmodas Ghose, 1903 SCC Online PC 4*** stated as follows:--

> "……It is beyond question that an infant falls within the class of persons here referred to as incapable of entering into a contract; and it is clear from the Act that he is not to be liable even for necessaries, and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against his property. Under secs. 183 and 184 no person under the age of majority can employ or be an agent. Again under secs. 247 and 248, although a person under majority may be admitted to the benefits of a partnership, he cannot be made personally liable for any of its obligations; although he may on attaining majority accept those obligations if he thinks fit to do so. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are therefore of opinion

that in the present case there is not any such voidable contract as is dealt with in sec. 64."

120. Conclusions in the award that the minor respondents No. 9 to 12 are guilty of fraud through the said agent is a finding contrary to the statutory position in India.

121. Coming to respondent No.5, Mr.Malvinder Singh is the father and natural guardian of respondent No.5. The power of a natural guardian are stated in Section 8 of The Hindu Minority and Guardianship Act, 1956 which read as follows:-

"8. Powers of natural guardian.—

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,—

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in the case of necessity or for an evident advantage to the minor."

122. Hence, the natural guardian of a hindu minor has powers to do acts necessary or reasonable and proper for the benefit of the minor. Mayne's Hindu Law and Usage, 17th Edition 2014 has described the powers of a natural guardian as follows:-

"Clause(1) deals with the general power of a natural guardian to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate. What is necessary or reasonable and proper for the benefit of the minor and his property is a question to be decided according to the facts and circumstances of each case. For example, maintenance of the minor, care of his health, education, payment of taxes in respect of his property, repairing the properties (houses etc.) to see that they do not become dilapidated or collapse, maintenance of the dependents where the minor is under a legal duty to maintain them, meeting the legal expenses to safeguard the interests of the minor, performance of ceremonies which the minor has to perform, can be generally said to be acts necessary and proper.

Under asset of circumstances what a man of ordinary prudence would do or would not do, may be a guiding factor to decide whether what was done by the guardin was reasonable and proper. No hard and fast rule can be laid to see whether any particular act of the guardian is reasonable and proper. Whether the transaction can be justified on the ground that it is for necessity or for benefit has to be determined with reference to Hindu law. A contract for the purchase of immovable property which is likely to increase in price is for the benefit of the minor. The Delhi High Court left the question open whether a guardian can bind the minor by a contract for the purchase of shares in a company. If the

guardian sells the property for the marriage of a minor, it cannot be said that it is for the necessity or for the benefit of the minor, as the marriage is in violation of the Child Marriage Restraint Act which prohibits child marriages."

123. The Supreme Court in ***Bishundeo Narain and Anr. vs. Seogeni Rai and Jagernath, AIR 1951 SC 280*** has stated as follows:-

> "26**.** It is well established that a minor can sue for partition and obtain a decree if his next friend can show that that is for the minor's benefit. It is also beyond dispute that an adult coparcener can enforce a partition by suit even when there are minors. Even without a suit, there can be a partition between members of a joint family when one of the members is a minor. In the case of such lastly mentioned partitions, where a minor can never be able to consent to the same in law, if a minor on attaining majority is able to show that the division was unfair and unjust, the court will certainly set it aside. The Rule, however, does not apply to decrees if the minor is properly represented before the court and the decree is as binding on him as on the adult parties, unless the minor can show fraud or negligence on the part of his next friend or guardian ad litem. This contention also therefore fails."

124. What follows is that a natural guardian can for the benefit of the minor, protection of the minor's estate take steps which are reasonable and proper regarding the estate of the minor. Sale of shares belonging to the minor of a company when a good price is being received could ordinarily be part of the power that a natural guardian can exercise under section 8 of the Act. However, no guardian would have the power to carry out a fraud for and on behalf of the minor so as to jeopardize the estate of a minor. There is nothing in Section 8 which would show that the natural guardian can when selling shares of the minor carry out a fraud on a third party and expose the

estate of a minor to grave risk and prejudice and a liability for the fraud played by him. Any such act done by the natural guardian would be beyond his powers under Section 8 of the Hindu Minority and Guardianship Act and cannot bind or fasten any damages or liability on the estate of the minor.

125. A Division Bench of the Andhra Pradesh High Court in ***Chatrati Sriramamurti and Another vs. Official Receiver, Krishna and Others, AIR 1957 AP 692*** held that gross negligence on the part of the next friend or guardian of the minor in conducting a suit entitles a minor to challenge a decree passed against him and to avoid its effect. The court held as follows:-

> "5. In spite of the dissent expressed in *Krishna Das Padmanabha Rao* v. *Vithoba Annappa*, ILR 1939 Bom 340 : (AIR 1939 Bom 66) (A), it must now be taken in view of the decision of the Supreme Court in *Bishundeo* v. *Sheogeni Rai*, 1951 SCJ 413 at p. 418 : (AIR 1951 SC 280 at pp. 283-284) (B), which affirms the principle of the decisions of the Madras, Allahabad, Calcutta, Lahore and Patna High Courts in *Ayya Pillai* v. *Ayyadurai Goundan*, 67 Mad LJ 927 at p. 936 : (AIR 1935 Mad 81 at p. 85) (C); *Muhammad Shadak Koyi Saheb* v. *Venkatakamaraju*, 1940-2 Mad LJ 433 : (AIR 1940 Mad 810) (D); *Egappa Chettiar* v. *Ramanathan Chettiar*, ILR 1942 Mad 526 : (AIR 1942 Mad 384) (E); *Chanduru Punnaya* v. *Rajam Viranna*, ILR 45 Mad 425 : (AIR 1922 Mad 273) (F); *Siraj Fatima* v. *Mahmud Ali*, ILR 54 All 646 : (AIR 1932 All 293) (FB) (G); *Maheschandra* v. *Manindra Nath*, ILR (1941) 1 Cal 477 : (AIR 1941 Cal 401) (H)); *Iftkhar Hussain Khan* v. *Beant Singh*, ILR 1946 Lah 515 : (AIR 1946 Lah 233) (FB) (I)) and *Kamakshya Narain* v. *Baldeo Sahai*, ILR 27 Pat 441 : (AIR 1950 Pat 97) (FB) (J), that gross negligence on the part of a next friend or guardian-ad-litem of the minor in conducting or defending a suit to which he is a party, entitles the minor

to challenge the decree passed against him and avoid its effects.

6. The negligence must have been such as to result in the loss of a right which would have been successfully asserted if the suit had been conducted or resisted with ordinary care and prudence. It might consist in the omission to raise an available plea or to adduce available evidence to subantiate it. If the next friend or guardian-ad-litem had been guilty of gross dereliction of duty, that is to say, if he had neglected to do what was plainly his duty or did or omitted to do something which no man of common honesty and ordinary prudence would have done or omitted, then the minor would have a right to sue to set aside an adverse decision attributable to the guardian's breach of duty.

7. The negligence of the guardian must be so serious or of such a character as to justify the inference that the minor's interests were not at all protected and in substance, though not in form, the minor went unrepresented at the trial. The decisions are exhaustively examined in ILR 54 All 646 : (AIR 1932 All 293) (FB) (G) and ILR 27 Pat 441 : (AIR 1950 Pat 97) (FB) (J), and it is unnecessary to refer to them again. Though the rule is now well established, previous decisions are not of much guidance as authority in individual cases, for the question in each case is, whether on the facts proved, the minor had lost a valuable right and the conduct of the guardian was so grossly negligent as to entitle the minor to avoid the effect of a decree against him."

126. Clearly the acts of fraud said to have been committed by Mr.Malvinder were beyond the scope of his powers under section 8 of the Guardian and Wards Act. These acts cannot bind respondent No.5 and no award could be passed against respondent No.5.

127. Reference may be had to the judgment of the Supreme Court in ***Ritesh Agarwal vs. Securities and Exchange Board of India (supra).*** That was a case where one Shri Surinder Kumar Aggarwal whose wife and two minor sons were shown to have made contributions to the company in the course of a public issue a sum of Rs.2.25 crores was to be invested by the promoters. It later transpired that the promoters who were required to subscribe Rs.2.25 crores had invested only a sum of Rs.35 lacs. The Supreme Court held as follows:-

> "29**.** Ritesh Agarwal and Deepak Agarwal are said to be minors. As they were minors having regard to the provisions of the Contract Act, they could not have been proceeded against strictly in terms of the provisions of the said Act. Apart from the actions taken by the Board, the persons who undertook those fraudulent actions may also be held to be guilty of making a misrepresentation and commission of fraud not only before the prospective purchasers of the shares but also before the statutory authority. The same, however, would itself not mean that a minor would not (*sic*) be penalised for entering into a contract which per se was not enforceable. A contract must be entered into by a person who can make a promise or make an offer. If he cannot make an offer or in his favour an offer cannot be made, the contract would be void, as an agreement which is not enforceable in law would be void. Section 11 of the Contract Act provides that the person who is competent to contract must be of the age of majority. If Ritesh Agarwal and Deepak Agarwal were minors, as would appear from their birth certificates, they could not have entered into the contract.
>
> 30. We, therefore, are of the opinion that subject to any other or further order which the Board may pass as against Shri Surender Kumar Agarwal and Smt Rooprekha Agarwal, the impugned directions would not be binding on Ritesh Agarwal and Deepak Agarwal."

128. Similarly, in ***Commissioner of Income Tax vs. Master Sunil Kalro (supra)*** the Division Bench of the Karnataka High Court held as follows:-

> 8. "Person" has been defined under section 2(31). A careful reading of the definition of person would show that a minor cannot said to be a person for the purpose of section 271(1)(c) of the Act. Even otherwise in our view a minor has to be protected on account of the age factor. In fact several other enactments would also provide sufficient safety to the minor acts. Therefore, despite the strong arguments of Sri Indra Kumar, learned senior counsel, we are of the view that a minor cannot be saddled with any penalty for any omission and commission committed by others acting on behalf of the minor.
>
> 9. In fact, the Kerala High Court in (sic) has ruled that an individual is different from a person. Though, a minor can be an assessee but in the light of the wordings of the "person" under section 271(1)(c), the minor cannot be saddled with penalty.
>
> 10. In fact, the Madras High Court in *CIT* v. *R. Srinivasan*, [1997] 228 ITR 214 has ruled that any sum payable by the guardian on behalf of the minor is recoverable under section 162 of the Act by the guardian including penalty for the default committed by him. The logic is simple. Any omission or commission committed by a representative or a guardian cannot be fastened on the minor in terms of the Act. Therefore, we deem it proper to hold that no penalty can be levied on the minor."

129. Clearly, the finding recorded by the Arbitral Tribunal that the minor respondents have fraudulently misrepresented and/or concealed from the petitioner the source and severity of Ranbaxy's problems is a finding contrary to the statutory law of India including the provisions of The

Contract Act and the Guardian and Wards Act. The consequent award of damages on the said respondents of approximately Rs.3,500/- crores is also contrary to the statutory law of India. The next question that arises is as to whether the said portion of the Award awarding damages against the minor respondents can be said to be contrary to the Fundamental Policy of Indian Law. The Supreme Court in ***Renusagar vs. General Electric, (supra)*** held as follows:-

> "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 Protocol & Convention Act of 1837 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."

130. The Supreme Court in the said judgment also came to a conclusion that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India and noted as follows:-

> "76. Keeping in view the aforesaid objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries, we are of the view that the

> provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in Section 7(1)(*b*)(*ii*) of the Act. The submissions urged by Shri Venugopal to show that there has been a violation of the provisions of FERA, therefore, need examination."

131. The position regarding minors is quite clear. In India it is the fundamental policy of Indian Law to protect a minor. Order 32 of CPC provides elaborate procedure for protection of the interests of the minor who may sue or who is being sued. In fact Order 32 Rule (7) provides that no friend or guardian for the suit shall without the leave of the Court enter into an Agreement or compromise on behalf of a minor with reference to the suit. Section 30 of the Indian Partnership Act provides that a minor is not personally liable for any acts of the partners or of the partnership for his share in the firm.

132. Similarly, under the Hindu Minority and Guardianship Act a natural guardian can do such acts which are necessary and reasonable and appropriate for the benefit of the minor or for the realization, protection and benefit of the minor's estate. In the Guardians and Wards Act, 1890 there is an introduction which reads as follows:-

> "From the early Roman days to the present day, the king and the state is under a duty to care for the class of persons who are incompetent to take care of themselves because of their immature intellect and imperfect discretion arising from their age. Under the Hindu Law as in English Law, the king is regarded as '*parens patriae'*. The Hindu sages made it clear that the king as the ultimate protector of the state, may give suitable directions for the protection of the estate of the infants. The protection of infants by the king is now taken by the Court as representative of the sovereign."

133. Article 15, 39(e) and (f) and 45 of the Constitution of India empower the state to make special provisions for protection of children.

134. It is clear that protection of the minor is a fundamental policy of Indian law. It is a substratal principle on which Indian law is founded.

135. Hence, a minor cannot be guilty of having perpetuated a fraud either himself or through any agent. If the natural guardian commits the fraud he cannot bind the minor or the estate of the minor with any penalty or adverse consequences that would result on account of the fraud played by the natural guardian. Any such transaction cannot bind the minor.

136. Even otherwise, in my opinion, the Award against the minor is shockingly disproportionate. The minors acting through their guardian/so-called agent have received a total sale consideration of only Rs.14 lacs or so. At best on account of the fraud played by the guardian/agent, the estate of the minor gained four to five lacs of rupees. For this act they have been saddled with a liability of Rs.3,500/- crores approximately. If any fraud was committed by their natural guardian/agent the petitioners were free to commence proceedings against him. It is also admitted fact that the guardian who is alleged to have committed fraud is a party to these proceedings and also has suffered award against himself. Hence, I accept the objections against the award on behalf of respondents No.5 and 9 to 12.

ORDER

The objections of respondents No.5 and 9 to 12 (minors) are accepted. The award is held to be not enforceable against the said respondents. Acceptance of objections of respondents No.5 and 9 to 12 would not affect

enforcement of the Award against other respondents. The objections of all other respondents are dismissed.

JAYANT NATH
(JUDGE)

JANUARY 31, 2018
n/rb/v