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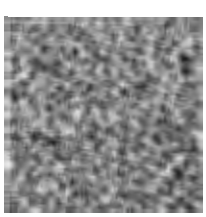
Certificate No.	:	**IN-DL46676127049137T**
Certificate Issued Date	:	15-Feb-2021 01:00 PM
Account Reference	:	IMPACC (IV)/ dl857003/ DELHI/ DL-DLH
Unique Doc. Reference	:	SUBIN-DLDL85700395356333416258T
Purchased by	:	ZOSTEL HOSPITALITY PRIVATE LIMITED
Description of Document	:	Article 12 Award
Property Description	:	Not Applicable
Consideration Price (Rs.)	:	0 (Zero)
First Party	:	ZOSTEL HOSPITALITY PRIVATE LIMITED
Second Party	:	ORAVEL STAYS PRIVATE LIMITED
Stamp Duty Paid By	:	ZOSTEL HOSPITALITY PRIVATE LIMITED
Stamp Duty Amount(Rs.)	:	500 (Five Hundred only)



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ARBITRATION BETWEEN

ZOSTEL HOSPITALITY PVT. LTD. AND ORS. .....CLAIMANTS

VERSUS

ORAVEL STAYS PVT. LTD. .....RESPONDENT

BEFORE THE ARBITRAL TRIBUNAL COMPRISING OF HON'BLE MR. JUSTICE A.M. AHMADI (RETD.) FORMER CHIEF JUSTICE OF INDIA SOLE ARBITRATOR

IN THE MATTER OF:

ZOSTEL HOSPITALITY PVT. LTD. AND ORS. .....CLAIMANTS

VERSUS

ORAVEL STAYS PVT. LTD. .....RESPONDENT

Counsels:

For Claimants:

Mr. Arun Kathpalia, Senior Advocate

Mr. Abhishek Malhotra, Advocate

Mr. Krishnendu Datta, Advocate

Mr. Deepak Biswas, Advocate

Ms. Shilpa Gamnani, Advocate

Ms. Atmaja Tripathy, Advocate

Mr. Gurmukh Shiv Choudhuri, Advocate

For Respondent:

Mr. Salman Khurshid, Senior Advocate

Dr. Abhishek Manu Singhvi, Senior Advocate

Mr. V.Srinivasa Raghavan, Senior Advocate

Mr. P.V. Kapur, Senior Advocate

Mr. Sandeep Grover, Advocate

Mr. Avimukt Dar, Advocate

Mr. Mayank Mishra, Advocate

Mr. Mohit Chadha, Advocate

Ms. Vaishnavi Rao, Advocate

Ms. Rithika Ravikumar, Advocate

Ms. Prerna Sharma, Advocate

Ms. Swati Mittal, Advocate

Ms. Madhavi Khanna, Advocate

Mr. Abhirup Paul Bangara, Advocate

Mr. Zafar Khurshid, Advocate

Ms. Aadya Mishra, Advocate

Ms. Sakshi Katiyal, Advocate

Ms. Jyoti Singh, Advocate

Ms. Mahima Rathi, Advocate to assist the Arbitral Tribunal.

1. Original Award received by the Claimants/ authorized agent_____

2. Copy of the Award received by the Respondent/authorized agent_____

AWARD

1. Disputes arose between Claimants and Respondent in respect of Term Sheet dated 25.11.2015. Clause 16 of the said Term Sheet contained an arbitration clause, pursuant to which Claimant No.1 approached the Hon'ble Supreme Court of India in Arbitration Petition (Civil) No. 28/2018 and sought appointment of an Arbitrator under Section 11(6) of the Arbitration & Conciliation Act, 1996 (Hereinafter referred to as '**the Act**'). Vide order dated 19.09.2018, the Hon'ble Supreme Court constituted this Arbitral Tribunal appointing me as the Sole Arbitrator.

2. Brief Facts leading to the institution of the present proceedings by the Claimants are that Term Sheet dated 25.11.2015 (hereinafter referred to as the '**Term Sheet**') was executed between Claimant Nos. 1 & 2 and the Respondent for the purpose of acquisition of assets of Claimant No.1 including Intellectual property Rights, Software, key employees etc. by the Respondent. It is the Claimants' case that they acted upon the Term Sheet, fulfilled all the obligations stipulated therein and transferred their business to the Respondent. Claimants claim to be aggrieved by the acts and omissions of the Respondent and the breach of terms and conditions of the Term Sheet due to which the acquisition process could not be formally concluded and the same deprived them of the benefits that were due to accrue to them upon completion of the acquisition process as

envisaged in the Term Sheet. The Respondent has refuted the Claimants' case and inter alia submitted that the Term Sheet was merely exploratory, non-binding in nature and stood terminated. Due Diligence process contemplated under the Term Sheet was never completed and Definitive Documents, which were a sine qua non for completion of the acquisition process were never executed. Therefore, the Claimants are not entitled to any relief.

3. Claimants have prayed for the following reliefs against the Respondent in their Statement of Claim:

i. Specifically perform its obligation agreed upon the Term Sheet by transferring/issuing, in the name of Claimants 7% of the present shareholding of the Respondent in favour of Claimant Nos. 2-17, *pro rated* to their respective shareholding of Claimant No.1;

ii. Pay the agreed contracted amount of USD 1 million to the Founders i.e. Claimant Nos. 4-10; or

iii. In the alternative and without prejudice to the claims in paragraphs 7(i) and (ii) above, pay to the Claimants, jointly, in the amount equivalent to 7% of the value of Respondent company as per the last round of funding received by the Respondent, along with USD 1 million to Claimant Nos. 4-10, reflecting the benefit of bargain as promised by Respondent to the Claimants;

AND

iv. Pay interest @18% per annum from the date of execution of Term Sheet till date of payment, on the due amount of USD 1 million to Claimant Nos. 4-10; AND

v. Pay damages for loss of goodwill and reputation as well as inconvenience caused to the Claimants, in the amount of USD 17 million; AND

vi. Pay for the costs of the present proceedings; AND

Pass any such order as the Hon'ble Tribunal may deem fit in the facts of the case.

4. The Claimants sought the following additional alternate reliefs in their Replication:

a. Reject the Statement of Defence in its entirety; AND
b. Pass final award in favour of Claimants and against Respondent, in terms of prayer sought in the Statement of Claim of the Claimants; AND/OR
c. Pass an award in favour of Claimant No.1, in the alternative, for payment of USD 88,922,768/- (Eighty-Eight Million Nine Hundred Twenty-Two Thousand Seven Hundred Sixty-Eight Only) along with interest at the rate of 24% per annum from March 31, 2016 till the date of payment thereof; AND/OR
d. Pass such further orders as the Hon'ble Tribunal may deem fit in the facts of the case.

The Respondent was permitted to file a Sur-Rejoinder to the Replication.

5. Thereafter, following issues were framed.

1. Whether the Arbitral Tribunal has jurisdiction to consider or entertain the claims of Claimants Nos. 3 to 17?
2. Whether Claimant Nos. 2 and 3 have waived their rights to raise any claims in the present arbitration and hence their claims are not maintainable?
3. In the event of Claimant Nos. 2 to 17 not being entitled to maintain their claim, whether Claimant No. 1 is entitled to claim/pray for the relief of allotment of shares from the Respondent to Claimant Nos. 2 to 17 and the payment of USD 1 million dollars to Claimants No. 4 to 10?

4. Whether the term sheet dated 26.11.2015 is non-binding as stated in it or whether it is a binding, valid and enforceable agreement in terms of the acts of the parties as alleged by the Claimants?

5. Whether there was *consensus ad idem* between the parties on the Draft Definitive Agreements stipulated under clause 7 of the Term Sheet dated 26.11.2015?

6. Whether as asserted by the Claimants they were ready and willing to perform their obligations under the Term Sheet dated 26.11.2015 and to execute the draft definitive agreements contemplated under the Term Sheet?

7. Whether the transaction(s) as contemplated in the Term Sheet dated 26.11.2015 has been consummated and the Claimants have performed conditions detailed in the Term Sheet dated 26.11.2015?

8. Whether the Claimants prove that there was breach of contract in terms of the Term Sheet dated 26.11.2015 by the Respondent?

9. Whether the Claimants are entitled to specific performance of the Term Sheet dated 26.11.2015 by directing the Respondent to issue 7% of the present shareholding of the Respondent in favour of Claimant No.2 to 17 pro-rated to their respective shareholding of Claimant No.1?

10. Whether the Claimants No.4 to 10 are entitled to the payment of USD 1 million dollars?

11. Whether as an alternative to specific performance, Claimants are entitled to an amount equivalent to 7% of the value of the Respondent as per the last round of funding received by the Respondent along with USD 1 million dollars to Claimant Nos. 4 to 10?

12. Whether Claimants No. 4 to 10 are entitled to interest on the amount of USD 1 million from the date of execution of the Term Sheet, if so for what period and at what rate?

13. Whether the Claimants prove loss of goodwill and are entitled to damages to the extent of 17 million USD?

14. Whether the Claimant No.1 is entitled in the alternative for payment of USD 8,89,22,768/- as claimed in the Replication?
15. Who should bear the cost and if so to what amount?
16. To what reliefs are parties entitled?

6. Parties were heard at length. Arguments advanced in respect of each issue, along with findings of this Arbitral Tribunal, are as under:

Issue No.1: Whether the Arbitral Tribunal has jurisdiction to consider or entertain the claims of Claimants Nos. 3 to 17?

Mr. Abhishek Malhotra, Learned Counsel for the Claimants argued that Claimant Nos. 3 to 17 have been validly arrayed as parties in view of the settled law and this Arbitral Tribunal has the jurisdiction to entertain their claims. This argument was based on three main premises:

a. It is settled law that non-signatories to the Arbitration Agreement can be arrayed as parties to the arbitration.
b. The Arbitration Clause in the Term Sheet has wide amplitude and includes the claims of Claimant Nos. 3 to 17.
c. Arbitration proceedings have been validly initiated by the Claimants.

In support of their submissions, Claimants *inter alia* relied upon clause 16 of the Term Sheet and order dated 19.08.2019 passed by this Tribunal dismissing Respondent's application under Section 16 of the Act, vide which Claimant Nos. 3-17 were allowed to participate in the proceedings. An article written by William W. Park titled 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' was also relied upon. Judgments passed by Hon'ble Supreme Court in Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. and Ors. [(2013) 1 SCC 641], Cheran Properties Limited vs. Kasturi and Sons Limited and Others [(2018) 16 SCC 413], RVR Solutions v. Ajay Kumar Dixit and Others [2019

SCC Online Del 6531], Duro Felguera, S.A. vs. Gangavaram Port Ltd., [(2017) 9 SCC 729], Maharishi Dayanand University and Anr vs. Anand Coop. L/C Society Ltd. and Anr. [(2007) 5 SCC 295], Jindal Stainless Limited vs. Moorgate Industries India Pvt. Ltd [OMP(I) Comm. 333/2016], Renusagar Power Co. Ltd. vs. General Electric Company and Anr. [(1984) 4 SCC 679], State of Goa vs. Praveen Enterprises (2012)12 SCC 589 etc. were also relied upon.

Mr. Salman Khurshid, Learned Senior Counsel for the Respondent refuted the submissions made by the Claimants and argued that no arbitration agreement subsists between Claimant Nos. 3-17 and the Respondent. He further submitted that:

a. A non-signatory third party cannot be made party to an arbitration proceeding.
b. Judgments passed in Chloro Controls (supra) and Cheran Properties (supra) do not apply to the facts and circumstances of the present matter and are distinguishable from the present case.
c. The power to implead third parties lies exclusively with the Courts and not with the Arbitral Tribunal. Therefore, allowing the claims of Claimant Nos. 3-17 would tantamount to exceeding jurisdiction.
d. Arbitration had not been initiated by the said Claimant Nos. 3-17 in accordance with the Act and the said Claimants have not filed a petition under Section 11 of the Act seeking appointment of an arbitrator.

In support of its submissions, Respondent relied upon various judgments including V.G. Santhosam & Others. Vs. Shanthi Gnanasekaran & Others (2020) 5 MLJ198, Deutsche Post Bank Home Finance Ltd. vs. Taduri Sridhar & Others. (2011) 11 SCC 375, Balmer Lawrie & Co. Ltd. vs Saraswathi Chemicals Proprietors Saraswathi Leather Chemical (P) Ltd 239(2017) DLT 217, Sudhir Gopi vs. IGNOU (2017) 164 DRJ 227,

Indowind Energy Limited vs. Wescare(India) Ltd. & Ors.(2010) 5 SCC 306, Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.(2017) 162 DRJ 412 etc.

The Respondent laid stress upon Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.(2017) 162 DRJ 412 which has held that notice under Section 21 of the Arbitration and Conciliation Act, 1996 is mandatory to initiate arbitration proceedings. Relevant portion of the said judgment reads as under:

> "Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law." (Para 30)

In response, Claimants relied upon the judgment of State of Goa vs. Praveen Enterprises (supra) to support their contention that a notice under Section 21 of the Act is for the purpose of limitation and to intimate the Respondent that disputes have arisen. It was also submitted that the requirements under the Act have been complied with as Claimant No.1 had sent notice dated 25.02.2018 to the Respondent intimating that disputes had arisen.

In the considered opinion of this Tribunal, the decision in Praveen Enterprises (supra) is of no assistance as the said judgment dealt with the requirement of a Notice under Section 21 vis-à-vis counter claims. The said judgment is not applicable to the facts of the present dispute. Therefore, in view of the law laid down in Alupro Building Systems Pvt.

Ltd. (supra) and in view of the fact that the mandatory requirement of Section 21 of the Act has not been complied with by Claimant Nos. 3 to 17, this Tribunal holds that it has no jurisdiction to consider or entertain the claims of Claimant Nos. 3-17.

As the mandatory requirement of Section 21 has not been complied with, examination of other aspects pertaining to arraying of non-signatories as parties and the nature of the arbitration clause is an academic exercise and does not warrant further examination.

Issue No.2: Whether Claimant Nos. 2 and 3 have waived their rights to raise any claims in the present arbitration and hence their claims are not maintainable?

Mr. Malhotra, Learned Counsel for the Claimants submitted that neither Claimant No. 2 nor Claimant No.3 had waived their rights to raise a claim before this Tribunal. It was submitted that Claimant No. 2 was not only a signatory to the Term Sheet but also a beneficiary to the Transaction. It was added as a Proforma Respondent in the Petition under Section 11 of the Act before the Hon'ble Supreme Court and had expressed its consent for appointment of Arbitrator suggested by Claimant No.1 vide letter dated 27.09.2018.

The personal involvement of Claimant No. 3 in the negotiations, discussions pertaining to execution of the Term Sheet and at every stage of the transaction was relied upon to state that Claimant No. 3 had not waived its rights to prefer a claim before this Arbitral Tribunal.

Tribunal's attention was drawn by the Claimants to the fact that the Respondent's submissions were contrary to its pleadings before Hon'ble Delhi High Court and Supreme Court. Pleadings filed by the Respondent

before Hon'ble Delhi High Court and Supreme Court were relied upon to state that Claimant Nos. 2 and 3 were admitted beneficiaries and necessary and proper parties to the Arbitration. Therefore, the Respondent could not approbate and reprobate before different forums.

Mr. Salman Khurshid, Learned Senior Counsel rebutted the argument advanced by the Claimants and submitted that the arbitration petition before the Supreme Court was preferred only by Claimant No.1. Claimant No.2 was only a proforma Respondent and did not enter appearance before the Supreme Court. Also, Claimant No.2 had not been referred to the present proceedings by the Supreme Court. Regarding letter dated 26.07.2018, it was submitted that the said letter records the factum of disputes having arisen only between Claimant No.1 and the Respondent. This was supported by the notice invoking arbitration dated 25.01.2018 which was issued only by Claimant No.1 and not the other Claimants. Pleadings filed by Claimant No.3 before the Delhi High Court were relied upon to state that there had been a categorical waiver by Claimant No. 3 who submitted that it will not be a Claimant in the Statement of Claim. It was only after the Respondent raised objections that the Claimants are rescinding from the waivers extended by them. Hence, Claimant Nos. 2 and 3 cannot maintain their claims.

Without going into the merits of the arguments advanced and in view of the findings given in Issue No.1, this Tribunal does not consider it fit to entertain the claims of Claimant No.3. Claimant No.2, though a signatory to the Term Sheet, has not served a Notice under Section 21 to the Respondent. Therefore, it cannot raise any claims before this Arbitral Tribunal. Hence, claims of Claimant Nos. 2 and 3 are not maintainable before this Arbitral Tribunal.

Issue No.3: In the event of Claimant Nos. 2 to 17 not being entitled to maintain their claim, whether Claimant No. 1 is entitled to claim/pray for the relief of allotment of shares from the Respondent to Claimant Nos. 2 to 17 and the payment of USD 1 million dollars to Claimants No. 4 to 10?

Mr. Malhotra, Learned Counsel for the Claimants submitted that:

(a) Claimant No.1 is a signatory to the Term Sheet and is the 'Target' sought to be acquired by the Respondent under Clause 1 of the said Term Sheet.

(b) Claimant No.1 as an independent legal entity, is well within its rights to initiate proceedings against the Respondent for the breach of contract leading to closure of Claimant No.1's business, failure to compensate the shareholders as promised in the Term Sheet and for misleading it into closure of its business.

(c) The act of transfer of Claimant No.1's business to the Respondent was not gratuitous. Therefore, the Respondent having gained the benefit of the bargain is liable to pay the compensatory reliefs sought by Claimant No.1.

(d) The Respondent is estopped from raising this objection qua maintainability at the concluding stage of the Arbitration because it had specifically stated during the course of arguments on the Section 16 application that Claimant Nos. 2-17 can at best claim through Claimant No.1. Attention was drawn to the fact that the said point was given up by the Respondent by omission in the Sur-Rejoinder Note of Arguments submitted by Respondent on 20.07.2019.

(e) That Claimant Nos. 2-17 had authorized Claimant No.1 to proceed with the transaction. Reliance was placed on the testimony of CW-1 who had

deposed that approvals (written as well as oral) in favour of Claimant No.1 were given by Claimant Nos. 2-17 before the signing of the Term Sheet. It was also submitted that written approvals were available from Orios Venture Partners (Claimant No.2), Tiger Global (shareholder at the time of execution of Term Sheet and later transferred its shares to Claimant No.2), Sol Primero (Claimant No.3), and the founders (Claimant Nos. 4-10) were given to Claimant No.1 and the approvals from the Angel Investors of Claimant No.1 was given by Mr. Zishaan Hayath (Claimant No.11).

In response to the Claimants' submissions, Mr. Salman Khurshid Learned Senior Counsel for the Respondent submitted that the present arbitration proceedings are not maintainable at the instance of Claimant No.1. It was submitted that under the Term Sheet, no benefits were to accrue upon Claimant No.1 and no relief arising from the Term Sheet had been sought on behalf of Claimant No.1 in the Statement of Claim. Bacchaj Nahar vs. Nilima Mandal and Anr. (2008) 17 SCC 491 was cited to state that Court can only grant a relief which has been sought by a party and cannot grant any relief which has not been specifically sought.

Mr. Khurshid also submitted that it was only after the instant objection was raised as a preliminary objection at the stage of filing of Statement of Defence, that the Claimants added an additional relief in the Replication seeking an alternative relief of USD 88,922,768/- in favour of Claimant No.1. Therefore, Claimant No.1 cannot maintain the proceedings before this Arbitral Tribunal.

In order to decide the issue at hand, it is essential to first examine the Term Sheet and the nature of obligations stated therein. A reading of the Term Sheet shows that:

a. Both Claimant No.1 and the Respondent are signatories/parties to the Term Sheet.

b. Clause 1 (Target) recognizes Claimant No.1 as the 'target'.

c. Clause 3 (Acquisition) states that:

"For the purposes of acquisition of Assets, the acquirer shall pay the minimum permissible price by law to the Target."

d. Clause 4 (Closing) states that:

"Closing shall be conditional upon fulfillment of the following conditions:

i. Completion of limited legal and financial diligence of the Target.

ii. Target obtaining all corporate, governmental, management, third party, exchange control and other regulatory approvals that are necessary or advisable.

Upon closing:

(f) Preference shareholders of the target shall be entitled to .... in the Acquirer.

(g) Equity shareholders of the target shall be entitled to.... in the Acquirer."

e. Clause 5 (Shareholder Rights) states that:

"Liquidity Preference

In the event of any liquidity event..... ... the preference shareholders of the target will have liquidation preference.... ."

f. Clause 7 (Definitive Documents) states that:

"Subject to the conditions set forth in this Term Sheet, the parties shall mutually agree, execute the following documents and such other documentation as the parties may deem necessary.....

.....

The parties may pursuant to mutual discussions agree upon execution of one or more agreements to capture the entire understanding arrived at amongst them."

g. Clause 8 (Representation and Warranties) states that:

"The transaction shall be subject to customary representations and warranties by the Target, Target Shareholders and the Acquirer."

h. Clause 9 (Due Diligence) states that:

"The Target shall provide all such information, documents and material about the business and affairs of the Target as listed in the Exhibit to this Term Sheet."

i. Clause 10 (Non-Compete & Non-solicitation, Non- Disparagement Agreement) states that:

"Founders shall enter into non-disparagement agreement, non-compete and non-solicitation agreement with the acquirer.....

.....

The target shareholders agree not to directly (or through an affiliate) invest in any business that is determined by the Board of the Acquirer as a competing business....."

j. Clause 12 (Confidentiality) states that:

"The terms and conditions of this Term Sheet are confidential and the parties shall not disclose the same to any third party except as provided below."

k. Clause 14 (Announcements) states that:

"All announcements or public statements in relation to the contemplated transaction shall be made only with prior approval of the Acquirer and the Target, which approval shall not be unreasonably withheld."

l. Clause 15 (Exclusivity) states that:

"The parties hereby further undertake that after signing this Term Sheet, they shall not for a period of 15 business days.....

approach any person, solicit any offers, engage in any discussions or enter into any agreements or commitments from any person with respect to sale or acquisition of any equity instruments of the Target."

m. Clause 16 (Governing Law & Arbitration) states that:

"Any dispute between the parties arising from or relating to this Term Sheet which cannot be amicably resolved between the parties shall be referred to Arbitration in New Delhi in accordance with the Arbitration and Conciliation Act, 1996."

A perusal of the above mentioned clauses of the Term Sheet shows that Claimant No.1 was a signatory to the Term Sheet and defined as the Target, whose acquisition was contemplated by the said Term Sheet.

Various clauses of the Term Sheet lay down the obligations of Claimant No. 1 in its capacity as the Target/Party to the Term Sheet. Additionally other clauses such as clauses 8 and 10 deal with the obligations and/or entitlements of the Founders and Target Shareholders defined under clause 2 of the Term Sheet.

In view of the above, it is evident that inclusion of the above terms in a Term Sheet, to which the Respondent is also admittedly a signatory, supports the Claimant's case. Had the Claimant not been authorized to negotiate the Term Sheet on behalf of the Target Shareholders and the Founders, such clauses could not have been a part of the Term Sheet. The fact that Respondent is a signatory to the Term Sheet makes it clear that it had acknowledged and accepted the commitments made to and on behalf of the Target Shareholders and the Founders through Claimant No.1, at the time of execution of the Term Sheet.

Thus, the Respondent is estopped from contending that Claimant No.1 cannot claim/pray for the reliefs on behalf of other Claimants. This Tribunal holds that Claimant No.1 is entitled to claim/pray for the relief of allotment of shares from the Respondent to Claimant Nos. 2 to 17 and the payment of USD 1 Million Dollars to Claimants No. 4 to 10.

Issue No.4: Whether the term sheet dated 26.11.2015 is non-binding as stated in it or whether it is a binding, valid and enforceable agreement in terms of the acts of the parties as alleged by the Claimants?

The nature of the Term Sheet dated 26.11.2015, is one of the focal points of the disputes that have arisen in the present matter. While it is the Claimants' case that the Term Sheet is binding, the Respondent has vehemently argued that it is Non- Binding and merely exploratory in nature.

Mr. Malhotra, Learned Counsel for the Claimants argued that the Term Sheet was a complete contract and contained the Respondent's offer to acquire the business of Claimant No.1, its acceptance and consideration along with the conditions precedent and subsequent. The conduct of the parties, subsequent to the execution of the Term Sheet created a binding contractual obligation on the parties (both signatories and non-signatories). The parties had by conduct waived the non-binding preamble of the Term Sheet and created a binding & enforceable contract. There was consensus ad idem of parties on consummation of the transaction and the Term Sheet contained all essential terms of acquisition agreed to between the parties including, identified target, parties to the agreement, broad identification of assets to be acquired, rights and obligations of the shareholder and acquirer, consideration, warranties and indemnities, pre

and post-closing conditions and restrictive covenants. The only contingency was the due diligence (satisfied in December 2015) and the agreement on the language of the Definitive Agreements (finalized in January 2016 and remained unchanged) which would have led to the signing of Definitive documents.

Claimants put forth three broad arguments in support of their case. Firstly, it was argued that:

a) Notwithstanding the use of the term 'Non-Binding' in the recital, every aspect of the Term Sheet was intended to be binding. Reliance was placed on clauses 4, 5, 7, 8, 9, 10, 11 and 14 of the Term Sheet in support of the same.

b) Clause 4 shows that upon closing of the Transaction, shareholders of Claimant No.1 were to acquire pro-rata shareholding of 7% in the Respondent. The consensus ad idem on the aforesaid consideration finds mention across correspondence shared between the parties and also the Definitive Documents finalized by them. Reliance was placed on Ex. C-30, Ex. C-39 and pages 572-573, 534-540, 536, 874, 989, 1125, 1181 and 1238 of the Respondent's documents and the testimony of CW-10.

The second argument advanced by the Claimant was that the parties had, by conduct, waived the non-binding nature of the Term Sheet. Mr. Malhotra submitted that the contract must be interpreted in accordance with the language employed therein coupled with the intent of parties. Such intent is inter alia reflected from the 'conduct of parties' as held in RTS Flexible Systems Ltd. vs. Molkerei Alois Muller Gmbh & Ors. Co. KG (UK Production) [2013] 3 All ER 1. Reliance was also placed on Revielle Independent LLC vs. Anotech International [Case No. 2013 Folio 1137] and Videocon Telecommunication Ltd. vs. Bharat Sanchar Nigam Limited (TDSAT) [Petition No. 10 of 2013].

It was further argued that it is settled law that contemporaneous correspondence can be read to deduce the intent and consensus ad idem between parties. A perusal of the correspondence exchanged between parties makes it clear that a binding contract was created at the behest of the Respondent. Attention was drawn to the Definitive Documents and it was stated that it showed 'all material terms' had been agreed to, by all parties. Following instances were pointed out to show that the obligations of the Term Sheet were binding and accepted by the Respondent.

a) Due diligence process was completed by December 14, 2015 and Respondent was satisfied with the outcome thereof. Reliance was placed on Respondent's email (Due Diligence Confirmation email) dated 14.12.2015 (Ex. C-41) which records that Respondent had gone through the Due Diligence Documents shared with it and did not have any further requisitions.

b) Public announcement by SoftBank (Respondent's Shareholder) on 10.02.2016 [Mark-A] declared 'Acquisition of Zo Rooms' as a highlight of the 9 month period ending December 2015.

c) Clause 4.3 of the Framework Agreement clarified that significant obligations under the Term Sheet and Definitive Documents had been performed by the Claimants and the insertion of the clause was accepted by both parties.

d) Minutes of Meeting dated 22.02.2016 (Ex. C-57) recorded Respondent's assurance that "the Company completely endorses the deal and is extremely unhappy at the stand that VN is taking". Reliance was also placed on the fact that during his cross- examination, Mr. Abhishek Gupta (RW-1) stated that the contents of the said email accurately described the discussions during meeting dated 22.02.2016.

In view of the above, it was submitted that conduct of parties read with the correspondence on record created valid, binding and enforceable contractual obligations on the parties. Signature of parties to a written

contract is not a pre-condition to the existence of contractual relations as a contract can equally be accepted by conduct. Respondent had failed to explain its conduct which proves that it consented to and instructed the Claimants to consummate the Transaction.

The third argument advanced by the Claimants in support of their case was that there was consensus ad idem and consummation of transaction by conduct. It was submitted that as a part of acquisition by the Respondent, Claimants effectuated transfer of employees, hotel properties under the name 'Zo Rooms', consumer migration from Online Travel Agent (OTA) Platforms, 1505 future bookings w.e.f 31.12.2015, consumer data and termination of vendor agreements. Respondent has failed to provide any justification in response to its conduct.

Ex. C-48 (Colly) was relied upon to state that vide email dated 04.08.2016, parties had finalized the Definitive Documents (Ex. C-27 to C-35) and that upon finalization, Claimant No.1 on instructions of the Respondent procured stamp papers. It was further submitted that the only obligation which remained to be performed was for the Respondent to pay the agreed consideration for the benefits received. In support of their submissions, Claimants relied upon B.L. Sreedhar and Ors. Vs. K.M. Munnireddy (Dead) and Ors. [(2003) 2 SCC 355], Kollipara Sriramulu (Dead) through LRs vs. T. Aswatha Narayana (Dead) through LRs [AIR 1968 SC 1028] etc.

Mr. Salman Khurshid, Learned Senior Counsel for the Respondent refuted the Claimants' arguments and submitted that:

a. The Term Sheet does not constitute a binding agreement for the proposed transaction.

b. There is no Oral Agreement between the Parties and parties have clearly expressed their intention to be bound by the Definitive Agreements in writing.

c. Term Sheet is an agreement to enter into an agreement and is not recognized in law.

d. Definitive Documents were never agreed upon or executed or signed.

In support of the said arguments, reliance was placed on the preamble of the Term Sheet to state that the common intention of the parties was to 'not' create any binding obligation under the Term Sheet and the signatories clearly specified that they will only create binding contractual obligations upon execution of Definitive Agreements. Reliance was placed on Polymat India P. Ltd vs. National Insurance Co. Ltd. & Ors. [2005 123 Comp Cas 663] and Kamala Devi vs. Takhatmal and Ors. [AIR 1964 SC 859] to state that the intention of the parties must be gathered from words of the contract and the same is evident from the words of the preamble to the Term Sheet. It was further submitted that when the meaning of the words is clear and does not admit to any divergent/multiple interpretation, then the language must be taken as conclusive of the parties' intention and the Arbitral Tribunal ought not to look into extrinsic evidence.

It was argued that it is not the Claimant's case that they were under any mistaken impression that the Term Sheet was a final and binding contract and parties well understood that they were only at the stage of initial phases of discussion and that the Term Sheet was intended to be a non-binding document. Respondent's Board Resolution dated 25.11.2015 was cited to state that authorization was provided for the limited purpose and limited extent of authorizing Mr. Ritesh Agarwal (RW-3) and Mr. Abhishek Gupta (RW-1) to execute a non-binding Term Sheet to explore possible business opportunity of acquiring some assets of Claimant No.1. Board of the Respondent had not provided consent to the consummation of

transaction and it was understood that the Term Sheet was signed only for the purpose of further discussions. Moreover, the Term Sheet was terminated vide correspondence dated 17.09.2016 and 19.09.2016.

Claimants' argument regarding Oral Agreement between the parties was refuted as under:

i. There is no pleading of oral agreement in the Statement of Claim.
ii. No plea of Oral agreement can be set up once parties agreed in the Term Sheet that they will be bound only by the Definitive Agreements - if and when they are executed.
iii. There is no plea of Oral Agreement.

It was further submitted that the Term Sheet being an agreement to enter into an agreement, was not recognized under law. Reliance was placed on Von Hatzfieldt- Wildenburg vs. Alexander [(1912) 1 CH 284] in support of the same. If the parties are ad idem at the material terms of the contract and agree to be bound only by the execution of a definitive document, no rights and obligations could arise till such time as the definitive document is executed. Reliance was placed on Rohit A. Kapadia & Anr. vs. Perviz J. Modi and Dresser Rand S.A. vs. Bindal Agro Chem Ltd. & Anr. [(2006) 1 SCC 751].

The proposed terms remained inconclusive and uncertain. Therefore, the Term Sheet is void in view of Section 29 of the Contract Act. It was stated that the terms were uncertain in respect of assets to be acquired, consideration etc. The closing of the transaction was predicated on the completion of various conditions, some of which have been mentioned in Clause 4, Annexure I and Annexure II of the Term Sheet. However, the clause 4 also states that closing was also based on completion of "any other condition in the Definitive Agreements". Presence of this condition makes the Term Sheet further ambiguous, in as much as at the time of

execution of the same, the parties were not even aware of what conditions would be required to be fulfilled for a binding agreement to be effectuated between the parties.

Regarding Claimants' argument that the non-binding nature of the Term Sheet was waived by the parties, it was submitted that Claimants have not pleaded when, by which express conduct the non-binding nature was waived by the parties converting the Term Sheet into a binding contract. Respondent differentiated Reveille Independent LLC vs. Anotech International (UK) Ltd. [Case No. 2013 Folio 1137] and RTS Flexible Systems Ltd.vs. Molkerei Alois Muller Gmbh & Co. KG (UK Production) [2010 3 All ER 1], Videocon Telecommunication Ltd. vs. Bharat Sanchar Nigam Ltd. [TDSAT] cited by the Claimant to state that the same are not applicable to the facts of the present case.

Mr. Malhotra submitted in rejoinder that the Respondent had taken a contradictory stand by stating on one hand that it was the clear intent of the parties that the Term Sheet was non-binding and arguing on the other hand that Term Sheet was vague and ambiguous.

Regarding Respondent's argument that the Term Sheet was vague and ambiguous, it was submitted by the Claimants that assuming without admitting that the case was as alleged by the Respondent, then it is settled law that the Term Sheet must be interpreted in the light of conduct of parties as held in Transmission Corporation of Andhra Pradesh Limited & Ors. Vs. GMR Vemagiri Power Generation Ltd. and Anr. [(2018) 3 SCC 716].

Regarding the Respondent's contention that email dated 14.12.2015 [Ex. C-41] (Due Diligence Confirmation Email) cannot be construed as

evidence of completion of Due Diligence, Claimants submitted that Respondent had failed to show from the documents on record of the Tribunal, whether any requisitions were raised by the Respondent's counsel after 14.12.2015 till 31.03.2016 (the date when Definitive Documents were to be executed). It was further submitted that in view of the Respondent's failure to show the requisite documents, its contention is baseless and deserves to be rejected. It was further submitted that the fallacy in the Respondent's case is evident from the testimony of Mr. Abhishek Gupta (RW-1) when, in his answers to questions regarding proof of intimation of pending due diligence between 14.12.2015 and 31.03.2016, relied upon emails dated December 2-3, 2016 which were much prior to the period specified above.

Regarding the aspects of 'oral agreement between parties' and 'waiver by conduct', the Claimants submitted that they had not pleaded that parties had waived the requirement of executing the Definitive Documents or that any oral agreement had been entered into by the parties. It was the Claimants' case that parties by conduct had created a binding contract which was also performed by the Claimant. The judgment in Dresser Rand (supra) was relied upon to state that the Respondent's reliance on the said judgment is misplaced in so far as it states that it is open for the courts to hold that parties are bound by the document, and the courts will, in particular be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it.

In order to ascertain the true intent of the parties, it is imperative to read the complete document as a whole. It would not be in the interest of justice if conclusions are drawn merely by reading the preamble and

ignoring the clauses which form the main subject matter of the Term Sheet.

Clause 4 (Closing) states that:

The Closing shall be conditional upon fulfillment of the following conditions:

i. Completion of limited legal and financial diligence of the Target.
ii. Target obtaining all corporate, governmental, management, third party exchange control and the regulatory approvals that are necessary or advisable.
iii. Conditions identified under Annexure-I; and
iv. Any other conditions in the Definitive Agreements

Conditions laid in Annexure-I (Closing Obligations) are as follows:

1. Withdrawal of all cases by the Target against the Acquirer, including but not limited to CS(OS) No. 2093/2015, contemporaneously and simultaneously with the Acquirer withdrawing its cases against the Target, including but not limited to CS(OS) 1058/2015, pursuant to a certain Settlement and Release Agreement executed in a mutually acceptable form and manner.
2. Transfer consumer traffic by redirecting all calls, website, phone based application and any other consumer traffic generating system to the respective channels of the Acquirer, reasonable costs of which shall be borne by the Acquirer.
3. Transfer assets reasonable costs of which shall be borne by the Acquirer.
4. Send an appropriate written, mutually agreed communication to all stakeholders of the Target, including but not limited to the property owners, customers and the employees intimating about the closure of operations of the Target and the Acquisition by the Acquirer.
5. Hand over to the acquirer all data base and records related to customers, hotel owners including contracts pertaining to live property and property

yet to go live along with the relationship contacts, subject to confidentiality norms and privacy related concerns.

6. Execute all documents (to the satisfaction of Acquirer) to ensure that employee/option holder liabilities are satisfied after Closing.]

Clause 7 deals with Definitive Documents and states that:

"Subject to the conditions set forth in this Term Sheet, the parties shall mutually agree, execute the following documents and such other documentation as the parties may deem necessary (hereinafter referred to as the Definitive Agreements):

a) Share Subscription Agreement/Merger Framework Agreement (Acquirer);
b) Shareholders Agreement (Acquirer);
c) Asset/Business Transfer Agreement;
d) Non- Compete, Non-Solicitation Agreement with the Founders; and
e) Settlement and Release Agreement executed between Acquirer and Target "

Clause 9 deals with Due Diligence and states that:

"Following execution of this Term Sheet, the Acquirer shall have the opportunity to conduct a diligence on the Target. The Target shall provide all such information, documents and material about the business and affairs of the Target as listed in the Exhibit to this Term Sheet."

A reading of Clause 4 and Annexure - I shows that completion of the due diligence process, obtaining approvals and fulfillment of conditions under Annexure-I are requirements that ought to be fulfilled in order to close the transaction. In other words, closing of the transaction (i.e. Acquisition of

Claimant No.1 by the Respondent) is the natural and only consequence of compliance of these conditions.

Clauses 4(iii) and 4(iv) of the Term Sheet show that fulfillment of the conditions stated in Annexure-I are essential and conditions stated under Definitive Agreements have to be fulfilled in addition to the conditions laid down in clauses 4(i) to 4(iii).

A careful examination of Annexure-I, shows that said conditions demand specific actions to be taken by the parties such as withdrawing cases (instituted and pending) against each other, transfer of consumer traffic & assets by Claimant No.1 to the Respondent, handing over database & records related to customers and hotel properties by Claimant No.1 to the Respondent etc.

Therefore, it is evident that the Term Sheet demanded Claimant No.1 to fulfill many conditions as closing obligations and it is not the case that Claimant No.1 was to fulfill only the conditions mentioned in the Definitive Documents to act towards Closing the Transaction. Clause 4 read with Annexure-I shows that the Term Sheet was not a mere exploratory document. It is duly executed by Claimant No.1 and the Respondent and binds Claimant No.1 to fulfill several obligations, apart from those listed in the Definitive Documents. Therefore, a complete reading of the Term Sheet does not support the stand taken by the Respondent.

Clause 7 stipulates that the execution of Definitive Documents was 'subject to the conditions set forth in the Term Sheet'. This encompasses conditions mentioned in clause 4 and buttresses the point that execution of Definitive Documents was not independent of the Term Sheet.

Clause 9 is not a mandatory clause in view of the Preamble of the Term Sheet. However, it was only pursuant to Clause 9 and the execution of the Term Sheet that the right to conduct a diligence of Claimant No.1 accrued upon the Respondent. Had the Term Sheet been Non-Binding and obligations of the parties were meant to materialize wholly and solely upon the execution of Definitive Documents, the Respondent could never have been entitled to conduct a Diligence of Claimant No.1 in the absence of any Definitive Documents to that effect. It can be safely said that at the very least, it was only pursuant to the Term Sheet, that the Respondent could conduct the Due Diligence and became privy to sensitive commercial information that would not have been shared by Claimant No.1 in ordinary course of business with a competitor. A perusal of the Limited Diligence Checklist annexed with the Term Sheet shows that it sought detailed information about Corporate Documents, Share & Shareholder Information, Financial Diligence, Intellectual Property Rights, Assets, Human Resource, Litigation and Information Technology. Ex. C-40 is the Preliminary Requisition List shared by Respondent No.1 prepared pursuant to the documents received from Claimant No.1 by the Respondent in response to the Limited Diligence Checklist.

The Term Sheet did contain a basic framework regarding acquisition, subject to which the Definitive Documents were to be executed. Therefore, even if it is assumed that at the time of execution of the Term Sheet the parties had intended that the Term Sheet be Non-Binding and exploratory, by conduct, parties waived the non-binding preamble of the Term Sheet and created a binding & enforceable contract.

In the considered opinion of this Tribunal, a plain reading of the Term Sheet as a whole does not support the case set-up by the Respondent. The Term Sheet is a binding document. Without expressing any opinion

on the consequences of the acts listed below (which is the subject matter of other issues), it is observed that the Claimant did take various steps in order to fulfill the obligations listed in Annexure-I of the Term Sheet such as:

1. Facilitating transfer of Claimant No.1's employees [Ex. C-19 (Colly) relied upon]
2. Facilitating transfer of properties in Claimant No.1's network to Respondent's Network. [Ex.C-21 relied upon]
3. Facilitating the process of Consumer Migration [Ex. C-1 (Colly) relied upon]
4. Facilitating the process of transferring of future bookings w.e.f. 31.12.2015
5. Providing consumer data of Claimant No.1 to the Respondent [Ex. C-2 relied upon]

Had the Term Sheet been non-binding and meaningless, there was no reason for the Respondent to have entertained or shown interest in any communication in respect of transfer of employees/ properties/ consumer migration etc.

Hence, this Tribunal holds that the parties were acting upon the Term Sheet and the Term Sheet is a binding document.

Issue No.5: Whether there was *consensus ad idem* between the parties on the Draft Definitive Agreements stipulated under clause 7 of the Term Sheet dated 26.11.2015?

Mr. Abhishek Malhotra, Learned Counsel for the Claimants' submitted that consensus ad idem had been achieved in respect of the Definitive Documents. It was submitted that:

(a) It was on the instructions of the Respondent and after *consensus ad idem* had been achieved between the parties that the Claimants bought the Stamp papers for execution of the Definitive Documents. Reliance was

placed on emails dated 31.03.2016 [Ex. C-48 Colly] sent by Ms. Nikita (counsel of the Respondent) and email by Mr. Vinay Thakur (one of the officials of the Respondent) giving the details of the stamp papers to be bought and instructions that they must be bought on the same day.

(b) The only reason for non-execution of the Definitive Documents was due to the unsupportive attitude and stand taken by Venture Nursery (one of the shareholders of the Respondent). Reliance was placed on the testimony of Claimants witnesses Mr. Abhishek Bhutra (CW-1) and Mr. Dharamveer Chauhan (CW-9) along with Exhibit C-56 (email dated 26.01.2016 sent by Mr. Gautam Mago of Sequoia Capital - a shareholder of Respondent company to Claimant No.1's shareholder) in support of the submission.

(c) Mr. Gautam Mago would not have given the assurance that parties 'were nearly there' save for the 'unreasonable demands' of Venture Nursery if the Respondent had any misgivings or concerns regarding the Transaction, particularly the ones sought to be raised belatedly in these proceedings.

(d) In order to resolve the Venture Nursery Issue, representatives of Respondent and Claimant No.1 met on 22.02.2016 where the Respondent agreed to close the said issue by giving an exit to Venture Nursery and signing Framework Agreement at the earliest. Reliance was placed on Ex. C-57 (email dated 03.03.2016) to state that the discussions between the parties during the said meeting were recorded in Ex. C-57 and the same was confirmed by Mr. Abhishek Gupta (RW-1) in his testimony. Therefore, parties had consensus ad idem on the Definitive Documents.

(e) Reliance was placed on email dated 02.03.2016 (Ex. C-51) to state that the said email exchanged between counsels for Respondent and Claimant No.1 demonstrates that both Respondent and Claimant had committed to conclude the envisaged transaction as per the terms agreed to and reflected in the finalized documents previously circulated.

(f) A short extension of time was accorded to the Respondent to allow it to negotiate with its minority shareholder and resolve the issue. In order to accommodate the same, amended Framework Agreement to capture the above understanding was shared with the Respondent.

(g) The final version of the amended Framework Agreement was shared by the Claimant on 02.03.2016 and the Respondent has not placed any further communication to rebut this.

It was also argued that the agreement between parties on all the definitive agreements is evident from emails dated 04.08.2016 sent by Mr. Neeraj Shrimali from Avendus Capital (Claimant No.1's Tax Advisor) to the Respondent's counsel. While the email was shared at the time when the parties were discussing alternative structure for the lapse of the transaction in view of the lapse of timeline of 31st march 2016, Ex. C-48 (colly) clearly shows that all Definitive Documents were 'drafts in agreed form' prior to March 31, 2016.

Mr. V. Srinivasa Raghavan, Learned Senior Counsel appearing for the Respondent argued that the parties had no intention to be bound in the absence of finalization of Definitive Documents and it is not the Claimant's case that there is waiver of this requirement. Reliance was placed on the testimony of CW-1 and CW-7 in support of the same. It was further submitted that the Claimants witnesses admitted that signing would be essential to show confirmation of acceptance of the terms of Definitive Agreements and it was not open to the Claimants to assert that Definitive Documents were entered into orally or by exchange of correspondence and drafts.

It was submitted that a new understanding was recorded vide email dated 17.09.2016. Additional data and documents were given to process the documents for a demerger instead of business transfer. It was submitted

that the Claimant's stand was contradictory in so far as on one hand it asserted consensus of Definitive Documents, while on the other Claimant referred to the new understanding in the Statement of Claim. It was further argued that the earlier drafts of Definitive Documents were no longer relevant as new documents were required to be agreed in terms of the new understanding. Therefore, the argument that consensus was arrived at between the parties by March 2016 cannot be believed or given credence. Even if there was a consensus between the parties on the drafts of Definitive Agreements, as alleged, then the Claimants have by their conduct and admission given up the transaction as contemplated under such Draft Definitive Agreements.

Attention was drawn to the fact that the drafts placed on record by the Claimant showed that Zostel Hostels business was also to be acquired. However, the Claimants relied on email dated 10.02.2016 (Ex. C-66A) to state that Zostel Hostels business was not to be transferred. This contradiction in itself shows that the drafts could not have been final. Further, emails dated 08.04.2016 and 10.04.2016 (Ex. C-50) were relied upon to show that there was no consensus between the parties and that the Claimant wanted to carry out changes in the drafts. Attention was drawn to the fact that many drafts were exchanged even in September 2016 and the consideration was left blank deliberately since there was no consensus.

It was also submitted that:

(a) There were contradictions in the Claimant's pleadings in so far as the time period for finalization of Definitive Agreements was concerned. Reliance was placed on Para 5.7.1, 5.9.4, 5.9.8 and 5.15 of the Statement of Claim.

(b) Para 5.20.2 of the Statement of Claim contained an assertion by the Claimants that a new understanding had been recorded in email dated

17.09.2016 addressed by Claimant No.1 to Respondent and consented to by the Respondent in its response dated 19.09.2016.

(c) Para 5.20.3 of the Statement of Claim stated that certain additional data and documents were given to process the documents for a demerger instead of a business transfer. Therefore, the so- called Definitive Documents in which there was a so-called consensus by March 2016 were no longer relevant and there had to be other documentation agreed upon pursuant to a new understanding of a merger.

(d) The assertion that there was a 'new understanding' in September 2016 which required new documentation to be agreed upon shows that there was no finality or consensus whatsoever about the so-called definitive agreements placed on record by the Claimants.

(e) Therefore, even if there was a consensus on the drafts of the Definitive Agreements, then the Claimants have by their own conduct and admissions given up the transaction as contemplated under the draft Definitive Agreements.

(f) Definitive Documents relied upon by the Claimants show that there were 10 agreements to which almost 33 parties were signatories to atleast 1 of the said agreements including but not limited to all shareholders of Claimant No.1, shareholders of Respondent and key employees of Claimant No.1.

(g) Therefore, Claimant's allegation of consensus between Claimant No.1 and Respondent is of no avail as the said agreements had to be agreed upon and signed by several parties. There is no averment in the Statement of Claim that there was any agreement and/or consensus among all of the 33 parties.

(h) Admittedly, it is not the Claimant's case that after September 2016, any Definitive Agreements had been drawn up and agreed pertaining to the 'new understanding'.

(i) The version of Definitive Agreements stated in the Statement of Claim had not been identified or produced with the Statement of Claim.

(j) Claimants were not certain of the documents as to which version of documents could be termed as the ones on which alleged consensus had been achieved.

(k) According to the Claimants themselves, one of the signatories (Venture Nursery) had objections to the documents. Therefore, it is incomprehensible how it can be claimed that the documents had been agreed upon.

(l) In view of the objections raised by Venture Nursery, and Claimant's own statement that the issue could not be resolved until July- August 2016, it becomes evident that there could not have been consensus on the so-called drafts of Definitive Documents by March, 2016.

In addition to the above mentioned submissions, a table containing documents/events relevant for determining the present issue of consensus ad idem on the Definitive Documents was placed on record. Contradictions in the testimonies of the Claimant's witnesses were also highlighted to state that even the evidence led by the Claimants would clearly show that the Definitive Agreements were not finalized between the parties who were supposed to sign them.

While addressing arguments in rejoinder, Mr. Malhotra submitted that:

(a) The approval of the following shareholders of the Respondent was already available on record of the Tribunal:

i. SoftBank Group International Ltd. [Relied on Ex. C-55 Colly and Mark A]

ii. Sequoia Capital Investments India Invetsments IV [Relied on Ex. C-56]

iii. Mr. Ritesh Agarwal [Ex. C-38 (Colly), C-53 (Colly) and C-69]

iv. Remaining Shareholders except Venture Nursery [Ex. C-57 and testimonies of CW-1 and CW-9 relied upon]

(b) Revised Framework Agreement was sent in accordance with parties discussions during meeting dated 22.02.2016. However, once parties had given an exit to Venture Nursery, revised version became unnecessary and Definitive Documents could have been executed as they were.

(c) The Respondent, while setting out the table of events/documents failed to explain the gap in communication between 10.04.2016 and 27.07.2016 while they were negotiating on daily basis. This gap is explained by the WhatsApp conversation between Mr. Dharamveer Chauhan and Mr. Ritesh Agarwal [Ex. C-53 (Colly)] which makes it clear that parties were waiting only for the exit of Venture Nursery. After the exit of Venture Nursery, the parties were only to complete the formality of executing the documents.

(d) Regarding Respondent's averment that Claimants were aware of the Venture Nursery issue since January 2016 and hence there could have been no consensus, it was submitted that the said contention is patently false. Reliance was placed on emails dated 04.11.2015 and 05.11.2015 (Ex. C-10 Colly) exchanged between Mr.Maninder Gulati of the Respondent and Mr. Abhishek Bhutra (CW-1) wherein CW-1 categorically asked for an assurance that the transaction would not be sabotaged at the last minute under the guise of lack of approvals. The Board Resolution dated 25.11.2015 was provided by the Respondent to assuage the Claimants' concerns that the Board of the Respondent, did, in fact approve the transaction.

(e) Regarding change in the nature of transaction from Slump Sale to Court approved demerger, it was submitted that after the exit of Venture Nursery, parties opted for an alternative business structure in the form of a Court approved demerger process, since the earlier structure was no longer viable (Reliance placed on testimony of CW-10).

(f) Since all aspects under the Definitive Agreements had been agreed upon, and Claimant had completed their obligations, they agreed to adopt a court demerger process on the advise of the Respondent's advisors.

(g) Only the Framework and Shareholder Agreement were to be modified to restate the revised shareholders rights after the exit of Venture Nursery. Even in the alternate structure, Definitive Documents were to be modified to incorporate changes in structure from slump sale to demerger.

Parties have been heard. It is settled law that *consensus ad idem* means agreement between parties over the same thing in the same sense. In Mayawanti vs.Kaushalya Devi (1990)3SCC1 it has been held as follows:

"19. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement. Negotiations thereafter would also be material if the agreement is rescinded."

In view of Clause 7 of the Term Sheet, the Definitive Documents were to be executed subject to the conditions set forth in the Term Sheet. Therefore, one of the primary aspects on which the parties were ad idem was the acquisition of identified assets of Claimant No.1 by the Respondent. This intention is further buttressed by the contents of Ex. C-

10 Colly wherein vide email dated 04.11.2015 Mr. Abhishek Bhutra (CW-1) categorically asked Mr. Maninder Gulati of the Respondent that:

"While we are working towards ironing out the term sheet, it is imperative that we obtain from OYO copies of Board Resolution, shareholders resolution and existing investors approval for the proposed transaction.

This is necessary to ensure that the transaction is not sabotaged at the last minute in the guise of internal approvals not being available."

In response to the Claimant's concern, Mr. Maninder Gulati replied that:

" Hi Abhishek, sabotage is totally not the intention but we can understand your concern. We are happy to provide Board approval when we are near fina o... the term sheet.... We are also talking to our tax guys to understand how best to structure this transaction."

The Board Resolution dated 25.11.2015 ought to be read in the context of the above mentioned conversation and it is clear that at the very least, parties were ad idem in respect of acquisition of identified assets of Claimant No.1 by the Respondent.

Admittedly, Due Diligence was conducted in December 2015. Parties began exchanging drafts of various Definitive Agreements in the month of December 2015, and by January 2016 several revised drafts were shared based on comments of the parties. In view of the arguments advanced by both parties, it is clear that upto nearly end of January 2016, the drafts were being commented upon and revisions were being made accordingly. However, it was on January 26, 2016 that one of the partners of Sequoia

Capital (Respondent's Shareholder and Investor) addressed an email to Claimant No.1's shareholder (Ex. C-56) stating that:

> "..Oyo team has been working relentlessly to finalise the docs. We are nearly there but a minority investor has held up the process by asking for new and unreasonable rights in the SHA and generally being unsupportive.
>
> Just wanted to let you know that we are trying to resolve asap while minimizing any long term risk/issues."

Several drafts were shared thereafter. Meetings took place between the parties regarding the issues raised by Venture Nursery and its objections in respect of the deal. Ex. C-57 captures the position existing as on 22.03.2016 and highlights that:

a. Venture Nursery was not supporting the deal and has written to the Board of Directors stating this.
b. OYO was reluctant to do anything which can put the intended financing at risk.
c. OYO's team stated that going forward they would attempt to do a quid pro quo with Venture Nursery. The terms being that if existing or new OYO investors are ready to give VN exit, the VN would have to agree to stop being signatories to future SHAs and amendments thereto. Their idea is to bring out the irrationality at Venture Nursery's end by offering them a deal which would be fair.
d. It was decided by all parties that revised Framework Agreement would be signed at the earliest.

Though Ex. C-57 has been denied by the Respondent being an internal document of the Claimant, RW-1 (Mr. Abhishek Gupta) relied on the said email in his cross examination and stated that some items discussed in

the meeting were documented in Ex. C-57. In view of RW-1's testimony, Respondent's objection qua Ex. C-57 is not sustainable.

Ex. C-53(Colly) is a WhatsApp communication between Mr. Dharamveer Chauhan and Mr. Ritesh Agarwal and shows that Claimants were regularly seeking updates on the Venture Nursery Issue. The said communication clearly shows that the parties were waiting for the exit of Venture Nursery to complete the transaction.

Ex. C-48(Colly) shows that it was on the instructions of the Respondent that the Claimants bought the Stamp papers. This leads to a natural conclusion that Respondent was inclined to close the transaction.

Documents placed on the record show that the parties were inclined to close the deal. It is evident that the revision of Definitive Documents and their finalization was significantly affected by the events pertaining to the issues raised by Venture Nursery. Objections raised by Venture Nursery disturbed the normal course of finalization of the Definitive Documents. No documents have been placed on record, which suggest a contrary view.

It was essential that Definitive Agreements be amended to include the changes necessitated in view of the objections raised by Venture Nursery. However, such documents never came to be finalized by the parties. Therefore, in view of the documents placed on record and the pending issue with Venture Nursery that remained to be resolved by the Respondent, this Tribunal holds that there could not have been complete *consensus ad idem* on the Draft Definitive Agreements.

Issue No.6: Whether as asserted by the Claimants they were ready and willing to perform their obligations under the Term Sheet dated 26.11.2015 and to execute the draft definitive agreements contemplated under the Term Sheet?

Mr. Malhotra, Learned Counsel for the Claimants submitted that the Claimants were always ready and willing to perform their obligations under the Term Sheet and execute the draft definitive agreements contemplated under the Term Sheet.

In support of their contentions, Mr. Malhotra submitted that:

a) Claimants performed all closing obligations under the Term Sheet independent of contemporaneous/simultaneous action/performance by the Respondent.

b) The obligations that remained unfulfilled [i.e. Execution of Finalized Definitive Documents and Withdrawal of pending litigation by both parties] were solely on account of Respondent's non-performance of obligations pursuant to the Term Sheet, despite Claimants' willingness and readiness to perform the same. Reliance was placed on upon paragraphs 5.16, 5.18, 5.19, 5.20.5, 5.21.2 of the Statement of Claim and Ex. C-50(Colly) to demonstrate the readiness and willingness of the Claimant to perform.

c) It was after the transfer of Claimants' hotel business and employees to the Respondent that the Claimants were informed about the issues raised by Venture Nursery (Respondent's Minority Shareholder).

d) Claimant relied upon its emails dated 08.04.2016 and 10.04.2016 (Ex. C-50 Colly) addressed by Claimant No. 8 to the Respondent asking the exact dates of execution of the final definitive Documents as several timelines had slipped and whether the Framework Agreement would be signed within 3 days. Attention was also drawn to Respondent's reply dated 09.04.2016 informing the Claimants that 'several discussions were underway with the early investors and some concrete actions could be taken by the end of the month'.

Reliance was placed on Ramesh Chandra Chandiok vs.Chunilal Sabharwal AIR 1971 SC 1238 to state that the question of readiness and

willingness is one of construction of facts, details or particulars of a case from which the readiness and willingness can be inferred. Testimony of Claimant's witnesses was relied upon to state that while the Claimant was ready and willing to close the transaction, it was the Respondent who was not willing to perform its obligations, despite having gained the benefit of the bargain.

The following instances were highlighted in support of the contention that the Claimants were ready and willing to perform their obligations:

a) Claimants purchased Stamp papers at the instructions of the Respondent [Relied on Ex. C-42 Colly and Ex. C-48 Colly]

b) Whatsapp conversation between Mr. Dharamveer Chauhan (Respondent No.5) and Mr. Ritesh Agarwal (RW-3) where the Claimant on multiple occasions sought response from the Respondent on the status of transaction after the exit of Venture Nursery (Relied on Ex. C-53)

c) Testimonies of Claimant's witness Mr. Tarun Tiwari (CW-3) who stated that while Claimants were willing to transfer whatever the Respondent asked them to, for many of the items, they received 'no instruction'.

d) Special Purpose Vehicle called 'Woodlight Interiors' in February- April 2017 was created as required under alternative structure of court approved demerger. (Relied on CW-1 and CW-10)

e) Efforts were made towards amicably resolving the pending litigations between parties which is a Closing Obligation under the Term Sheet. [Order dated 12.01.2016 passed in CS (OS) 1058/2015 recording that Respondent and Claimant No.1 had compromised the matter in principal and the terms of the same were being finalized. Compromise continued till September 2017 as evident from order dated 20.09.2017] However, Claimants failed to withdraw the pending litigation owing to the Respondent's failure to adhere to any of its obligations in terms of payment of consideration in lieu of transfer of Claimants' business.

f) Claimants attempted to close the transaction even in October 2017 i.e. after the transfer of its hotel room business in January 2016. (Relied on Ex. C-60)

All obligations under the Term Sheet were performed except withdrawal of litigation and execution of the finalized Definitive Documents which remained unfulfilled on account of Respondent's lack of readiness and willingness to perform its obligations.

Mr. Raghavan, Learned Senior Counsel for the Respondent reiterated the submissions made earlier and submitted that the Claimants have failed to prove unconditional readiness and willingness at all times to fulfill their obligations under the Term Sheet and/or the Definitive Agreements.

It was submitted that:

(a) Claimants have not pleaded that they were ready and willing to perform the obligations under the Term Sheet.

(b) Claimant No.1 has failed to transfer its business, key employees, IPRs to the Respondent.

(c) Claimants did not comply with the non- compete obligations, they continue to operate the business.

(d) In September 2016, Claimants by their own conduct gave up the transaction contemplated in the Term Sheet and the Draft Definitive Agreements. Parties embarked upon fresh negotiations for a merger/demerger structure. Therefore, Claimants have failed to prove that:

i. They performed all their obligations under the Term Sheet and alleged Draft Definitive Agreements.

ii. They were ready and willing to perform these obligations at all material times.

Regarding Respondent's averment that the Claimants had never pleaded that they were ever ready and willing to perform the obligations, Mr.

Malhotra submitted that the same was a glaring instance of falsifying facts and reiterated the relevant paras from the Statement of Claim pertaining to readiness and willingness. Further, it was submitted that the scope of the present proceedings and dispute did not include claims under Definitive Documents. Therefore, Respondent's reliance on Definitive Documents to show non-performance is a merit less attempt to mislead this Tribunal.

This Tribunal finds merit in the arguments advanced and documents placed on record by the Claimants and holds this issue in favour of the Claimant. The Claimants were ready and willing to perform their obligations under the Term Sheet and execute the draft Definitive Documents.

Issue No.7: Whether the transaction(s) as contemplated in the Term Sheet dated 26.11.2015 has been consummated and the Claimants have performed conditions detailed in the Term Sheet dated 26.11.2015?

Claimant mainly submitted that the transactions contemplated in the Term Sheet had been consummated and parties had performed conditions detailed in the Term Sheet. In support of their submissions, Claimants reiterated the arguments advanced in earlier issues and further submitted that the parties were not merely engaged in due diligence but were actively engaged in consummation of the transaction by completing the closing obligations under the Term Sheet. Following transactions were alleged to have been consummated by the Claimants:

Transfer of Hotel Properties of Claimant No.1 to the Respondent: Claimants submitted that:

i. Under the Term Sheet, Claimant No.1 was obliged to facilitate the transition of the properties maintained under the brand 'Zo Rooms' to the Respondent's network and the said obligation was fulfilled. It was immaterial whether the Respondent actually took over the properties since the focus of the Term Sheet was ceasing of Claimant No.1's business.

ii. On 12.12.2015, Mr. Abhinav Sinha of the Respondent wrote a detailed email (Ex. C-23) setting out the property acquisition process and that the on boarding of hotel properties was to happen in a single meeting.

iii. In compliance with the detailed procedure and conditions set out in the email, Claimant No.1 shared details of 400 properties and terminated its contract with all 800 properties. Details of the same were available at a dropbox link accessible by both parties. Reliance was placed on Ex. C-5, Ex. C-21 and Cross-Examination of CW-4)

iv. Respondent shortlisted 298 properties and expressed its intention to acquire the same. CW-4 facilitated visits by the Respondent's representatives to selected hotel properties and accompanied them on such visits. (Reliance placed on Ex. C-5, Ex. C-21 and cross-examination of CW-4)

v. Claimant No.1 shared details of points of contact (POCs) in Kolkata, Agra, Ahmedabad, Amritsar, Indore and Bhopal and finished the process of introduction of all the hotel owners with the Respondent's Representatives by January 30, 2016. (Reliance placed on Ex. C-21)

vi. Respondent wrote to Claimant No.1, confirming that they had met with the hotel owners and would onboard the hotels once they accepted their deals. (Reliance placed on Ex. C-21.)

vii. Upon Respondent's instructions, Claimants informed their hotel partners that the Respondent was acquiring Claimant No.1's hotel business and therefore, Claimant No.1's contracts would be transferred to the Respondent. (Relied on CW-4's Cross- Examination)

viii. For integration of properties in Respondent's business, Claimants sought and received No Dues Certificate from almost all hotel properties.

ix. Access to the No-Dues Certificate was provided to the Respondent via the DropBox Folder created for the transaction. (Relied on Cross-Examination of RW-1 and CW-2)

x. As per Mr. Abhinav Sinha's email and action plan laid out, Claimants complied with the detailed steps laid down by the Respondent and discharged its obligations in relation to property acquisition process specified by the Respondent. Respondent had stated that after the introduction of its Points of Contacts, OYO will take over the process and that they will not be needing Claimant No.1 for contracting and signing these properties. (Reliance placed on Ex.C-5, and testimony of CW-4.)

xi. Hospitality industry is based on the relationships formed between the stakeholders. Established relationships of Claimant No.1's Points of Contact (POCs) with the hotel owners were exploited by the Respondent to re-negotiate a better deal than the Respondent would have managed to obtain otherwise.

Consumer Migration and Transfer of Confidential data: Claimants submitted that:

i. All consumer traffic generating systems were transferred by Claimant No.1 to the Respondent. (Testimony of CW-3 relied upon)

ii. Contracts from Online Travel Agents such as Just Dial and Sulekha were determined and all leads were systematically transitioned to the Respondent. (Reliance placed on testimony of CW-3 and Ex. C-1 Colly).

iii. Claimant No.1 also provided SEO Information, mobile App device IDs, website data to the Respondent and transferred the Just Dial and Sulekha leads directly to their systems. (Reliance placed on testimony of CW-3)

iv. Claimants provided their SEO Report, Consumer Booking Details (including name, phone number and email), unique user IDs of 4,93,862

consumers who had installed the mobile application on android devices, app funnel details for 1.12.2015 to 17.12.2015, unique user IDs of 19,058 consumers who were using the mobile application of Claimant No.1 on apple devices, keyword reports, website details of page views etc. (Reliance placed on Ex. C-3 Colly)

v. Claimants had provided data pertaining to General Managers, Corporate Account Contacts, Offline Travel Agents. (Reliance placed on Ex. C-4)

vi. Vide email dated 28.12.2015, Respondent directed the Claimant to send prepared communications (for which templates were provided by the Respondent) to their prospective customers informing them that Claimants would be unable to process the booking on account of transfer of business to the Respondent and that the bookings made by such customers had been redirected to the Respondent. [Ex.C-1 (Colly) relied upon]

Transfer of Future Bookings: Claimants submitted that:

i. 1505 future bookings of Claimant No.1 were transferred between 01.01.2016 and 31.01.2016 to the Respondent and the same has been admitted by the Respondent [Ex. C-1(Colly) and Ex.C-2 relied upon]

ii. By the middle of December 2015, Claimant's focus was completion of deal. Hence, on the instructions from the Respondent, no efforts were made by Claimant No.1 to generate any leads or business. Any new business opportunities were given up by the Claimants and transferred/forwarded to the Respondent. [Ex. C-1 (Colly) relied upon]

Transfer of Assets: Claimants submitted that:

i. Claimant No.1 completed the transfer of assets as instructed and required by the Respondent.

ii. Respondent shared an excel sheet vide email dated 12.01.2016 setting out the data to be provided by Claimant No.1 along with the timelines and

the same was provided vide emails dated 23.01.2016 and 19.01.2016. [Reliance placed on Ex.C-1(Colly) and Ex.C-2 (Colly) and Ex.C-3(Colly)]

iii. After receiving the data, Respondent revised the excel sheet and re-shared it. All data was provided and verified except for the data that was provided on 'Deal Date' or 'Announcement Date'. Thus, all requisitions till that relevant point were provided. [Reliance placed on Ex.C-2 (Colly) and Cross- Examination of CW-3]

iv. The fact regarding transfer being complete was acknowledged by the Respondent including the draft Framework Agreement filed by the Respondent. Clause 4.3 of the said agreement was relied upon to show that both parties had acknowledged the factum of transfer being complete. Clause 4.3 read as follows:

"*4.3. The Parties acknowledge that based on the commitment of Oyo to consummate the Proposed Transaction, Zostel and Zo Founders have already in good faith, initiated and substantially completed a majority of their obligations identified under the BTA, including but not limited to (i) obtaining resignation from a majority of Zostel employees; (ii) facilitating employment by OYO of the employees selected by OYO from amongst these resigning employees; (iii) termination / dis-continuation of arrangements with a substantial number of hotel owners associated with Zostel and the facilitation of transitioning of arrangements with such hotel owners in favour of OYO; (iv) sharing of key databases and information regarding the business of Zostel; (v) furnishing all information in order to enable the transfer of customer traffic from Zostel's website in favour of OYO; and (vi) handover of all customer bookings booked with Zostel for stays falling after 1 January 2016.*"

Appropriate written, mutually agreed communication was sent to all the stakeholders of Claimant No.1, in accordance with the procedure for transition and integration of the business set out by Mr. Abhinav Sinha of the Respondent vide email dated 12.12.2015. The same included but was not limited to property owners, customers and employees intimating them about the closure of operations of Claimant No.1 and Acquisition by the Respondent:

The Claimant submitted that:

v. The obligations stood satisfied in view of the communications sent to stakeholders as per the instructions of the Respondent such as :

- Customers [Reliance placed on Ex. C-1]
- Employees [Reliance placed on Ex. C-19(colly) and Cross Examination of CW-5]
- Hotel Partners [Cross Examination of CW-4]

It was submitted that Claimant No.1 also issued written communications to vendors such as Airtel, assigning/novating business contracts in favour of the Respondent. [Ex. C-17 and Ex. C-23 relied upon]

Transfer of Employees: Claimants submitted that:

i. Claimant No.1 facilitated the hiring of all its employees that Respondent wished to hire in accordance with Mr. Abhinav Sinha's email dated 12.12.2015. [Ex. C-19 (colly) relied upon]

ii. Respondent expressed its desire to take Claimant No.1's entire tech and design team on board and shortlisted those employees that it wished to hire. Thereafter, the Respondent conducted interviews and hired certain employees. [Ex. C-19,Ex. C-20, Ex.C-44, Ex.C-45 and testimony of CW-5 relied upon]

iii. After hiring the selected employees by the Respondent, Claimants provided full and final settlement of the said employees. [Ex. C-25 (Colly) and cross examination of CW-1 and CW-2 relied upon]

iv. In support of its submissions, Claimants relied upon Ex. C-19 Colly, Ex. C-42 to C-47 which were emails pertaining to:

- 'Employee Integration' where Respondent requested setting up interviews
- 'Shortlisted Candidates for OYO' wherein Respondent confirmed that Claimant No.1 could seek resignations from selected employees and make full and final settlements.
- 'Employee Closing FnF at Zo' confirming that some employees of Claimant No.1 had already joined the Respondent. It confirmed that Claimants had sent official communications to all campuses, full time hires and interns that their internship was transitioned to OYO with the same duration and stipend.

iii. Respondent No.1 on boarded Claimant No.1's interns. As per the instructions and consent of the Respondent, Claimant No.1 received resignation emails from employees who were selected by the Respondent. This shows that Claimants not only performed their obligation in respect of employee transfer under the Term Sheet but also under the Definitive Documents. [Ex. C-19 (Colly) and C-25 (Colly) relied upon]

Handing over database and records related to customers, hotel owners, including contracts pertaining to live property and live property yet to go live along with relationship contracts:

Claimants relied on Para 5.7.1 to 5.7.3 of the Statement of Claim to submit that its compliance with the closing obligations is established.

a. Regarding Database and Records related to customers, it was reiterated that Claimants shared android device IDs of 4,93,862 and apple device IDs of 19,058 users who used Claimant No.1's mobile application. Data regarding Android Device IDs, Apple Device IDs, App funnel numbers ,

app install daily active user numbers, device uninstall reports, SEO landing page reports, web and mobile site data dump pages, Zo wallet cash details etc. were also shared with the Respondent.

b. Database and Records related to hotel owners: At the instructions of Mr. Abhinav Sinha of the Respondent , Claimant No.1 transferred:

- Database pertaining to Jaipur Properties for upcoming pilot project.
- Database of properties that would be part of transition properties in Delhi, Gurgaon, Bangalore, Mumbai, Hyderabad
- List of Properties to be transitioned in Pune and Bangalore and Mr. Mandar of the Respondent asked for deal details to start renegotiating with them. (Ex. C-19 (colly) and Ex. C-21 relied upon)

Respondent's conduct demonstrating consummation:

It was submitted that transaction contemplated under the Term Sheet was consummated with the transfer of Hotel Business, employees, vendors and all other assets of Claimant No.1 by the end of January 2016. Reliance was placed on the following in support:

a) Order dated 12.01.2015 passed in CS(OS) No. 1058/2015 before Joint Registrar, Delhi High Court recorded that both Respondent and Claimant had compromised the matter in principal and terms of the same were being finalized.

b) Unqualified Public Announcement/Statement issued by SoftBank highlighted the 'Acquisition of Zo Rooms' by the Respondent as key highlight of Respondent's business for the quarter. [Relied on Mark A and Ex. C-55 (Colly.)]

c) The fact that transaction had already been consummated and Respondent had acquired the business of Claimant No.1 is evident from the interview of Mr. Ritesh Agarwal (RW-3) published on 01.03.2016. In the said

interview, RW-3 was questioned about the acquisition of Claimant No.1 and he did not deny the statements put to him. RW-3 went on to explain how consolidation with competitors would help in a significant manner and benefit consumers. He did not indicate that multiple media reports about acquisition of Zo Rooms were creating a wrong impression in the market.

d) Consummation of the transaction is evident from WhatsApp conversation of Mr. Ritesh Agarwal (RW-3) and Mr. Dharamveer Chauhan (CW-9) which took place after the exit of Respondent's minority shareholder Venture Nursery. RW-3 clearly stated that 'parties should get done and back to execution' since all issues were solved at the Respondent's end. [Ex. C-53 relied upon]

e) Email dated 27.07.2016 shows that pursuant to Claimant No.5's conversation with Mr. Ritesh Agarwal, Claimants were asked to begin the closing process. [Ex.C-52 relied upon]

Mr. Raghavan, Learned Senior Counsel for the Respondent advanced arguments in support of his submission that there has been no consummation of the proposed transaction under the Term Sheet or drafts of the Definitive Agreement. His arguments were based on four main premises:

d. Failure to transfer the 'entire business' of Claimant No.1 as claimed.
e. Failure of Claimant No.1 to transfer its 'Zostel' hostel business.
f. Failure of Claimant No.1 to complete the obligations mentioned in the Term Sheet.
g. Misplaced reliance by Claimant on other aspects.

Regarding Claimant's failure to transfer the 'entire business', Respondent submitted that:

(h) Claimant had set up a case that they had transferred their entire business. Therefore, now, in view of the pleadings and evidence affidavits of CW-2, CW-9 and CW-10, if the Claimants are unable to prove that Claimant No.1's entire business has been transferred to the Respondent, then Claimants cannot succeed in their claim.

(i) A perusal of Claimant No.1's financial statement for Financial year 2016-17 show that Claimant No.1 continued to operate its business even after 31.03.2016 which is contradictory to its own claim that its entire business was transferred to the Respondent by the end of January 2016. [Ex. R-1 and Ex. R-3 relied upon]

(j) Claimant No.1 continued to retain its assets as well as employees and continued to carry out its business contrary to the case sought to be set up by them.

Regarding Claimant's failure to transfer its Zostel Hostel business, it was submitted that:

c) Claimants have set up a case that Respondent had decided not to acquire Zostel Hostel Business. However, their stand is contrary to the drafts of Definitive Agreements placed on record by the Claimants which records that 'Zostel Hostel Business' is an asset to be transferred by Claimant No.1 to Respondent. No explanation has been offered by the Claimants on this aspect.

d) Testimony of CW-1 was relied upon to state that Claimants true intent was to transfer all such properties and employees of Claimant No.1 as the Respondent saw fit to accommodate into its organization.

e) Under Clause 10 of the Term Sheet, a non-compete, non-solicitation and non-disparagement agreement was required to be executed by the founders. In view of the said clause, Claimant No.1 could not have carried

on the 'Zostel Hostel Business'. However, despite categoric obligations, Claimants continue to carry on the said business even as on date. Hence, it is evident that Claimants have not fulfilled their obligations.

Regarding Claimant No.1's failure to complete the proposed obligations under the Term Sheet, it was submitted that:

i. Claimants failed to transfer the identified assets mentioned under clause 3. These identified assets included Intellectual Property Rights (Trademarks and Domain Names), Software of Claimant No.1,Certain Key Employees of Claimant No.1 etc. [Reliance was placed on Testimony of CW-2, CW-3, CW-4, CW-9, Ex. R-58, Ex. C-19, Ex. C-25, Ex. C-30, Ex. C-30]

ii. Claimants failed to determine 'minimum permissible price by law' under clause 3 of the Term Sheet. This value was to be arrived at after obtaining valuation report from an independent third party valuer, which was never procured and finalized. Claimant has alleged that the reference to 'minimum permissible price' was to ensure tax efficiency and the value was identified as Rs. 71 crores. However, the drafts of Definitive Agreements circulated via email on 23.01.2016 provided that the numbers mentioned in the draft Framework Agreement were subject to confirmation by Respondent and thus were not the final figures.

iii. Claimant failed to complete the conditions precedent to 'closing' of the proposed transaction which is evident from the following:

- Claimant No.1 never completed the legal and financial due diligence process. [Reliance placed on Ex. C-2, Ex.C-41, Ex. R-34, Ex. C-21 to C-23, Ex. R-38, R-40, R-41, R-42]
- Claimant No.1 never obtained all corporate, governmental, management, third party and exchange control. Other regulatory approvals stipulated under sections 55(2), 62(1) Companies Act, clauses 5 & 7 of the Term Sheet, Rule 13 Companies (Share capital Debentures) Rules, 2014,

Foreign Exchange Management Act, 1999 were also not obtained. [Reliance placed on testimony of CW-1].

- The maxim *Ex Dolo Malo Non Oritor Action* was relied upon to state that cause of action founded on illegality cannot be taken cognizance of or accepted.
- Claimant No.1 never fulfilled the conditions identified under Annexure- I. It was submitted that Claimant No.1 did not withdraw all cases against the Respondent as envisaged under the Term Sheet. Consumer traffic from Claimant No.1's website, mobile application, calls emails, organic via search engines, Justdial, Sulekha, Online Travel Agents, Offline Travel Agents, Traffic via hotel general managers, corporates and customer database was not transferred to the Respondent. Claimant No.1 continued to receive bookings even after 01.01.2016 and continues to carry out their business even as on date.
- An undated letter has been placed on record alleging that the Airtel Number belonging to the Claimants had been transferred to the Respondent. However, no confirmation of transfer has been placed on record.
- Testimony of CW-3 relied upon to state that no co-relation was ever done between unique IDs and mobile numbers of individuals, Hence, the information shared was completely useless.[Reliance was placed on the testimony of CW-3 in support of the same]
- Claimant No.1 did not transfer its assets to the Respondent. Claimant No.1 allegedly had 800 properties in 54 cities on its network. However, details of only 400 properties were shared. Out of the said 400 properties, 115 properties were already on the Respondent's network. Claimant No.1 introduced the Respondent only to the representatives of hotels in 1 city out of 54 cities i.e. Chennai.
- Claimants have argued that vide email dated 12.12.2015, a detailed roadmap was laid out by the Respondent for the proposed transaction.

However, no document has been placed on record which shows that the said 'detailed roadmap' was complied with by Claimant No.1. No communications have been issued to hotel partners and no full & final settlements were made with them. The onus is on the Claimants to show that they performed all their obligations and no evidence has been placed on record in support of the same. Merely because a plan was laid out does not mean that plan was executed.

- Claimant No.1 did not issue any communication to any stakeholder informing them about the closure of its business. Cross- Examinations of CW-2, CW-3, CW-5 and CW-9 were relied upon to state that no communication were issued to Online & Offline Travel Agents, Corporates, Employees, Hotels, Consumer Traffic Generating Systems.
- In order to assert that communications were issued to stakeholders, Claimant has relied on only 1 communication [Ex. C-1(colly) pg 179]. The said communication only deals with future bookings which the Respondent agreed to honor *de hors* the transaction proposed under the Term Sheet. The said communication does not state that Claimant No.1 is closing down/transferring its operations. Despite claiming that they had thousands of customers, Claimant No.1 has placed only one communication on record to allege that obligation of informing its stakeholders has been complied with.
- Claimant No.1 has not handed over any database related to customers, owners, live properties including contracts etc. [Relied on testimony of CW-3]. Data pertaining to hotel properties that was shared was incomplete and rife with inaccuracies and discrepancies.
- There is no document on record to show that Claimant No.1 executed all necessary documents to ensure that all employee/option holder liabilities of its employees were satisfied.

Regarding failure of Claimant No.1 to fulfill other conditions stated in the Definitive Agreements, it was submitted that:

- A table was placed on record perusal of the obligations and conditions mentioned therein coupled with testimony of the Claimants' witnesses shows that Claimants failed to fulfill any obligations/conditions mentioned in the drafts of the Definitive Agreements.

Regarding failure of Claimant No.1 to complete the obligations mentioned in Annexure-II of the Term Sheet, it was submitted that Claimant No.1 and its Founders never actually fulfilled their obligations as provided under Annexure- II. Thus, they cannot claim any monetary compensation by way of the present proceedings.

Regarding Claimant's reliance on other/external factors, it was submitted that:

- Having failed to establish the factum of transfer of business from Claimant No.1 to the Respondent, Claimants have sought to rely on various external factors to assert that the business was transferred to the Respondent. These factors cannot come to the Claimants' aid since they have been unable to prove their assertion that the entire business was transferred to the Respondent.
- It was submitted that the reliance placed on SoftBank's announcement is misplaced because it was made in accordance with the laws of USA and Japan where the said company is listed. It was published in February 2016, at which time it has not even been alleged that proposed transaction had been consummated.
- Reliance placed on disclaimer made specifically for Sprint is also incorrect. Statement made by SoftBank cannot be attributed to the Respondent as it is one of the multiple shareholders which cannot bind the Respondent. Under Company law and Contract Law, shareholders can give their approval through Shareholders' resolutions and signatures on

the Definitive Agreement, not by way of unilateral emails or announcement.

- Reliance on clause 4.3 of the Framework Agreement is misplaced as the said clause was unilaterally inserted in the draft of Framework Agreement by Claimant No.1.
- Reliance placed on CNBC's interview with Mr. Ritesh Agarwal (RW-3) is misplaced because despite repeatedly being questioned, he did not admit that transaction had been consummated.
- Reliance placed on emails dated 26.01.2016 and 30.01.2016 is misplaced as the said emails were exchanged between parties who are not parties to the present proceedings. Therefore, the same cannot be relied upon without producing the authors of the said emails as witnesses
- According to the estimate given by Claimant No.1, for the period of January-March 2016, atleast 3 lakh bookings ought to have been received. Due to Claimant No.1's liquidity issues and believing the promise of Claimant No.1 that it would compensate the Respondent for future bookings, Respondent in good faith, agreed to honour 1505 future bookings. However, Respondent suffered severe losses and was constrained to file a suit before Hon'ble Delhi High Court seeking damages. Therefore, Claimant No.1 cannot agitate this issue before this Tribunal.

Following arguments were inter alia advanced in rejoinder by the Claimants:

i. Regarding Respondent's allegation that Claimant No.1 did not transfer all its assets/properties, it was submitted that the said allegation was premised on the testimony of Mr. Ayush Mathur (RW-2) who had no personal knowledge about the transaction in general and discussions in relation to property transfer. None of the correspondence pertaining to

property transfer was addressed to RW-2 and he had himself admitted that discussions in this regard were led by Mr. Abhinav Sinha, Mr. Maninder Gulati and Mr. Abhishek Gupta.

ii. Claimants refuted the argument that consumers and live consumer traffic had not been migrated from Claimant No.1's platform to the Respondent. It was reiterated that Mr. Abhineet Sawa, the author of relevant documents pertaining to consumer traffic migration and the person leading the thinking and execution of consumer traffic migration was not produced as a witness and persons not having personal knowledge about the same were called to depose instead.

iii. Regarding transfer of future bookings, it was submitted that Respondent has admitted the transfer of 1505 future bookings. A perusal of CS(OS) 63/2018 alleging damages for the loss, shows that it does not contain any averment in respect of Respondent's acquisition of 1505 bookings and the prayer clause also does not mention any losses caused as a result of future bookings transferred by Claimant No.1 to the Respondent. Reliance was also placed on Reference Order dated 19.09.2018 passed by Hon'ble Supreme Court in support of the submissions and it was submitted that the plea has been taken as a means of avoiding adjudication of the present claim.

iv. Respondent had argued that no records showing full and final settlement with employees had ever been provided by the Claimants to the Respondent. In order to refute the said submission, Claimants relied on the testimony of CW-2 and Ex. C-15 Colly and stated that they had demonstrated that all no dues certificates and full & final settlement letters were in the desired format.

Parties have been heard. The Term Sheet shows that the transaction i.e. acquisition of Claimant No.1 by the Respondent consisted of several steps that were listed in Annexure I and Annexure II of the Term Sheet as Closing and Post - Closing Obligations. The pleadings and documents placed on record show that Claimant No.1 did perform some of the conditions stated therein on the instructions of the Respondent. These inter alia included termination of contracts with hotel properties, transfer of Consumer Traffic to the Respondent, sending appropriate written, mutually agreed communication to stakeholders of the target intimating them about closure of operations of the target and acquisition by the acquirer and handing over data base and records related to customers & hotel owners. It is also observed that obligations such as withdrawal of pending suits was to be done simultaneously by both parties and was not carried out in view of the turn of events and the issues raised by the Respondent's shareholder, Venture Nursery. Some conditions remained unfulfilled on the part of Claimant No.1 due to the absence of instructions from the Respondent.

A perusal of the pleadings and evidence placed on record, shows that the Claimant performed part of its obligations under the Term Sheet as instructed by the Respondent. The said obligations were performed in compliance of the Term Sheet which was binding on the parties (as held in Issue No.4) and were not gratuitous acts. There is no document on record which shows that the Respondent instructed Claimant No. 1 at any stage, to stop taking steps towards fulfillment of the obligations stipulated under the Term Sheet. In fact, communications placed on record show that the Respondent was instructing and coordinating with Claimant No.1 regarding various aspects of the transaction. This Tribunal holds that Claimant No.1 carried out all acts within its control to consummate the transactions contemplated in the Term Sheet and fulfilled the obligations stipulated under the Term Sheet as instructed by the Respondent. The

Claimant cannot be held responsible for the obligations that could not be fulfilled due to lack of instructions on the part of the Respondent or due to complications that arose due to the dispute raised by the Respondent's minority shareholder, Venture Nursery.

Issue No.8: Whether the Claimants prove that there was breach of contract in terms of the Term Sheet dated 26.11.2015 by the Respondent?

Claimants mainly submitted that the transaction contemplated under the Term Sheet was consummated between the parties upon performance of all obligations by the Claimants to the satisfaction of the Respondent. However, the Respondent failed to act upon the following obligations under Annexure-I:

i. Respondent did not execute the Definitive Documents despite the same having been ready for execution.
ii. Respondent did not pay the minimum purchase price permissible by law as envisaged under clause 3 of the Term Sheet i.e. Rupees 71 crores which is the amount at which the shares were notionally valued.
iii. Rupees 71 crores was to be transferred to Claimant No.1 from where it was to be transferred to an escrow account enabling individuals or group of shareholders of Claimant No.1 to use this money to buy the shares of Respondent Company for completion of transaction. Non-payment of this amount disrupted the transaction and resulted in non-grant of the promised 7% shares in the Respondent.
iv. Respondent did not complete the formality of simultaneous withdrawal of civil suits against the Claimants.

v. Respondent failed to pay the founders the promised amount of USD 1 million despite completion of milestones.

Therefore, the Respondent had committed breach of contract.

It was further argued that the sole issue preventing the final closure of the entire transaction was the unreasonable demands by Respondent's minority shareholder 'Venture Nursery'. Claimants had no role to play in the resolution of the said issue. Respondent did not resolve the issue by June 2016 which is the time by which Definitive Documents could still have been executed. However, since the entire business of the Claimant had been transferred by then, the Respondent had ensured elimination of its closest competitor and received further funding of USD 163 million, Respondent had no incentive to complete its end of the bargain for which it had already received benefits.

In the matter at hand, parties have created a legally binding and enforceable contract by way of conduct. Reliance was placed on Reveille Independent LLC vs. Anotech International (England and Wales High Court, Case No. 2013 Folio 1137) to state it is settled legal position that contract can be created by conduct even without formally executed documents being in place.

It was argued by the Claimants that the Respondent's case is marred with inconsistencies. Respondent has deliberately produced witnesses who neither have detailed knowledge of the transaction and nor were they involved in major aspects of the transaction. When confronted with the documentary evidence, they deliberately and with a malafide intent provided interpretations inconsistent with the text of the document.

Section 59 and 63 of the Indian Evidence Act, 1872 along with the judgments in Vikas vs. State of Maharashtra (2008)2SCC 516 and Bhugdomal gangaram & Ors. Vs State of Gujarat 1984 SCC Cri 67 were

relied upon to state that oral evidence of a witness must be direct arising out of the experience or involvement of a witness. Testimony of a person based on information of another person is inadmissible in the absence of examination of the said person as a witness. Testimonies of Respondent's witnesses ought to be rejected as the witnesses have admitted lack of awareness and knowledge of crucial aspects of the transaction and that their testimony lacks credibility on account of contradictions and conduct during their cross- examination. Respondent's case is built upon hearsay evidence which is inadmissible in law. Respondent intended to hide crucial facts had failed to produce Mr. Maninder Gulati and Mr. Abhinav Sinha who led the transaction as witnesses despite both of them being still employed with the Respondent. Attention was also drawn to the fact that Respondent has deliberately suppressed material information from the Arbitral Tribunal on the pretext of confidentiality despite Tribunal's Order dated 02.11.2018 guarding confidentiality.

Respondent refuted Claimants' arguments and inter alia submitted that:

ii. There was no consensus ad idem between parties in respect of the Definitive Documents and there was no consummation of the transaction.
iii. Minimum Permissible Price by law was not determined and the said value was to be arrived at after obtaining a valuation report from an independent third party valuer in accordance with law. Such report was never procured or sought to be procured.
iv. Withdrawal of pending suits was a closing obligation under Annexure-I of the Term Sheet and Claimant No.1 failed to fulfill the same.
v. In the absence of fulfillment of post-closing obligations and execution of Definitive Documents, Claimants were not entitled to USD 1 million.

Regarding issues raised by Venture Nursery, it was submitted that the Claimants were well aware of the objections raised by Venture Nursery

and hence, cannot contend that there was *consensus ad idem* or consummation of transaction stipulated under the Term Sheet or the Definitive Documents. There was no binding contract between the parties and hence there cannot be any breach of contract.

Regarding non- production of witnesses, Respondent argued that it had produced 3 witnesses. Mr. Ritesh Agarwal (RW-3) was a signatory to the Term Sheet and a proposed signatory to the Definitive Documents in his capacity as a shareholder and responsible for the affairs of the company as the CEO. Mr. Abhishek Gupta (RW-1) is the Global Financial Officer of the Respondent. Claimants have relied on emails sent by him in support of their case. Mr. Ayush Mathur (RW-2) is the Chief Supply Officer of the Respondent and is responsible for handling all hotel properties on the Respondent's network. Therefore, he was the best person to depose regarding the properties on the Respondent's Network and whether any properties were transferred from Claimant No.1 to the Respondent. Moreover the witness was able to point out the inaccuracies and discrepancies in the data provided by Claimant No.1 to the Respondent.

Parties have been heard. In view of the arguments advanced, evidence led by the parties and the findings in Issue Nos. 4, 5, 6 and 7, this Tribunal holds that while the Claimant was ready and willing to fulfill the obligations mentioned in the Term Sheet and also performed part of the obligations, the Respondent failed to do so. On being requested by the Claimants for performance of simultaneous obligations such as finalization and signing of the Definitive Documents, the Respondent kept assuring that the same would be done once Venture Nursery's concerns were addressed. Claimant No.1 continued to perform its obligations in compliance of the Term Sheet. There is no document on record which shows that the Respondent instructed Claimant No. 1 to stop taking steps towards fulfillment of the obligations stipulated under the Term Sheet at

any stage. Therefore, there was a legitimate expectation on the part of the Claimant that the Respondent would also perform its part of the obligations under the Term Sheet. However, as the Respondent failed to perform its obligations, this Tribunal holds that Respondent committed breach of its obligations under the Term Sheet.

Issue No.9: Whether the Claimants are entitled to specific performance of the Term Sheet dated 26.11.2015 by directing the Respondent to issue 7% of the present shareholding of the Respondent in favour of Claimant No.2 to 17 pro-rated to their respective shareholding of Claimant No.1?

Claimants have argued that they are entitled to specific performance of the Term Sheet dated 26.11.2015 and the Respondent has denied the Claimants' submissions. Parties reiterated the arguments advanced earlier in support of their submissions.

Clause 4 of the Term Sheet states that:

"The Closing shall be conditional upon fulfillment of the following conditions:

i. Completion of limited legal and financial diligence of the Target.
ii. Target obtaining all corporate, governmental, management, third party, exchange control and other regulatory approvals that are necessary or advisable.
iii. Conditions identified under **Annexure-I**; and
iv. Any other conditions in the Definitive Agreements ("Closing")

It is hereby clarified that the term Closing, in case of a Merger Framework shall mean the filing of the scheme of merger with the court.

Upon closing:

(a) Preference shareholders of the target shall be entitled to acquire preferred securities (which may include equity with contractual rights) ("Preferred Stock") in the Acquirer.

(b) Equity shareholders of the target shall be entitled to acquire equity shares in the Acquirer."

The total shares issued including, Preferred Stock and Equity Shares shall not exceed 7% of the fully diluted shareholding of the Acquirer. Upon completion of the post-closing obligations as set out in **Annexure-II ("Post closing obligations"),** Founders shall be entitled to a payout of US$ 1 million."

Parties have been heard. Clause 4 shows that it is only upon 'closing', that the preference and equity shareholders of Claimant No.1 would have been entitled to a total of 7% of the fully diluted shareholding of the Acquirer/Respondent. 'Closing' was conditional upon fulfillment of certain conditions, one of which was fulfillment of obligations under the Definitive Documents.

This Tribunal has held (Issue No.5) that parties could not arrive at consensus ad idem in respect of the Definitive Documents and the same were not finalized on account of the objections raised by Respondent's shareholder Venture Nursery, which was to be resolved by the Respondents.

The Term Sheet was a binding document and the Claimant did everything within their control to complete their obligations under the same. The Claimant cannot be held responsible for the acts and omissions of the

Respondent and/or its shareholders by virtue of which some of the obligations could not be fulfilled by the Claimant. This Tribunal has held that Claimant No.1 is entitled to claim/pray for the relief of allotment of shares from the Respondent to Claimant Nos. 2 to 17.

It is clear that Definitive documents could not be executed because of a problem created by a shareholder of the Respondent (Venture Nursery); the Term Sheet is a binding document and parties were acting on it; some of the pending obligations could not be carried out due to lack of instructions from the Respondent; the Respondent has committed a breach of its obligations under the Term Sheet and the Claimant did everything within its control to complete its obligations under the Term Sheet. Thus the Claimant cannot be held responsible for the acts and omissions of the Respondent and/or its shareholders by virtue of which some of the obligations under the Term Sheet could not be fulfilled by the Claimant. Hence, the Claimant is entitled to Specific Performance of the Respondent's obligations. However, as Definitive Agreements have yet to be executed, the Tribunal holds that the Claimant is entitled to take appropriate proceedings for Specific Performance and execution of the Definitive Agreements as envisaged for itself and its shareholders under the Term Sheet.

Issue No.10: Whether the Claimants No.4 to 10 are entitled to the payment of USD 1 million dollars?

Claimants argued that Claimant Nos. 4 to 10 are entitled to payment of USD 1 million dollars. Respondent refuted the said contention and stated that Claimant Nos. 4 to 10 are not entitled to the said payment. Parties reiterated the arguments advanced earlier in support of their submissions.

Clause 4 of the Term Sheet states that:

"The Closing shall be conditional upon fulfillment of the following conditions:

g) Completion of limited legal and financial diligence of the Target

h) Target obtaining all corporate, governmental, management, third party, exchange control and other regulatory approvals that are necessary or advisable.

i) Conditions identified under **Annexure-I**; and

j) Any other conditions in the Definitive Agreements ("Closing")

It is hereby clarified that the term Closing, in case of a Merger Framework shall mean the filing of the scheme of merger with the court.

Upon closing:

(a) Preference shareholders of the target shall be entitled to acquire preferred securities (which may include equity with contractual rights) ("Preferred Stock") in the Acquirer.

(b) Equity shareholders of the target shall be entitled to acquire equity shares in the Acquirer."

The total shares issued including, Preferred Stock and Equity Shares shall not exceed 7% of the fully diluted shareholding of the Acquirer. Upon completion of the post-closing obligations as set out in **Annexure-II ("Post closing obligations"),** Founders shall be entitled to a payout of US$ 1 million."

For the reasons and the finding in Issue No. 9, it is held that the Tribunal cannot grant the relief sought at this stage as the same is dependent on

the fulfillment of post- closing obligations which stage will be reached only after the Definitive Agreements are executed.

Issue No.11: Whether as an alternative to specific performance, Claimants are entitled to an amount equivalent to 7% of the value of the Respondent as per the last round of funding received by the Respondent along with USD 1 million dollars to Claimant Nos. 4 to 10?

Claimants argued that they are entitled to an amount equivalent to 7% of the value of the Respondent as per the last round of funding received by the Respondent along with USD 1 million dollars to Claimant Nos. 4 to 10. Respondent refuted the said contention and stated that Claimants are not entitled to the same. Parties reiterated the arguments advanced earlier in support of their submissions.

In view of the finding that the Claimant is entitled to specific performance, the alternate relief becomes redundant.

Issue No.12: Whether Claimant Nos. 4 to 10 are entitled to interest on the amount of USD 1 million from the date of execution of the Term Sheet, if so for what period and at what rate?

Claimants argued that the Respondent has breached the contract. Therefore, interest may be awarded at the rate of 18% on USD 1 million payable to Claimant Nos. 4 to 10 from the date of execution of the Term Sheet till the date of grant of the award by the Hon'ble Tribunal. Respondent refuted the said argument. Respondent reiterated its earlier submissions and inter alia submitted that parties did not enter into a

binding contract and there was no breach of contract. Hence, the Claimants are not entitled to any interest.

This Tribunal has disallowed the claim of USD 1 Million at this stage. Hence, the Claimant is not entitled to any interest on the same.

Issue No.13: Whether the Claimants prove loss of goodwill and are entitled to damages to the extent of 17 million USD?

Claimants submitted that they are entitled to damages on account of loss of goodwill, reputation and inconvenience caused to them. It was mainly submitted that:

i) Under Section 21 of the Specific Relief Act, 1963 compensatory damages can be awarded.

ii) The Non-Performance of obligations by the Respondent and lack of payment of consideration for the transaction has adversely affected Claimant's goodwill and reputation, further causing great inconvenience to the Claimant.

iii) At the time of the transaction, Claimant No.1 was the second largest player in the budget hotel segment. Within one year of its creation, it grew into 4000 room nights with credible customer ratings. Therefore, it had impeccable goodwill among all stakeholders.

iv) Public announcement by SoftBank in February 2016 confirmed the acquisition of Zo Rooms by the Respondent. News regarding acquisition was also published in several other public media reports. [Relied on Mark A and Ex. C-55].

v) Claimant's hotel partners, booking agents, online platforms, customers and other stakeholders thus, had the knowledge of the acquisition of Claimant No. 1's hotel rooms business by the Respondent.

vi) However, later when the Respondent failed to honour its obligations and committed breach of the contract, the goodwill of Claimant No.1 was severely impacted.

vii) Goodwill is a part of the value of business and is associated with the brand name, customer relations and patronage, reputation amongst the hotel partners and other such factors which generate economic benefits. By breach of contract, the Respondent has severely affected the business and goodwill of Claimant No. 1.

viii) Breach of contract by the Respondent has resulted in injury to Claimant No. 1's goodwill, closure of business as it's hotel business was transferred to the Respondent and adversely affected the hostel business of Claimant No.1 thus, resulting in severe pecuniary loss to the Claimants.

Respondent argued that the Claimant was not entitled to any damages on account of loss of goodwill, reputation or inconvenience caused. It was mainly submitted that:

vii. A perusal of the Statement of Claim, Replication and the Evidence Affidavits show that there is no basis for such a Claim and the same is vague and unsubstantiated.

viii. Claimant has not placed a single document on record or made any averment regarding loss of goodwill.

ix. Claimant has not led any evidence to show that they have suffered loss or the extent of such loss on account of breach of the Term Sheet.

x. In view of the law laid down in Ghaziabad Development Authority vs. Union of India [(2000) 6 SCC 113], the said relief is liable to be rejected on the ground of complete lack of evidence.

The Tribunal has held that the Claimant is entitled to Specific Performance. Hence, on Specific Performance, the goodwill of Claimant

would also be transferred to the Respondent. Therefore, the Tribunal does not deem it fit to grant relief in respect of loss of Goodwill to the Claimant. The same will be dependent on the outcome of the proceedings for Specific Performance.

Issue No.14: Whether the Claimant No.1 is entitled in the alternative for payment of USD 88,922, 768/- as claimed in the Replication?

Claimant argued that as an alternative to the reliefs sought in the Statement of Claim, it is entitled to an amount of USD 88,922,768/- on the principle of Quantum Meruit. Claimants mainly submitted that:

v. Conduct of the parties demonstrates the existence of a valid contract. Such a valid contract existed, in the very least, as per the understanding between the parties that Claimant No.1 would wind up its budget hotel room business.

vi. If one party renders a service to another, not intending to do so gratuitously and the other party has obtained benefits, then the first party is entitled to compensation. [Reliance placed on V.R. Subramanyam vs. B. Thayappa 1961 3 SCR 663]

vii. The parties created a valid contract by conduct and acted upon it by transitioning employees, assets and entire hotel rooms business of Claimant No.1 to Respondent. Claimants did not do the said acts gratuitously.

viii. Documents and evidence on record show that the Respondent did not at any point of time, stop or restrain the Claimants from transitioning the hotel business, nor did it furnish any reason for non-execution of the Definitive Documents till the conclusion of business transfer. On the

contrary, Respondent instructed the Claimants to transfer the business and employees expeditiously. [Ex. C-1 colly and Ex. C-5 relied upon]

ix. The main consideration of a Quantum Meruit Claim is the need to protect the reasonable expectations of honest men. [Relied upon Reveille Independent LLC (supra)]

x. Claimants acted upon the transaction in good faith and Respondent has received the benefit of the bargain. Therefore, Respondent is liable to pay compensatory reliefs on the basis of the principle of Quantum Meruit.

xi. Quantum Meruit is a principle of equity applicable to India as well other jurisdictions. This Arbitral Tribunal is empowered to grant restitutionary relief by application of Quantum Meruit since the claim is incidental to the contract performed by the Claimants. Reliance placed on Government of Gibraltar vs. Kenny and Anr. (919560 2 Q.B. 410), Patel Engineering Co. Ltd. vs. Indian Oil Corporation Ltd. (AIR 1975 Pat 212) and Renusagar Power Co. Ltd. vs. General Electric Company and Anr. (1984) 4 SCC 679.

xii. The Arbitration clause is broadly worded and the relief of Quantum Meruit is incidental to and has arisen in relation to and pursuant to the Term Sheet.

xiii. The Alternative relief sought is well substantiated, based on documents and witness depositions. It is based on the post money valuation before the initiation of negotiation for the transaction with the Respondent.

a. The pre-money valuation of Claimant No.1 prior to its last round of Series B funding was USD 60,000,000 (USD Sixty Million). [Relied on the cross-examination of CW-7]

b. Claimant No.1 was to receive further investment from its investors Tiger Global and Orios Venture in 2 tranches and both investors had given an unconditional undertaking to infuse funds for series B of funding. [Relied on the cross-examination of CW-9]

c. The First tranche of USD Ten million was received in July 2015. This investment was made with the understanding that market value of Claimant No.1 is worth USD 88,922,768.

d. If Respondent had not initiated negotiations for acquiring Claimant No.1, Claimants could have sought for the second tranche of Series B fund at the requisite time. Claimant No.1 did not pursue and seek further infusion of funds solely on the basis of the transaction initiated with the Respondent. [Relied on the cross-examination of CW-1]

e. Therefore, the loss of business of Claimant No.1 is to the tune of USD 88,922,768/- and was solely based on the Respondent's breach despite having received the benefit of the bargain.

f. Respondent was privy to the facts pertaining to pre and post money valuation of Claimant No.1 and was aware of the valuation of Claimant No.1. As a part of due diligence process, Respondent was provided with a copy of the revised Articles of Claimant No.1 post the Series B investment along with the Shareholders Agreement. The same was also discussed in email exchanges between CW-9 and RW-1. [Relied on Ex. C-7 (colly), Ex. C-12 and Ex. C-40]

g. After being informed about the post money valuation at USD 88,922,768/- Respondent neither questioned its veracity nor sought any additional clarification or valuation report/document in support of the Claimants' valuation. [Relied on Ex. C-12]

h. Mr. Abhishek Gupta (RW-1) in his deposition stated that neither a valuation report was required to assess the figures, nor was it sought from the Claimants. [Relied on the cross-examination of RW-1]

i. Respondent had no issues with the Claimants' valuation and it is only during the course of the present proceedings that it has raised questions challenging the veracity of the same.

j. Respondent received a funding of USD 100 million and USD 62 million from SoftBank on the basis of acquisition of Claimant No.1's business which was valued at 88,922,768/-

Respondent refuted the Claimant's Claim and submitted that the same cannot be granted. It was mainly argued that:

e. This relief cannot be granted since it has not been sought in the Statement of Claim and was introduced as a prayer in the replication to circumvent the objections of maintainability raised by the Respondent. Reliance placed on Anant Construction Pvt. Ltd. vs. Ram Niwas (1994) (4) 31 DRJ 2015.

f. The plea of Quantum Meruit has been raised for the first time during the final arguments. There is no document on record to show that Claimant's valuation was USD 88 Million. The Share Subscription Agreement and Valuation Report are available but have not been placed on record and purposely.

g. Alleged valuation included both Zo Rooms and Zostel Hostel Business and Zostel Hostel Business was admittedly never transferred. Claimant No.1 is attempting to doubly compensate itself.

h. No funding was ever received from the investors by Claimant No.1 to constitute the post money valuation. Therefore, its value never became USD 88 Million.

i. In view of the law laid down in Mahanagar Telephone Nigam Ltd. vs. Tata Communication Ltd. (2019) 5 SCC 341, Puran Lal Sah vs. State of UP (1971) 1 SCC 424, Mulamchand vs. State of MP AIR 1968 SC 1218 and Alopi Parshad & Sons vs. Union of India AIR 1960 SC 588, it was submitted that the plea of Quantum Meruit is not sustainable because:

i) If party is seeking Specific Performance of a contract, then it cannot make a claim for damages under Quantum Meruit arising from the same contract.

ii) This plea is mutually destructive of the original case.

iii) Compensation on the basis of Quantum Meruit is based on the benefit received by the alleged recipient and is distinct from damages of the breach of the contract i.e. the measure of loss by the Claimant.

iv) Measure of any compensation based on Quantum Meruit cannot be the value of alleged loss suffered but only the value of benefit received.

v) Value mentioned in the Draft Definitive Agreement is 71 crores only. This amount was payable subject to transfer of complete/entire business which was never done. Claimants are not entitled to receive any amount from the Respondent.

In rejoinder, Learned Counsel for the Claimants inter alia submitted that:

n. The rigors of CPC are not applicable to the Arbitration proceedings.

o. Pleadings in respect of the Quantum Meruit Claim are a part of the Statement of Claim and relied on paras 6, 6.2, 6.3, 6.4.6.5, 6.6.3 and 7(iii) in support of the same.

p. The Argument that Quantum Meruit claim was not raised till the final arguments is erroneous. Pleadings pertain to facts and not law.

q. Separate issue was framed by this Arbitral Tribunal in respect of the Quantum Meruit Claim. Opportunity to respond was given to the Respondent by way of a Sur- Rejoinder along with the opportunity to lead evidence. Therefore, no objection can be raised at this stage.

Parties have been heard. The principles of Quantum Meruit are recognized under Section 70 of the Indian Contract Act, 1872. The question regarding the applicability of Section 70 was considered in Mahanagar Telephone Nigam Limited vs. Tata Communications Ltd (AIR 2019 SC 1233) as follows:

"This Section occurs in Chapter V of the Contract Act, which chapter is headed, "of certain relations resembling those created by contract". There are five Sections that are contained in this Chapter. Each of them is posited on the fact that there is, in fact, no contractual relationship between the parties claiming under this Chapter..... ..... Here again, there is no contractual relationship between the parties. It is in this setting that Section 70 occurs."

And again in Mulamchand vs. State of Madhya Pradesh AIR 1968 SC 1218, as follows:

"The important point to notice is that in a case falling Under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under s. 70, it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution."

The law laid down in Mulamchand (supra) has been upheld in Mahanagar Telephone (supra) and also in Orissa Infrastructure Development Corporation vs. Mesco Kalinga Steel Ltd. (2017) 5 SCC 86.

In the matter at hand, a defined contractual relationship exists between the parties. Since a binding contractual relationship exists between the

parties, Section 70 and the Principle of Quantum Meruit will not apply in view of the law laid down in Mulamchand and Mahanagar Telephone (supra), as well as in Orissa Infrastructure Development Corporation vs. Mesco Kalinga Steel Ltd. (2017) 5 SCC 86. In view of the finding that a binding contractual relation exists between the parties and that the Claimant is entitled to Specific Performance of the Respondent's obligations, this Tribunal holds that the alternate relief of Quantum Meruit is not maintainable.

Issue No.15: Who should bear the cost and if so to what amount?

Learned Counsel for the Claimant submitted that the Claimant has undergone loss of business and goodwill owing to the Respondent's actions. The Respondent has benefitted by acquiring Claimant No.1's hotel business and has committed deliberate breach of contract. Therefore, Respondent is a defaulting party. It is settled law that defaulting party ought to bear the costs of the dispute under adjudication. Arbitral Tribunal may be guided by Section 31A of the Arbitration and Conciliation Act, 1996 while granting costs. Claimants have sought the entire cost of the proceedings along with the Cost of payment of Stamp Duty for procuring stamp paper at the instructions of the Respondent.

In view of the arguments advanced earlier, Respondent denied that Claimants are entitled to costs. It was submitted that costs of the entire proceedings ought to be awarded in favour of the Respondent in addition to the costs for application under Section 27 of Arbitration and Conciliation Act, 1996 as already granted in favour of the Respondent vide order dated 22.06.2020.

In view of the findings of this Tribunal, the Claimant is entitled to costs in the cause.

Issue No.16: To what reliefs are parties entitled?

In view of the above findings, this Tribunal holds that Claimant is entitled to Specific Performance of the Respondent's obligations under Term Sheet dated 26.11.2015. However, as Definitive Agreements have yet to be executed, the Tribunal holds that the Claimant is entitled to take appropriate proceedings for Specific Performance and execution of the Definitive Agreements as envisaged, for itself and its shareholders under the Term Sheet.

Further, the Claimant is entitled to costs in the cause.

Justice A.M. Ahmadi (Retd.)

Sole Arbitrator

Date: 06-03-2021