HIGH COURT OF JUDICATURE AT BOMBAY

sbw

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

ARBITRATION PETITION NO.442 OF 2017

Prysmian Cavi E Sistemi S.r.I.
(formerly known as Prysmian Cavi
e Sistemi Energia S.r.I.), a company
incorporated under the laws of Italy with
its registered office at Via Chiese 6,
20126 Milan Italy. .. Petitioner

V/s.

1. Vijay Karia
2. Jagdish Karia
3. Jaswanti Jagdish Karia
4. Chandrakant M. Karia
5. Shilpa V. Karia
6 Master Pratham V. Karia
7. Vijay P. Karia – HUF
8. Pramod Mohanlal Karia – HUF
9. Hetvi Vijay Karia
10. Vasumati C. Karia
11. Piyush J. Karia
12. Piyush J. Karia – HUF
13. Tejal P. Karia
14. Yash P. Karia
15. Kunj P. Karia
16. Paresh J. Karia
17. Chandrakant M. Karia-HUF
18. Jagdish M. Karia – HUF
19. Vivek Hanmantrao Kulkarni
20. Pravinchandra C. Modi

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

21. Anil Kumar K.
22. Suryakant Khushal Das Sheth
23. Megha K. Murthy
24. Ritesh Kedia
25. Reema Nilesh Vaghani
26. Rajesh H. Dube
27. Anil Harihar Borkar
28. Shah Pragna Indravadan
29. Vivek Kohli
30. Pamela Miranda
31. Dipti Bharat Kotak
32. M/s. Comet Cables Pvt. Limited
33. Rai Bala
34. Mahesh Chand
35. Hemant Krishnarao Talapadatur
36. Ajitchandra Jeram Thakker
37. Bharat Jeram Thakker
38. Hema Jayesh Kotak
39. Jitendrakumar Zatakia
40. Shital Thakkar
41. Ameeta Bharat Thakkar
42. Neha Garg
43. Narandas Kotak
44. V. Hariharan
45. Bina Sayani
46. Mittal N. Mehta
47. Raksha J. Mehta
48. Jaswantilal M. Mehta
49. Latha K. Murthy
50. Jayshree Dilip Shah
51. Dilip Chinubhai Shah
52. Rushikesh Jitendra Zatakia

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

53. Ramniklal J. Sayani
54. Aruna R. Sayani
55. Trupti S. Sayani
56. Rajeshkumar R. Sayani
57. Surajkumar R. Sayani
58. Kantilal Tapandas Someiya
59. Mrudula Kantilal Someiya
60. Saroj Narendra Kotak
61. Sunil Gopal Kulkarni
62. Nikhil N. Banwat
63. Vishwas Dhall
64. Jayesh Kotak
65. Anil K. Someiya
66. Bina Anil Somaiya
67. Manasvi A. Someiya
68. Bakul Natvarlal Kotak
69. Nisha Bakul Kotak
70. Dineshchandra N. Shah
71. Sharif Habib Al Awadhi
72. Ibrahim Saad M. A. Yaaqib
73. Sanjay Goenka
74. The Hon'ble Sheikh Mohammad Bin
75. Mohammad Siddique Wadiwala
76. Estate of Promod Mohanlal Karia (since deceased) represented by Vijay Karia
77. Estate of Asha Paresh Karia (since deceased) represented by Vijay Karia

All represented by Mr. Vijay Karia
residing at – A-1202, Surya Apartments,
Bhulabai Desai Road, Mumbai-400 026. … Respondents

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

.....

Mr. Fredun E. De Vitre, Senior Advocate, a/w Ms. Naira Jejeebhoy, Mr. M. P. Bharucha and Ms. Shreya Gupta I/b. Bharucha and Partners for the petitioner.

Mr. Navroz Seervai, Senior Advocate, a/w Ms. Arti Raghavan, Mr. Vyapak Desai, Ms. Ranjana Adhikari and Manish Doshi I/b. Vimadalal & Co. for respondent nos.1, 5 to 7, 9, 20, 22, 23, 25, 27, 28, 31 to 34, 36 to 42, 44, 45, 50 to 58, 60, 61, 64 to 66, 73.

Mr. Aspi Chinoy, Senior Advocate a/w Hussain Somji I/b. Unadkat & Co. for respondent nos.3, 4, 10 to 18, 46 to 48 and 77.

.....

CORAM : A. K. MENON, J.
RESERVED ON : 10th SEPTEMBER, 2018
PRONOUNCED ON : 7th JANUARY, 2019.

JUDGMENT:-

1. By this petition, the petitioner corporation registered under the laws of Italy seeks enforcement of a foreign award.

The brief facts leading to the filing of the present petition are as follows:

2. The petitioner is engaged in manufacture of cables and systems for energy and telecommunications. The petitioner entered into Joint Venture Agreement (JVA) dated 19th January, 2010 whereby it became entitled to and holds 51% of shareholding of Indian Company Ravin Cables Limited ("Ravin"). One Vijay Karia ("Karia")respondent no.1 alone represents the existing

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

shareholders of Ravin. It is stated that all existing shareholders were represented by Mr.Karia who was empowered by powers of attorney stated to be coupled with interest and which were at all times valid and subsisting. One of the two erstwhile shareholders P. M. Karia and Asha P. Karia expired and their estate is said to be represented by the First respondent to the extent it concerns shareholding in Ravin. The shares said to have been held by late P. M. Karia are said to be presently under the control of respondent no.1 and the shares held by late Asha Karia were transferred to Paresh J. Karia-respondent no.16 who has constituted respondent no.1 as his attorney. Thus, the respondents hold 49% of the shareholding of Ravin. Negotiations in respect of the JV Agreement are believed to have commenced in 2008.

3. In essence the petitioner was to hold 51% shares by way of subscription and transfer of shares of an existing shareholders for achieving 51% shareholding. The petitioner is believed to have paid Euro 5 million to the promoters as 'Control Premium' as a result of which the petitioner would be entitled to manage and control Ravin by appointing three Directors on board and also appoint a Chief Executive Officer in due course. Mr. Vijay Karia was to continue as the Chairman and Managing Director. All the other shareholders were to be treated as one party, represented by the said Karia. On completion of integration period, Vijay Karia would cease to be involved in day

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

to day management of the company and his involvement was to be restricted to internal audit, strategy and business development. Thus, during the integration period, Vijay Karia was to be available for ensuring a smooth transition. Clause 8 of the JVA set out the purpose and the objects. The intention being to conduct the business of the company in the best interests of the company and in accordance with sound professional and commercial principles. The shareholders were to cooperate with the other parties and with the company and shall use its respective best efforts to ensure the success of the company with special focus in the industrial special energy cables and high voltage energy cables markets.

4. Under clause 8.2.3, if any Director or committee member nominated by a shareholder failed to vote in accordance with the terms of the agreement or it becomes disqualified by virtue of provisions of the Companies Act then in such event the shareholder was required to take all action within its power including to vote at general meeting to remove or replace such Director. The Articles of Association of Ravin are believed to have been amended pursuant to the JVA. Under clause 10 existing shareholders and other shareholders of Ravin were not to transfer or create any interest or encumbrance favour of competitors and the petitioners in their shares or part with them without the prior written consent of the petitioner. The parties were not to assign or sell or transfer

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

partially shares to a third party without written consent of the other party. The JVA provided for a "Right Of First Refusal(ROFR) and "Tag Along Rights", permitted transfers and further issue of shares. The JVA further provided that in the event of material breach it would constitute a default. Defaults included sale of 51% or 49% of shares by the non-defaulting shareholder at discounted price of 10% or 10% premium. The JVA provided for determination notice(s) and cessation of all rights of the defaulting party if the breach was not rectified after the cure period.

5. It provided for rights of shareholders who were to act in good faith and equity between them and for the manner in which the cables business would be carried on by the petitioner/ 4th respondent. The shares were to be valued by one of four valuers who were named KPMG, Ernst & Young, Price Waterhouse Coopers and Deloitte. Disputes, if any, were to be referred to an arbitration under the Rules of the LCIA although the seat and place was to be London the Indian Contract Act would apply but the law of arbitration was to be English Law. It is also in dispute that on 19th January, 2010, the parties signed a Control Premium Agreement under which control premium was paid to the promoters mainly the Karia Group. Pursuant to JVA, the Articles of Association of the company were also amended and in June 2010 Mr. Luigi Sarogni was appointed as CEO of the company. The integration period under JVA came to

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

an end on appointment of the CEO and it was agreed as long as integration period continued, the company would be managed jointly. In or around November 2010, the petitioner announced that its parent company was proposing to acquire the Draka Group of Companies engaged in manufacture of cable which acquisition would entail that the petitioners parent company would also required majority stake in the Indian subsidiary of the Draka Group known as Associated Cables Private Limited (ACPL). In September 2011, the Board of Directors conferred exclusive powers of day to day management of the company on the CEO appointed by the petitioner. Apparently this was the end of integration period contemplated under clause 12 of the JVA.

6. In November 2011 the company by resolution of its Board appointed Ms. Cinzia Farise, as CEO and empowered her to operate the company's bank accounts. The CEO was also appointed as a non-executive Director of ACPL by the parent company. In November 2011 the CEO Ms. Farise was also empowered to employ and lay off permanent staff. She required prior approval in the event the company intended to hire a new staff. Around this stage, friction between the parties commenced. A lady employee was hired in the Sales team. Apparently her records were not disclosed to the Human Resources Director and it is the petitioners case that her employment was not authorised. In the meanwhile, one Mr. Brunetti was appointed as Chief Financial

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Officer(CFO) and in December 2011 CEO proposed a board meeting to formalize the appointment of Brunetti as CFO. However, this was not approved by the Karia Group. Later in January 2012 the employees resorted to a strike allegedly supported by Vijay Karia and who did not take steps to prevent it. Karia is believed to have made several serious allegations against the CEO. The management meetings called by the CEO were not attended by the employees and eventually the petitioner issued a Request for Arbitration (RFA) as contemplated in clause 27 of the JVA on the basis that the respondents were trying to oust the petitioners from the affairs of the company and causing employees of the company to support such conduct. Karia apparently also filed a complaint with the Foreigner's Regional Registration Office (FRRO) against the CEO and the Human Resources Director in February 2012. In March 2012, the respondents filed a claim inter alia seeking an order requiring the petitioner to buy the respondents shareholding at a 10% premium. This led to a fresh controversy when the respondents contended that the option of selling their stake was a typographical error. The other shareholders were at all time represented by said Karia and the respondents had by then filed a counter claim and participated in the proceedings. On 26th March, 2012, the respondents are believed to have served a Determination Notice alleging breach by the petitioners and upon expiry of 60 days from the date of the Request for Arbitration breaches remained irremediable as a result the sole arbitrator

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

came to be appointed by the LCIA.

7. The respondents initially contended that the arbitrator would have a conflict of interest since according to them he had been engaged as a counsel by the petitioners' Advocates in some other unconnected matter. The petitioners Advocates and the arbitrator denied the allegations of conflict. Later this plea was given up and the parties continued with the Arbitrator appointed. It is material to note that at that time the registry of the LCIA had informed the respondents that the rules of the LCIA included a challenge procedure to the appointment of the sole arbitrator. This option was, however, not availed of and on 4th July, 2012 the petitioners filed a statement of claim and extended period for rectification of breaches ended on 6th July, 2012. On 20th July, 2012 the CEO Ms. Farise filed a witness statement in which she disclosed that she was a non-executive director of ACPL. She was not involved in day to day activities and had not disclosed any confidential information in relation to Ravin to ACPL. In or around August 2012, the arbitral tribunal passed an interim order by which Karia was to be continued as Chairman and Managing Director and had powers limited to internal audit, strategy and business development. Thereafter between 4th and 20th September, 2012 both parties served a notice of default since time to rectify had expired. The pleadings were meanwhile completed and procedural orders came to be passed from time to time including

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Procedural Order no.4 by which the petitioners were directed to produce documents. The order came to be passed on 14th November, 2012 but as far as the compliance was concerned, it was met with resistance and the petitioners apparently took a shelter under a letter of ACPL to the effect that the documents could not be submitted on the grounds of confidentiality. The parties were heard on jurisdictional issues including construction of the JVA and issues pertaining to a trademark licence agreement and a technical assistance agreement. A further Procedural Order no.9 came to be passed granting permission to the petitioner to rely on further documents in relation to existing pleaded allegations which the petitioner's claim to have found and to which documents they had no prior access.

8. Hearing on liability thereafter took place in London during May 2013. On 21st August, 2013, the tribunal dealt with the petitioners applications for interim measures. Mr. Vijay and Piyush Karia were directed to (a) ensure that the Board of Directors was reconstituted, (b) give effect to the petitioners' nomination and (c) provide the petitioners with management accounts of the company. Allegations of breach of confidentiality once again surfaced as a result of public advertisement issued by one Gilbert Tweed Associates, suggesting recruitment of personnel which allegedly was indicative of a favourable award being passed. This publication was attributed to the

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

petitioner. The petitioner, however, denied that it had caused such a statement to be made on its behalf and Gilbert Tweed Associates is said to have apologized for having made such a statement. The petitioner also undertook to terminate its arrangement with Gilbert Tweed Associates. While this may have been a mischievous ploy about needs to be considered is whether the award would be rendered unenforceable by reason of such unwarranted publication. The tribunal has dealt with this contention and accepted the petitioners undertaking to terminate the arrangement of Gilbert Tweed Associates as aforesaid.

9. On 19th December, 2013 the tribunal passed the Second Partial Final Award (PFA) in relation to the hearings held in May 2013. It held that the respondents were in material breach and that they were obliged to sell all shares of Ravin at the discounted price and as valued by KPMG. KPMG had been appointed in accordance with the JVA by consent of the parties on or about 28th October, 2012 and had conducted the valuation as provided for in the JVA. The respondents challenged the Second PFA to the limited extent of seeking a remand to the tribunal to reconsider the date of valuation. It is the application to be heard by Commercial Court which passed an order on 14th January, 2015. In the meantime, the petitioners had decided that it would not contest the application filed by the respondents seeking remand as aforesaid.

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

10. Vide Procedural Order no.11, further interim measures came to be passed holding that the respondents had no surviving rights under the JVA and they were directed to cease interfering with the operations and management of the company. In an unexpected development, on or about 23rd June, 2014, the respondents informed the tribunal that they would not be represented by their erstwhile Advocates and requested that communications to be made directly to the respondents at a nominated address and further accused the tribunal of bias.

11. According to the claimants and as canvassed by Mr. DeVitre, the allegations of bias were based on findings of the tribunal which they contended were wrong. On 1st July, 2014 the allegations of bias were rejected by the tribunal. On 29th July, 2014 Vijay Karia addressed an email agreeing to the engagement of Deloitte as valuers and for fixing a valuation date, being a date as close as possible and in any event not later than 30th September, 2014. Since the hearings were fixed on 1st and 2nd October, 2014, the tribunal is believed to have sent email to the respondents enquiring whether the respondents wished to submit any material in respect of the impending hearing but there was no response. On 28th September, 2014 the respondents informed the tribunal that they had applied to the LCIA seeking revocation of the authority of the sole arbitrator under Article 10.2 of the LCIA rules and that they would not appear

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

on the dates fixed for hearing. This challenge was repelled by the LCIA on the basis that it was beyond time.

12. Procedural Order no.12 came to be passed on 10th October, 2014 directing the appointment of the valuer, date of the valuation and the methodology to be adopted. It also provided for the material which the valuer was to be provided with. It also specified some method and material to be provided to the valuer. Mr. De Vitre submitted that the tribunal had observed that even 10 months after the Second PFA no valuer came to be appointed. It was submitted on behalf of the petitioner that on 14th October, 2014 the petitioners called upon the respondents to finalize the appointment of Deloitte but Karia objected to Deloitte's appointment claiming a conflict of interest since according to Karia the respondents had earlier approached Deloitte to conduct an independent valuation which had been declined. Deloitte had undertaken a forensic exercise on behalf of the respondents regarding certain data downloaded from Ravin's server and further Deloitte was also acting as auditor for Power Plus Cable Company LLC in which 49% shares were held by Ravin. Mr. DeVitre submitted that all the allegations made by the respondents and their Advocates have been dealt with in a rejoinder dated 18th October, 2014. Meanwhile a letter was addressed by Karia to the Institute of Chartered Accountants of India protesting against the appointment of Deloitte and relying

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

upon the correspondence between the parties in that respect. It is behaved that the said complaint was not sustained and was dismissed.

13. On 14th January, 2015 the Third PFA was made. It granted final relief holding that all rights of the respondents under the joint venture agreement ceased to be effective and that all aspects requiring respondents consent stands excluded. The respondents were restrained from exercising rights under the JVA and held that the date of the valuation would be 30th September, 2014. On 11th May, 2015 the said Karia addressed an email to the tribunal that the respondents have called upon Deloitte to refrain from proceeding with the valuation and threatening civil and criminal proceedings if Deloitte failed to comply. On 23rd November, 2015 Deloitte published its valuation report determining fair market value of the respondents equity shares at Rs.71/- after discounting the value by 10%. The Chartered Accountants engaged by the petitioners, however, also carried out the valuation of the shares after taking into Foreign Exchange Management Act (FEMA) requirements. That valuation surprisingly found that the each share was valued at Rs.16.88.

14. On 30th May, 2016 the petitioner called upon the respondents to sell to them their 49% of the shareholding of the company as per the Third PFA at Rs.63.90 being higher than the valuation computed by Deloitte. On 6th June, 2016 said Karia declined to transfer of shares. On 8th July, 2016 the petitioners

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

sought a final award from the tribunal as also termination of proceedings. Karia objected to the petitioners application while questioning Deloitte's valuation report. The petitioner refuted the respondents allegations and contending that this was only an attempt to delay the sale of shares and retain control of the company.

15. By Procedural Order no.13, the tribunal rejected the request of the respondents to dismiss the petitioners application and granted time to file a reply. The respondents sought time of 10-12 weeks. Vide Procedural Order no.13, time was granted till 17th October, 2016. Meanwhile on 15th October, 2016 the respondents filed an report by BDO and sought extension till 2nd December, 2016 to provide a separate stand-alone valuation. The respondents also sought time to file a written response to the petitioners application for award. The tribunal granted extension of time to file a complete response as also reply to the valuation report. The respondents thereafter filed the BDO valuation report and response to the petitioners application. A rejoinder came to be filed by the petitioners and on 3rd February, 2017, the tribunal informed the parties that the tribunal will proceed to issue a final award which came to be passed on 11th April, 2017. On 21st April, 2017, the petitioners Advocates called upon the respondents to comply with the order but to no avail and that is how this petition came to be filed in this Court.

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Submissions of counsel:-

16. On behalf of the petitioners, it is submitted by Mr. De Vitre vide the First Partial Final Award (PFA) the tribunal considered the arguments on construction of the JVA and whether certain aspects if proved would constitute a breach. The tribunal held that the contracts for sale of cables within the Cable Business which had been concluded directly by the petitioner or its affiliate otherwise than through Ravin do not constitute investment, acquisition or participation in the Cable Business in India. It held that the acquisition of Draka which in turn held the majority stake in ACPL, did not amount to participation of the Cable Business in India. The tribunal further inter alia held that clause 23.1 and 23.2 requires issuance of Determination Notice of an event of default even if the non-defaulting party contends that the material breach is irremediable and if the breach is not rectified at the expiry of the rectification period, that could be relied upon by the non-defaulting party which would result in deprivation and or alteration of rights of the defaulting party under clause 23.7 and that the definition of "Event of Default" was not conditional upon giving a Determination Notice. The tribunal also held that it did not have jurisdiction to decide the questions raised by the respondents as to who held the rights to register trademarks as also the alleged breaches of the Trademark Licence Agreement and the Technical Assistance Agreement.

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

17. Mr. DeVitre then drew my attention to the Second PFA, the tribunal held that in order to constitute the material breach the focus must be on the breach rather than the obligation that had been allegedly breached. Further it must be serious enough to have an adverse effect on an innocent party's interest. The tribunal rejected the case that a material breach would necessarily be a repudiatory breach. It analyzed the various breaches alleged by the petitioner and held that the respondents have committed material breaches of several of the JVA terms. It found that the witnesses examined by the petitioners were honest and that the respondents key witness's evidence as of Vijay Karia did not commend itself to the tribunal as being truthful. The counter claim was rejected and on the basis that none of the alleged breaches were material breaches. Apropos the breach concerning ACPL, the tribunal considered the fact that Karia had in his first reaction to the news of the acquisition was positive and his email was congratulatory in nature. Secondly, it found that the acquisition of ACPL was not a serious actual loss or having an adverse impact and considered expert evidence as to the potential impact that the acquisition could have on the business of Ravin. The tribunal also held that the Determination Notice need not be distinguished from the request for arbitration and that it was not a condition precedent to a request for arbitration. Further it was held that the petitioner issued a valid notice for determination under clause 23.2 as also a valid Event of Default notice under clause 23.4 of the agreement

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

and thus, the respondents were held liable to sell their shares at a discount of 10% and as determined in accordance with the JVA.

18. In the Third PFA dated 14th January, 2015, the tribunal dealt with the events after the Second PFA, observing that the respondents had challenged the Second PFA in the English Courts under Section 68 of the English Arbitration Act seeking remand which was not contested, alleging bias and seeking recusal by the arbitrator. This application was rejected . The tribunal observed that procedural orders were issued for interim measures, viz for appointment of valuer and for change of date of valuation. The tribunal held that the defaulting party viz. the respondents had ceased to have any effective right in relation to JVA including the requirement of consent from the respondents and Mr. Karia. It restrained the respondents in exercising any rights under the JVA. The date of assessment for the purpose of valuation of shares was fixed as 30th September, 2014.

19. By the final award, the tribunal rejected the respondents approach apropos appointment of Deloitte as valuer and the fixation of date for valuation. The tribunal accepted the valuation report made by Deloitte fixing the value of each share at Rs.71/-. At the same time it rejected the opposition to acceptance of the Deloitte valuation. The respondents were directed to transfer the shares

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

held by them to the claimant at the total cost of Rs.65.20 crores computed at the rate of Rs.63.90 per share and directed Mr. Karia as the constituent attorney for the existing shareholders to execute the transfer forms on behalf of heirs. It also directed the Board of Directors of Ravin to register transfer of shares and required Mr. Vijay Karia and Mr. Piyush Karia to resign as Directors on the transfers being registered and issued a permanent injunction in terms of the provisions of the JVA effectively restrained the Karia's from acting contrary to the JVA. Several other issues have been canvassed by the petitioners including the fact that on conclusion of the oral hearing on 24th May, 2013, the counsel for the respondents had specifically agreed and acknowledged that the respondents had been given a fair opportunity of a full hearing and it was impermissible for the respondent to resist the enforcement of the parties on the ground that non production of documents impaired the respondents ability to present its case. According to the Mr. De Vitre the award was enforceable and there was no occasion to question the enforceability of the award on any legitimate ground.

20. On behalf of respondent nos.1, 5 to 7, 9, 20, 22-23, 25, 27-28, 31 to 34, 36 to 42, 44, 45, 50 to 58, 60, 61, 64 to 66, 73, arguments were led by Mr. Seervai, and on behalf of respondent nos.3, 4, 10 to 18, 46 to 48 and 77 by Mr. Chinoy. Mr. Seervai assailed the award, submitting that although the petition

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

sought enforcement the opposition would involve review of merits, extensive re-appreciation of evidence and would result in the Court having to examine the matter as if in an appellate jurisdiction albeit not being one. Mr. Seervai submitted that this was an objection that would run through the entire set of grounds on which the enforcement was being opposed. He first submitted that acquisition of ACPL was a material breach because clause 21.1 of the agreement it prohibited the parties from investing, acquiring or participating in the Cable Business of India directly or indirectly, save and except through Ravin. He submitted that in the First PFA the tribunal held that the restraint under clause 21 was not limited to behaviour that would constitute competition to the company. In the Second PFA, the tribunal rejected the contention that breach of clause 21 as a result of acquisition of ACPL was material by reason that Ravin and ACPL operated in different spaces and were not competitors. The tribunal concluded in the Second PFA that the petitioner was not in material breach of terms of the JVA and thus was inconsistent with the tribunal's ruling in the First PFA and that such contradiction should shock the conscience of the Court. This was indicative of non application of mind and therefore contrary to the fundamental policy of Indian Law rendering the awards unenforceable in terms of Section 48(2)(b)(ii) and (iii) of the Arbitration and Conciliation Act. He highlighted the inconsistency as between the First PFA and Second PFA as to the scope of clause 21 whether it amount to competition

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

with Ravin or not. Mr. Seervai submitted that the inconsistencies between the First and Second PFA are such that it would shock the conscience of the Court and expose non application of mind and it was contrary to the fundamental policy of Indian Law.

21. According to Mr.Seervai the Court must examine whether the tribunal acted arbitrarily by shifting the goal-post between the First and Second PFA. This does not amount to a review on merits but on the procedure adopted in determination. The petitioners failure to produce the relevant documents was held against the respondents. ACPL's documents not having been produced by the petitioners, the tribunal observed that the respondents did not adduce evidence of serious actual loss or harm. Thus, the tribunal failed to secure relevant evidence to enable respondents to rely on it and enable the party to rely on it and drew an adverse inference against the party who sought production of evidence. This objection relates to unequal treatment of parties but not a review under merits of the ACPL factor. The objections to enforcement on the ground that critical evidence being entirely overlooked and not been dealt with at all and non-consideration of material evidence is a breach of natural justice and thus contrary to the fundamental policy of Indian law. For the aforesaid reasons, it thus reiterated that the award is not enforceable.

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

22. The tribunal had stressed upon the fact that the acquisition of ACPL was wholly incidental to and not in material competition with Ravin and therefore, the First PFA holds that the lack of material competition between ACPL and Ravin would be a relevant and important factor. He submitted that the record demonstrates that the respondents had clearly contended that competition with Ravin was their focal point in support of their allegation with regard to the ACPL breach, that there was an overlap between the business of ACPL and Ravin. Both Ravin and ACPL manufacture and sell instrumentation cables and both are competing the market of control cables segment and medium voltage segment and both Ravin and ACPL have common customers in India. He further submitted that it is not possible for the respondents to contend that the competition between the Ravin and ACPL was not relevant and could not form the basis of the tribunal's ruling.

23. Apropos the petitioners' failure to produce relevant documents, Mr. Seervai submitted that tribunal's ruling is in violation of principles of natural justice and the arbitral proceedings were conducted in a manner that rendered the respondents unable to present their case. Mr. Seervai submitted that the petitioners had been directed on 14th November, 2012 to produce evidence in respect of the value of ACPL's business with customers of Ravin and the value of the top 10 contracts in the relevant years. However, the petitioners had

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

contended that ACPL had declined to furnish the information on grounds of confidentiality. It was further contended that the respondents claim as to material breach, resulting from the ACPL acquisition was rejected on the basis that the respondents had failed to adduce "credible evidence of serious actual loss or harm". This evidence he submitted was in the possession of the petitioners and was not brought on record. Thus, on account of failure to produce the ACPL documents, Mr. Seervai contended that the respondents were unable to present their case despite which the tribunal had rendered a finding in favour of the petitioners and without drawing any adverse inference as to the petitioners failure to produce documents. On this basis, Mr. Seervai submitted that the impugned award is unenforceable in terms of Section 48(2)(b) of the Act.

24. Mr. Seervai invited my attention to the disclosure sought and submitted that the respondents had produced before the tribunal the entire list of customers of ACPL and other documents as obtained from the ACPL's website and the tribunal had considered the evidence and had concluded that material on record did not establish material breach.

25. The petitioners had failed to produce relevant documents being value of the top 10 contracts on the ground of confidentiality. Not having done so the

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

respondents were unable to present their case. This entails that the respondents were seeking to collect evidence in support of their case from the petitioners and not having been successful expected the tribunal to draw an adverse inference. This is being urged as a ground in support of the contention that the award is unenforceable. That evidence in the form of invoices, customer lists shows that ACPL was indeed under the control of the Petitioner but this was ignored and the tribunal failed to consider the submission of the respondents that key management personnel of the petitioners had been appointed in senior positions at ACPL. He invited my attention to the fact that ACPL vide letter of 16th November, 2012 declined to provide copies of documents. Procedural Order no.5 had specifically recorded that if the respondents wished to pursue their request for disclosure they must do so at the hearing on merits and the tribunal had limited power over third party's as against the power of the Court.

26. Mr. Seervai submitted that the tribunal's decision was perverse since critical evidence was ignored and being contrary to the evidence of expert witnesses who opined that Ravin and ACPL were competing in the market. He submitted that the petitioners expert witness had admitted that ACPL manufactures and sells low voltage power cables, the same product is that of Ravin's. That evidence in the form of invoices, tenders, purchase orders and customer lists that shows ACPL was in competition. He assailed the conclusion

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

of the tribunal that ACPL was not a competitor and that acquisition of ACPL would not adversely affect Ravin.

27. The next objection canvassed by Mr. Seervai is the allegation of the petitioner that the engagement of back office staff member Ms. Mathure at a salary of Rs.20,000/- per month was a material breach of the JVA but the tribunal found in favour of the petitioner holding inter alia, that the engagement of Ms. Mathure had led to considerable strife and that it would go to the root of the matter as to whether the respondents will allow the petitioners' nominee to run Ravin. Mr. Seervai submitted that the tribunal's award is rendered perverse and contrary to principles of natural justice.

28. The next ground canvassed by Mr. Seervai is that the tribunal's analysis of contemporaneous conduct was selective and perverse. He submitted that the respondents had given up their interest in competing business Vijay Industrial Electricals in order to comply with clause 21.1. However, when it came to considering the petitioners acquisition of ACPL, the tribunal failed to consider the respondents submissions. It also failed to consider email of July 2009 from respondent no.1's advisors to the petitioners representative which sets out that ACPL should be merged with Ravin cables post acquisition of Draka by the petitioners, yet the tribunal placed reliance on Mr. Karia's response to the

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

acquisition of ACPL as being highly instructive in determining whether acquisition of ACPL is to be analyzed as in the material breach or whether it had been the breaches or an excuse. He submitted that the tribunal had taken into consideration evidence which was irrelevant e.g. the congratulatory email sent by Mr. Karia upon acquisition of Draka but ignored the conduct of parties such as divestment in other competing concerns to ensure compliance with clause 21.1. He contended that parties were not treated equally and that the tribunal had rendered an award contrary to the basic notions of justice since it had adopted the different approach to the respondents.

29. The respondents also resist enforcement on the basis of incorporation of Jaguar Communication Consultancy Services Pvt. Ltd. (Jaguar) which had one of its main objects as manufacture, sale, distribution of telecom cables and which is said to be material breach of clauses 21.1, 8.2.1 and 20.1.2 of the JVA. The tribunal, according to Mr.Seervai, failed to consider the merits of the counter claim in respect of Jaguar. Although the petitioner contended that the respondents counter claims were not pleaded since it did not form part of the determination notice of March 2012 and were only raised to respondents closing submissions of August 2013, Mr.Seervai submitted that the tribunal's observation in the Second PFA that the respondents should be restricted to the four corners of the determination notice and the pleaded case and further that

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

the determination notice is clearly limited to a case of ACPL and on direct sales into India, was perverse. Mr. Seervai submitted that incorporation of Jaguar was a concealed breach and critical evidence in respect of the breach came to light only during cross examination of the petitioners witnesses which is why the submissions in respect of the counter claim were only made in the respondents closing submissions. He submitted that failure to consider respondents counter claims relating to Jaguar indicated the tribunal's arbitrary approach and is inconsistent with the First PFA where it rules that the non-defaulting party may rely on a concealed breach and treat the same as an un-rectified event of the default. Therefore, the tribunal's findings are violation of principles of natural justice since the proceedings were conducted in a manner so as to render the respondents unable to present its case.

30. The next ground urged by Mr. Seervai was pertaining to the petitioners' attempt to oust the respondents from Ravin. In this respect, Mr. Seervai submitted that the tribunal had clearly failed to consider the evidence of the counter claim and in particular the admissions in evidence and cross examination of petitioners witnesses, with the result that the tribunal failed to determine the effect of the petitioners taking away power from the first respondent during the integration period itself which is stated to be in violation of the JVA. That the JVA that required that the company should be jointly run

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

by petitioners CEO and the respondent no.1 during that period. This he submitted was unacceptable and therefore was a good ground of challenge since the tribunal had failed to rule on the respondents counter claim and therefore it would constitute a failure on the part of the tribunal resulting in a finding contrary to the fundamental policy of Indian Law. He therefore submitted that the award was violative being against the basic notions of justice.

31. The next ground for objection was as to direct sales of cables in India by the petitioner through distributors, sales agents, agency and distribution agreements allegedly in contravention of clauses 8, 20 and 21.1 of the JVA. It was contended that the tribunal adopted a perverse interpretation contrary to the plain language of the JVA. He submitted that the respondents claims arising from direct sales of cables in India was rejected on the ground that the impugned agreements and arrangements were permissible. The tribunal held that under clause 21.1 only long term arrangements involving injection of capital or exchange of capital know-how would be covered. Although clause 21.1 prohibits participation in the cable business which included manufacturing, sale, distribution, import, export, research, development of energy cables and /or telecom cables. The tribunal's decision he submitted was unsupported by evidence and the award was unenforceable being contrary to

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

the fundamental policy of Indian Law and basic notions of justice.

32. Mr. Seervai submitted that the tribunal also failed to consider the respondents allegation of breach of clause 8 and 20 of the JVA contemplated in the First PFA. The tribunal held that the direct sales could potentially amount to a breach of clauses 8 and 20 but the Second PFA failed to deal with these submissions. Mr. Seervai submitted that the tribunal's decision is perverse since it ignored particular evidence and arrived at a conclusion that there was no material breach of the JVA because the maximum loss through direct sales was Euro 1,30,000 which did not get near to satisfying the threshold to establish a material breach. The tribunal however did not record or deal with the evidence in respect of the subsidiaries and that sales through petitioners subsidiaries amounted to Euro 44 million.

33. The next point urged by Mr. Seervai was that all direct sales of cables in India by the petitioner were in contravention of clause 8, 20 and 21.1 of the JVA. Accordingly to Mr. Seervai the tribunal adopted a perverse interpretation and ruled that clause 21.1 of the JVA prohibited only long term engagements that involved injection or exchange of capital and know-how. The sales of cables through impugned arrangements were said to be permissible. This he submitted was contrary to the meaning and intent of clause 21.1. The reference

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

to cable business in clause 21.1 would entail *"...participation in the Cable Business in India.."* which expression was inclusive of *"...manufacturing, sale, distribution, import, export, research, development of energy cables and/or telecom cables..."* The tribunals decision was unsupported by evidence and contrary to the purpose and object of the JVA.

34. Mr. Seervai then submitted that failure to consider and rule on breach of clause 8 and 20, was in breach of the principles of natural justice and the fundamental policy in law and the basic notions of justice. As far as the aspect of valuation is concerned Mr. Seervai submitted that the tribunal disregarded the factual submissions in arriving at a valuation date. According to him both the petitioner and the respondents were *ad idem* on the issue of the valuation date being the date closest to the date of the actual sale of shares and it was on this basis that the respondents agreed to 30th September, 2014 being adopted as valuation date subject to sale of shares being concluded by 31st December, 2014. The tribunal proceeds on an incorrect basis that respondents agreement of 30th September, 2014 being valuation date was unconditional. According to him sale of shares was to be concluded by 31st December, 2014 and the tribunal while passing the final award on 11th April, 2017 adopted the valuation in the report made by Deloitte on 25th November, 2015. It ignored the fact that the respondents had agreed to valuation date as 30th September,

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

2014 only on the basis that transaction would be complete by 31st December, 2014 of the same year and the Tribunals approach in attributing delay to the respondents were canvassed by Mr.Seervai as evidence of bias and arbitrariness.

35. According to Mr.Seervai the respondents actions did not delay the submission of the valuation report since the respondents had even earlier objected to and complained against Deloitte being appointed as valuer and thus had not participated in the valuation process. Mr. Seervai further submitted that the complaint against Deloitte carrying out the valuation exercise could not prevent them from undertaking the valuation and the tribunal was wrong in accepting the petitioners contention that Deloitte took 10 months to produce the report on account of filing of the complaint and consequent delay. It is submitted that the petitioner on the other hand had contributed to the delay in culminating of the sale since it received the Deloitte Report in November, 2015 yet did not apply for a final award till July, 2016. The valuation by Deloitte allegedly resulted in a severe under valuation of the respondents shares by applying valuation as of 30th September, 2014. The tribunal conducted the valuation contrary to one proposed by both parties. The date should have been closest to the date of sale and the tribunal acted in contravention to the principles of natural justice. Therefore according

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

to Mr. Seervai the award was bad.

36. Mr. Seervai then submitted that the tribunal had adopted an approach that was different from the stand of both parties. It failed to consider the fact that respondents had challenged the Deloitte Report for not considering the value of the Ravin's 49% shareholding in Power Plus Company LLC. Furthermore, it was the petitioners case that share holding in Power Plus did not significantly affect the valuation of the company and Ravin had no details of Power Plus which would enable it to assess the value. Incidentally Power Plus had not distributed dividends to Ravin. However the tribunal calculated the fair value of Power Plus separately and in its assessment of Fair Market Value of the Company the method used was inconsistent with what was provided in clause 17 of the JVA. The tribunal had adopted a different procedure thereby displaying a non judicious and arbitrary approach. According to Mr. Seervai not having been provided any opportunity to make submissions on the tribunal's approach while taking a view not covered by either party, the award was unenforceable being contrary to the principles of natural justice and in contravention to the fundamental policy of Indian Law in terms of section 48(2)(b)(ii).

37. Mr. Seervai's next ground of opposition pertains to the trade mark and

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

license agreement. According to Mr. Seervai the petitioner surreptitiously attempted to register the Ravin trade mark in breach of clause 20.1.2 of the JVA that required parties to co-operate and act in good faith. The tribunal according to Mr. Seervai had incorrectly concluded that registration of the Ravin trade mark fell outside the scope of the arbitration clause. That the respondents were in breach of good faith obligation under clause 20.1.2 and it was not a dispute concerning the right to register the trade mark. The awards were thus unenforceable.

38. The last ground of challenge was based on allegation of bias. It is submitted that the outcome of the Second PFA was announced prior to the award being communicated. Reference was made to the communication put out by Gilbert Tweed in relation to the likelihood of personnel being recruited. The petitioners had also thought it fit to terminate the arrangements with Gilbert Tweed. This conduct it is submitted was clearly indicative of the fact that the petitioners had caused Gilbert Tweed to publish the report. It was contended that the tribunal surprisingly did not seek any further investigation but only accepted an apology from the petitioners counsel. Mr. Seervai submitted that the petitioner clearly had prior knowledge of the outcome of the proceeding and therefore it reflected on the sanctity of the proceeding and clearly demonstrated lack of impartiality. On this basis Mr. Seervai submitted that the

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

petitioner had not provided any explanation as to how one party had come to know of the outcome of the proceeding and the arbitrators rejection of the issue without considering the petitioners case was clearly unwarranted inasmuch as Gilbert Tweed would not have in the normal course come to know of the same unless they were informed of the likely outcome. There was no inquiry made into how the information pertaining to the Second PFA was made available to Gilbert Tweed and merely accepting the apology was not sufficient and it pointed out to the tribunals complicity in the matter. It was then submitted that the consequences of this episode strikes at the very root of the independence of the tribunal which was doubtful.

39. Continuing to support of the allegation of bias Mr. Seervai submitted that the respondents had made an application for recusal which application was not accepted. On 23rd June, 2014 the respondents alleged bias and unfairness in the conduct of proceedings which request was rejected. A further application was filed under the rules of the London Exchange in their LCIA Rules for the revocation of the appointment of the arbitrator on the ground of lack of impartiality and alleged justifiable doubts of its independence. That the LCIA Court summarily dismissed the application without addressing the merits and since impartiality and independence of the tribunal was fundamental the existence of bias renders the proceedings bad and rendered the award

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

unenforceable.

40. Mr. Seervai concluded by submitting that the tribunal was biased and had conducted proceeding in violation of principles of natural justice, rendered perverse finding on the aspects of non production of relevant documents by the petitioner ignoring all critical evidence and concluded that ACPL is not a competing entity. Perversity was more evident from the fact that the respondents had given up their interest in Vijay Industrial Electricals in order to comply with clause 21.1 yet the acquisition of ACPL was ignored. Mr. Seervai laid much stress on the interpretation of clause 21.1. For ease of reference clause 21.1 as contained in the JVA is reproduced below

> *"The Parties agree that neither Prysmian nor Mr. Karia, whether directly or through their Affiliates, shall invest, acquire or participate in the Cables Business in India, save and except through the Company in accordance with this agreement"*

Mr.Seervai relied upon the effect of the definition cable business as provided in schedule XXVI of the JVA and submitted that the tribunal had omitted the words "or participate", "sale", "distribution" and "import" while considering the definition of cable business. At the same time it read into clause 21.1 the words *"or enter into such other long term engagement, arrangement or commitment involving either an injection or exchange of capital or know how on the part of the investor"* even when these words were not part of clause 21.1 but were

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

used in order to reach the conclusion that the tribunal did in the First partial award. By deleting the word "Participate", "Sale", "import" and "distribution" from the definition of cable business, the scope of the expression cable business was altered favourably to the petitioners and by doing so the intention behind clause 21.1 was misinterpreted. He submitted that the tribunal could not have done so.

Mr. Seervai relied upon the following judgements

1. *PT First Media TBK vs. Astro Nausantara International B V.*[1]
2. *Dallah Real Estate and Tourism Holding Company vs. The Ministry of Religious Affairs, Govt. of Pakistan.*[2].
3. *Westlaw India Gbangbola vs. Smit and Sherrif*[3]
4. *Malicorp Ltd. vs. Government of Arab Republic of Egypt.*[4]
5. *Annie Fox and Ors. & Philip Fisher and Anr. vs. Wellfair Limited.*[5]
6. *Front Row Investment Holdings (Singapore) vs. Daimler South East Asia Pre.*[6]
7. *Vikram Greentech India Limited vs. New India Assurance Company Ltd.*[7]
8. *National Highways Authority of India vs. Som Datt Builders* [8]*NCC-NEC (JV)*
9. *Oil and Natural Gas Corporation Ltd. vs. Western Geco International Limited.*[9]
10. *Associate Builders vs. Delhi Development Authority*[10]

---

1 (2014) 1 SLR 372
2 (2010) 2 WLR 805
3 (1999) 1 T.C.L.R. 136
4 [2015]EWHC 361 (Comm)
5 1981 WL 186914
6 [2010] SGHC 80
7 (2009) 5 SCC 599
8 FAO(OS) no.427 of 2007 Del HC
9 (2014) 9 SCC 263
10 (2015) 3 SCC 49

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

MR. CHINOY's SUBMISSIONS

41. On behalf of the respondent nos.3, 4, 10 to 18, 46 to 48 and 77, Mr. Chinoy submitted that award in so far as it grants to the petitioners specific performance under the JVA and directs the respondents to sell and transfer shares in violation of basic fundamental principles of Indian Law governing specific performance of contracts. It is ex-facie arbitrary, perverse and discloses a non-judicious approach. The claimants had at no time averred that they were and at all times they were ready and willing to perform their obligation under the Contract, an express requirement of section 16(c) of the Specific Relief Act which was applicable. Such an averment was a mandatory condition for seeking specific performance. It is thus submitted that claimants could not claim specific performance since the tribunal found that they had committed breach of clause 21 of the JVA by acquiring a majority stake in ACPL through their holding company acquiring DRAKA which held a majority stake in ACPL. This rendered the award contrary to the fundamental policy of Indian Law. Accordingly a party which committed breach of the contract could not claim a decree or award for specific performance. This aspect of Indian Law was raised by the parties. The Second PFA however fails to consider these submissions and directs specific performance.

42. According to Mr. Chinoy the award was contrary to the fundamental

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

policy of Indian law as dealt with in ***ONGC Ltd. vs. Saw Pipes Ltd [(2003) 5 SCC 705.]*** He submitted that the award is ex-facie arbitrary and perverse. It was then submitted that the claimants had sought an order pursuant to clause 23 of the JVA requiring the respondents to sell their shares and the petitioners had specifically stated that a remedy will be in the nature of an order of specific performance. However in actual terms the respondents in their closing submissions dated 19th July, 2013 pointed out that the claimants were not entitled to get specific performance inasmuch as they failed to aver that they were ready and willing to perform their obligation an express requirement under section 16(c). In view there of claimants were debarred and dis-entitled in getting award in terms of clause 23 of the JVA having committed breach of material provision contained in clause 21 having acquired majority stake in ASCPL through DRAKA.

43. Mr. Chinoy made further reference to the fact that the arbitrator had held that the claimants had committed a breach of the JVA by having acquired a majority stake in ACPL but found that breach was not a material breach sufficient to constitute to event of default. That under the First PFA the arbitrator had held that on proper construction of clause 21 the acquisition by the petitioners principals of DRAKA which in turn held 60% of ACPL indicated that it was "capable of amounting to an acquisition of cable business in India".

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

In the Second PFA dated 19th December, 2013 the arbitrator held that the breach of clause 21 is not material breach. Although respondents had urged that the breach of clause 21 would go to the root of the JVA and was also in breach of clause 8.2.2(i) of the JVA and Article 318 of the Articles of Association, the tribunal held that it would focus on the materiality of the breach rather than materiality of the obligation, although there might be some overlap. Tribunal held that although in the First PFA it had held in favour of the respondents that acquisition of majority interest in ACPL was contemplated under clause 23, the question whether breach was material one was left open and thereafter the tribunal found that the respondents had fallen short in establishing material breach sufficient to amount to an event of default.

44. Mr. Chinoy submitted that the petitioner's contention that the tribunal had not come to a finding that the petitioner was in breach of clause 21 and that the respondents were relying in loose language in the PFA is incorrect was not a valid argument because if there was no finding of breach arrived at, there would have been no reason for the arbitrator to decide whether or not there was a material breach and proceed to a detailed consideration of facts. In the Second PFA Mr. Chinoy submitted, without adverting to issues of non compliance of the requirement of section 16(c) of the Specific Relief Act, the award grants specific performance requiring the respondents to sell their

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

shares at a discount.

45. Mr. Chinoy submitted that the contract was subject to Indian law and the petitioner had obviously claimed specific performance of clause 23. The respondents relied upon non compliance under section 16(c) resulting in petitioners being dis-entitled to claim specific performance. This submission was not dealt with. Not having dealt with this aspect the award is perverse. The arbitrators failure to deal with these issues are contrary to the fundamental policy of Indian law as contemplated in ***ONGC vs. Western Geco [(2014) 9 SCC 263]***. It was submitted that the award is invalid since it directs respondents to transfer their shares @ 10% discount of fair market value. Fair Market Value was to be determined by one of 4 firms. The determination of the fair market value was jointly referred to Deloitte to issue their valuation report but directed respondents to sell at discounted price at 10% discount of the Fair Market Value. That under the Foreign Exchange Management Act and Foreign Exchange Management (Transfer of Securities) regulation and pricing guidelines issued there under share can be transferred to non residents at price not less than Fair Market Value determined by internationally accepted pricing methodology for valuation of shares. That the provision in the JVA for discounted price would be unenforceable as matter of Indian law and this was highlighted by the petitioners before the tribunal. Mr. Chinoy submitted

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

that is the fundamental policy of law that the shares may not be transferred to a non resident at less than Fair Market Value but tribunal did not consider the issue by contending that the respondents had not raised it at the stage of First and Second PFAs. He submitted that the tribunal could not justify transfer of shares contrary to FEMA regulations.

46. In conclusion Mr. Chinoy submitted that the scope of review of grounds of public policy under Section 48 of the Arbitration Act has been dealt with in *ONGC (supra)* and *Associate Builders [(2015) 3 SCC 49].* The term fundamental policy of Indian law has been interpreted as "(1) one requiring a judicial approach (2) compliance with principles of natural justice and (3) application of mind to the facts and wednesbury principles of reasonableness. By virtue of the Amendment Act of 3 of 2016 the expression public policy in section 34 of section 48 was statutorily defined to include fundamental policy of Indian law. He submitted that this Court in ***Integrated Sales Service vs. Arun Dev [(2017) 1 Mh LJ 681]*** has held that interpretation of the expression "Fundamental policy of Indian Law" is part of the statutory provisions itself and the tests laid down in Western Geco and Associate Builders is applied to foreign Awards as well.

47. Mr. Chinoy further canvassed the point that the observations in the

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

ruling in HRD Corporation v/s. GAIL (2018) 12 SCC 471 relied upon by Mr. De Vitre were casual observations and does not result in any overruling. In the HRD Corporation case the scope of section 34 and 48 were not considered. The judgment dealt only with section 12. Counsel for the petitioner in that case contended that section 12(1) and (5) have to be read in context of the grounds for challenge to awards being narrower that they were under section 34 of the Act. The Supreme Court rejected this contention. It is further submitted that no arguments were advanced or considered by the Supreme Court under section 34 and 48 after 2016 amendment and the observation do not constitute ratio decidendi or obiter dicta. They are casual observations and do not overrule the judgment in Western Geco (supra) of this Court or Supreme Court in Western Geco. Thus according to Mr. Chinoy the expression fundamental policy of Indian Law in section 34 and 48 will have to be given a meaning to it by referring to judgment in ONGC (supra) and Associate Builders(supra). He therefore submitted that the award does not justify the order of enforcement.

Judgments referred by Mr. Chinoy

1. *Balraj Taneja & Anr. vs. Sunil Madan & Anr.*[11]
2. *Integrated Sales Services Ltd., Hong Kong vs. Arun Dev s/o. Govindvishnu Uppadhyaya.*[12]
3. *B. Vijaya Bharathi vs. P. Savitri & Ors.*[13]
4. *Man Kaur (Dead) by Lrs. vs. Hartar Singh Sangha*[14]

11 (1999) 8 SCC 396
12 2016(6) Mh.L.J. 195
13 (2018) 11 SCC 761
14 (2010) 10 SCC 512

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

5. *H. P. Pyarejan vs. Dasappa through his heirs.*[15]
6. *Raj Kishore vs. Prem Singh & Ors.*[16]
7. *National Highways Authority of India vs. Gwalior Jhansi Expressway Ltd.*[17]
8. *Durga Prasad Pradhan vs. Palden Lama & Anr.*[18]
9. *R. N. Philips vs. A. N. Sattnathan.*[19]
10. *Kaikhosroo Phirozshaw Doctor vs. State* [20]

Mr. De Vitre's submissions in rejoinder

48. In rejoinder Mr. Devitre submitted that by the second PFA the respondents were directed to sell their share holding in Ravin at a discount of 10% of the Fair Market Value to be determined by one of the valuers named in clause 17 of the JVA. That the respondents agreed that either of KPMG or Deloitte be selected by drawing of lots. KPMG was selected on 8th May, 2013 and the terms of engagement of the KPMG was also agreed between the parties but the respondents delayed agreeing to KPMG terms and in January 2014 respondents informed the petitioner that they had challenged the tribunal's finding as to valuation date in the second PFA under section 68 of

15 (2006) 2 SCC 496
16 (2011) 1 SCC 657
17 2018 SCC Online SC 688
18 AIR 1981 Sikk 41
19 1955 ILR 318
20 1955 ILR 69

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

the English Arbitration Act. The challenge was not opposed by the petitioner as a result of which it was remanded to the tribunal.

49. Mr. De Vitre submitted the fact that Deloitte had been engaged by Prysmian was in the public domain since 2013 and as admitted by the respondents in their email of 25th July, 2016 which forms part of the rejoinder to the reply filed by Vijay Karia. The respondents even threatened to take action against KPMG if they .corresponded with the petitioner without the respondents participation. It is in these circumstances that the petitioner had requested the tribunal to appoint Deloitte as the valuers. The petitioner also specifically highlighted to the tribunal that valuation date cannot be an unascertained future date and must be a known date prior to valuation exercise. The respondents therefore did not seriously object to the appointment of Deliotte nor did they make any submissions in relation to the valuation date. Deloitte was appointed by Procedural Order no. 12 dated 10th October, 2014 and the respondents had opportunity to participate in the preceding hearing. It is on 14th October, 2014 that the respondents informed the petitioner for the First time claiming that Deloitte was conflicted. This communication was not marked to the tribunal. Vide another email of 17th October, 2014 the objection was reiterated, but yet again, it was not marked to the tribunal. The petitioner's Advocate vide email dated 18th October, 2014 pointed out that respondents

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

had omitted to mention that it was First respondent who proposed Deloitte after they knew that the allegation of conflict was made. Despite all this the respondents ensured that Ravin executed the engagement letter with Deloitte. The respondents repeated the allegation of conflict and filed a complaint against Deloitte. Deloitte sought information to carry out valuation exercise, but the respondents did not provide such information. On 11th May, 2015 the respondents informed the tribunal that they had complained to the Institute of Chartered Accountants of India against Deloitte. On 23rd November, 2015 Deloitte made its valuation report and provided a copy in which it made a reference to the fact that respondents did not provide information.

50. In the meantime the petitioner asked M/s. Kalyaniwalla & Mistry, Chartered Accountants ("K & M") to carry out a valuation. The said firm issued a report dated 4th March, 2016. The K & M Report was attached to the petitioner's application for final award and by email dated 25th July, 2016 respondents accepted the fact that Deloitte's engagement with Prysmian was a matter of public knowledge as far back as 2013 and that the respondents were therefore well aware of this fact.

51. According to Mr. De Vitre, Mr. Karia was not ousted since he continued in management and he relied on submissions on behalf of the respondents counsel that Mr. Karia was a person who wanted to take life a little easier.

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

According to the petitioners the allegation of attempts to oust the respondents was the result of analysing an inter action between Mr. Sarogni and one Mr. Simms about the possibility of realigning of personnel in the management especially considering the fact that Mr. Karia could no longer be involved in day-to-day management.

52. In relation to the respondents case on specific performance he submitted that the respondents had contended that both parties could have been in material breach of the JVA. In the closing submissions the respondents had contested the claimants argument that the party which served a Determination Notice First should be treated as the non defaulting party and that the date of the first breach should be the relevant consideration. The respondents contended that the party who committed the breach first should be considered the defaulting party. The tribunal found that the respondents were in breach and that the claimants were not. As a result it was not necessary to consider the position resulting from both parties being in material breach. The contention that the petitioner cannot be granted specific performance under section 16(c) of the Specific Relief Act since in the absence of a pleading that they were ready and willing to perform was not argued before tribunal. This Mr. DeVitre submitted was evident from the closing submissions exchanged . The Respondents had in fact contended that if the tribunal concludes that both

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

parties had committed breach, specific performance should be granted to the party which committed the later breach.

53. In the circumstances the grant of relief on transfer of shares does not result in breach of section 16(c). Moreover clause 23.4 of the JVA provided for consequences if the material breach as specified in the Determination Notice if it is not cured within the specified period and the tribunal had only enforced the term of the JVA. Mr. De Vitre further submitted that there was no specific form in which such averment as to readiness and willingness had to be made and in the present case the test was satisfied considering the Determination Notice and the findings in the Award. It is further contended that the petitioner's Determination Notice and Statement of Claims sets out its right to take over management of the affairs of the company under the JVA. The petitioner had denied the respondents allegations of breaches and all the averments and materials on record established the petitioners performance and its readiness and willingness to perform the JVA. In any event he submitted that there is no breach of any policy of law and that the allegation that a foreign award is in breach of statutory provision may be based on equitable principles and not good ground to oppose enforcement.

54. In view of Mr. Chinoy's submission on violation of FEMA and the RBI

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

pricing guidelines, it was pointed out that the respondents had raised the issue in their reply dated 30th December, 2016. By contending that in RBI guidelines sale of shares can only be at fair market value and cannot be discounted as otherwise it would be in contravention of Indian law but they did not produce either FEMA regulations or personal guidelines or any other circular and accordingly the contention was rejected. He submitted that under pricing guidelines the price of transfer of shares from resident to non resident was to be not less than fair market value. There is no bar against the price being higher than valuation as determined under FEMA. That the Deloitte valuation was Rs. 71 per share and applying 10% discount Rs. 61.93 ps. per share and the valuation is contractually binding. Valuation by Deloitte is not certified for the purposes of FEMA and that the petitioner had produced a valuation from M/s. Kalyaniwalla & Mistry which certified the fair market value for the purposes of FEMA that valuation was 16.38. The K & M report was part of the petitioner applications for final award and respondents did not deal with it at all. They ignored the K & M report of the petitioners and highlighted the fact that respondents had not dealt with K & M report. They ignored the fact that although the FEMA valuation is much lower then the Deloitte valuation the claimant is committed to purchase shares as contractually agreed. The discounted price of 63.93 was worked out in accordance with the contract and is not less than FEMA fair valuation of 16.38. The objections on

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

this ground are therefore misconceived.

55. Mr. De Vitre further submitted that the FEMA presents a shift from the provision of earlier FERA and established a more lenient environment and does not render transactions void for violation. In the light of the respondents contention that the tribunal took into consideration the K & M Report which was not contractually provided for. Mr. Devitre submitted that no such case was urged before the tribunal and the final award mentioned that the K & M Report was not dealt with by the respondents in their submissions. He submitted that Shri Lal Mahal (supra) has laid down the principles underlying section 48 which entail that an inquiry under section 48 does not permit review of the foreign award on merits.

56. Although the defendants contend that tribunal ought not to have relied upon K & M Report there is no substance in this contention as the K & M Report and the BDO Report stand on a different footing. The K & M Report was for the purpose of establishing regulatory compliance and not to impugn the Deloitte valuation. The K & M Report was based on the very information forming the basis of the Deloitte report, whereas the BDO Report considers a different date of valuation and different methodology of valuation and not in compliance with Procedural Order No. 12. The tribunal however dealt with the BDO report and in any event Shri Lal Mahal (supra) holds that award

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

would not be rendered unenforceable if the tribunal considered a non-contractual report while rejecting a contractual one. Apropos the various legal pronouncements it was submitted that the 2015 amendment to the Arbitration and Conciliation Act grants for opposing enforcement of foreign award only include public policy restricted to fundamental policy of Indian Law is contemplated in Renusagar (supra) and Shri Lal Mahal (supra). Justice and morality as contemplated in Associate Builders (supra) and if the award is affected by fraud or corruption or violation of section 75 and 85 of the law as laid down in Renusagar and Shri Lal Mahal apply and the scope for resisting enforcement is extremely limited. It was further submitted that the wider grounds of challenge in ONGC (supra) and Associate Builders save and except paragraph 36 thereof have been done away with and are not applicable to enforcement proceedings contemplated under section 48. That the 2015 amendment act has brought section 48 in line with *Shri Lal Mahal* and this was as a result of the 246th Law Commission Report.

57. Mr. De Vitre submitted that reference to these judgments were felt necessary since section 12 and the schedule ought not to be construed widely using a more narrow approach in respect of grounds under section 34 and 48. Specific reference was made by Mr. Devitre to the observation of the Supreme Court in ***Kaikhosroo Phirozshaw Doctor vs. State [(1955) ILR Bom 69]*** to

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

state that the opinion of the Supreme Court even on a point which does not strictly arise must be accepted by the High Court as laying down a statement of law. More recently Supreme Court reaffirmed in ***HRD Corporation*** in the matter of ***Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd [AIR 2018 SC 1549]*** observing that it was in consonance with the objects of the Act to avoid increased interference by Courts. A contrary view would mean that 2015 amendment is not to be given effect to. Integrated Sales Services (supra) also follows Shri Lal Mahal (supra). Moreover it notes that the 2015 amendment Explanation 2 prohibits the review on merits of the dispute while considering a challenge to the enforcement on the ground that it is in contravention with the fundamental policy of Indian law. Renusagar (supra) lays down the following tests; (a) A Foreign award cannot be resisted on the basis of a challenge on merit. New York Convention tilts towards pre enforcement grounds. (b) Article V of the New York Convention does not include mistake of fact or law by the arbitrator is ground for refusing enforcement. (c) The New York Convention does not permit a review on merits. The award cannot be impeached on merits. (d) Objections to enforcement are limited in its scope and lastly (e) Contravention to some local law will not attract the public policy concept. In other words something more than violation of the Indian law is required.

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

58. Mr. De Vitre submitted that the principles in Renusagar (supra) have been followed in Shri Lal Mahal (supra) and applied to enforcement of foreign Awards. There is a very limited scope to resist enforcement. He then submitted that Shri Lal Mahal (supra) examined the effect of the meaning of the expression "merits of the award" to hold that section 48 does not facilitate a Second look at the foreign award at the stage on enforcement or its review on merits. Nor does it permit considering of acceptance or rejection of evidence by the tribunal. In view thereof he submitted that reliance on a report which was not provided for in contract or rejection of a report of a contractual agency cannot come in the way of enforcement of an award and the Court in any event does not exercise Appellate jurisdiction over foreign award nor it will enquire whether an error has been committed in rendering the award.

59. In ***M/s. Louis Dreyfus Commodities Suisse S. A. vs. Sakuma Exports Ltd [(2015) SCC Online Bom 5006]*** the Court held that even in case where the tribunal considered the documents along with written arguments without giving an opportunity to the respondents to deal with it could not be a ground to refuse enforcement. . A submission that the tribunal did not consider an Expert's report was one that touched the merits of the claim and could not be used for resisting a foreign award. The Court enforcing an award cannot review the award on merits even for considering an objection on the ground of

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

violation of fundamental policy and conflict with basic notions of justice. Challenge to awards under section 34 on the ground of 'patent illegality' as contemplated in Saw Pipes, Western Geco and Associated Builders(supra) now stand negated and can only be a ground of challenge under section 34 for domestic awards and not while considering section 48 for enforcement. The ground of patent illegality contemplated a domestic award and cannot apply to foreign awards. That the observation of the Delhi High Court in NHAI (supra) relied upon by respondents was based on Saw Pipes (supra) and dealt with domestic awards. In conclusion it is submitted that the reading of the 2015 amendment as clarified by the 246th Law Commission Report and the Supplementary Law Commission Report there can be no review on the merits of public policy and also on the ground of justice or morality since otherwise it would result in avoiding the effect of 2015 amendment. No finding of fact can be reversed on the basis that an arbitral tribunal did not consider certain evidence and/or if it had considered such evidence or argument the conclusion may be different.

Mr. De Vitre relied upon the following judgments

1. *Shri Lal Mahal Limited vs. Progetto Grano SPA*[21]
2. *M/s. Louis Dreyfus Commodities Suisse S. A. vs. Sakuma Exports Ltd.*[22]
3. *Sideralba S.P.A. vs. Shree Precoated Steels Ltd.*[23]
4. *Richmond Mercantile Limited FZC vs. Vinergy International Pvt.Ltd.*[24]

21 (2014) 2 SCC 433
22 (2015) SCC Online Bom 5006
23 (2015) SCC Online Bom 5056
24 (2016) SCC Online Bom 4559

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

5. *HRD Corporation (Marcus Oil and Chemical) vs. Gail (I) Ltd.*[25]
6. *Board of Control for Cricket in India (BCCI) vs. Kochi Cricket Pvt. Ltd. and others*[26]
7. *Renusagar Power Co. Ltd. vs. General Electric Co.*[27]
8. *ARK Shipping Co. Ltd. vs. CRT Ship Management Pvt. Ltd.*[28]
9. *POL India Project Ltd. vs. Aurelia Reederei Eugen Friederich GmbH.*[29]

60. I have heard the submissions of all learned Senior Counsel at length who have taken me through the relevant provisions of the JVA, the Awards and case law cited. The case of the respondents in a nutshell is that the awards are not enforceable under the Act because the respondents were deprived of an opportunity to present their case and because the awards are contrary to public policy. The respondents have contended that the scope for resisting enforcement pursuant to 2015 Amendment Arbitration Act are similar to the ground available under Section 34 for challenging an award, that except for the ground of patent illegality under Section 34(2)(a) which is available for challenging awards other than awards passed in international Commercial Arbitrations under Part I. The grounds for challenge under Section 34 and for the Court to decline enforcement under Section 48 are identical and that the expression public policy of India has now been defined with the intention of restricting the scope of public policy under Section 34 and 48 and in a sense

25 (2018) 12 SCC 471
26 (2018) 6 SCC 287
27 (1994) Supp 10 SCC 644
28 (2007) SCC Online Bom 663
29 ARBP/76/2012 WITH ARBP/12/2012 (BHC)

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

bring the definition in line with the Supreme Court's decision in Renusagar (supra). The respondents have contended that the amendment has erased the distinction created by Shri Lal Mahal which had narrowed down the scope of public policy than under Section 34. According to the respondents, the scope of public policy under Section 34 (2b)(ii) and 48 (2b)(ii) are the same. The respondents have contended that the decisions in Shri Lal Mahal, M/s. Louis Dreyfus, Richmond Mercantile and Sideralba S.P.A. (supra) are not relevant since they would operate in circumstances prevailing prior to the amendment of the Arbitration Act. The respondents contend that the award is violative of the fundamental policy of Indian law because the petitioner were granted specific performance despite failure to make averments of readiness and willingness which was mandatory. Besides the enforcement of the Award to the extent it contemplated sale of shares is in violation of the Foreign Exchange Management Act. The respondents have also contended that merely because they have not challenged the awards in the seat of the Arbitration does not restrict their rights to resist enforcement that they had the option of either challenging the awards at the seat or to resistant enforcement.

61. Mr. Seervai reiterated that the definitions of public policy and fundamental policy of Indian Law would apply with equal force to objections against enforcement of a foreign award. He relied upon paragraph 35, 38 and

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

39 of the decision of the Supreme Court in Western Geco (supra) which emphasizes that there must be fidelity of judicial approach and one which cannot be arbitrary, capricious or whimsical manner. A judicial approach ensures that the authorities act bonafide and deals with the subject in a fair, reasonable and objective manner and that the decision is not actuated by any extraneous considerations. A judicial approach would act as a check against flaws and faults that can render the decisions of a Court vulnerable. The fundamental policy of Indian law is a principle that Courts and quasi judicial authorities must decide in accordance with principles of natural justice and apart from ensuring compliance with the *audi alteram partem* rule one of the facets of the principles of natural justice is that the Court or authority deciding matters must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. A decision can be said to be perverse if no reasonable person would have arrived at the same. According to the respondents, in Associate Builders (supra) the Supreme Court dealt with what is judicial approach meant viz. a decision in order to be fair must be reasonable and objective. The principles of *audi alteram partem* must be observed and if a finding is based on no evidence or if irrelevant considerations are taken into account or if the decision ignores vital elements, such a decision would be perverse and contrary to the fundamental policy of Indian Law.

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

62. When queried whether or not the challenge in this matter requires me to consider the merits of the rival claims, Mr. Seervai submitted that the respondents were assailing the process which demonstrates that the tribunal did not act judicially, that the decisions were not fair or reasonable, the principle of *audi alteram partem* was not observed and that the decision was perverse and irrational such that no reasonable person could have arrived at the same. The findings were not based on evidence but on irrelevant considerations ignoring vital evidence and therefore should shock the conscience of the Court. Mr. Seervai fairly conceded that he was conscious of the fact that an award cannot be reviewed on merits, however, in the instant case the respondents by identifying conclusions arrived at by over looking the material evidence or arriving at a conclusion inconsistent with material evidence and identifying claims that were not decided on entirely or misconstruing claims or identifying claims that were entirely misconstrued by the tribunal, the respondents are not engaging in a review on merits. The awards in the opinion of Mr. Seervai do not comply with the requirements of natural justice.

63. On the aspect of valuation and inclusion of Power Plus for both the parties had agreed in principle that the value of power plus may be included or accounted for in the valuation but the tribunal disregarded the submissions of

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

the parties in its final award and took a different view. Mr.Seervai submitted that if an arbitrator does not express his disagreement with the party's witness or expert, it results in violation of principles of natural justice. He relied upon Annie Fox & Ors. (supra) and in this respect he submitted that in the instant case the tribunal did not record any disagreement with experts of parties. The testimony of the parties' experts in this regard constituted critical evidence and that the arbitrator's failure to express disagreement with the parties' experts deprived the parties of an opportunity to present their case and renders the awards unenforceable as being contrary to the fundamental policy of Indian Law and basic notions of justice.

64. Mr. Seervai submitted that the arbitrator's failure to consider material evidence is also violative of principles of natural justice and that this principle was enunciated in the case of ***Front Row Investment Holdings (Singapore) Pte. Ltd. (supra)*** wherein the challenge was on the basis that the arbitrator had while adjudicating the counter claim, incorrectly found that a party was asserting inducement on the basis of a single misrepresentation and while setting aside the award dealing with the counter claim. The Court held that failure to allow a party to address the tribunal on a key issue is a corollary to allowing the submission and ignoring it altogether whether deliberately or otherwise and in both these cases, the mischief results from a party denied an

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

opportunity to present its case to a judicial mind.

65. Furthermore, relying upon the Australian case of ***Timwin Construction v/s. Facade Innovations (2205) NSWSC 548,*** Mr. Seervai had submitted that there will be a breach of natural justice when the arbitrator disregards the submissions made by a party during the hearing and does not try to understand them or fails to deal with the matter in dispute. In the present case the arbitrator failed to consider the respondents submissions on Jaguar, the attempts to oust Mr. Vijay Karia, submissions in relation to breach of clauses 8 and 20 of the JVA as a result of the petitioner conducting direct sales in India and in the light of overwhelming evidence.

66. As regards clause 21 the respondents had submitted that the contract ought not to be rewritten under the guise of interpretation as laid down by the Supreme Court in ***Vikram India Greentech & Anr. V/s. New India Assurance Company Limited (2009) 5 SCC 559*** in which the Supreme Court observed that the endeavour must be interpret the words in a contract which is expressed by the parties and while construing the terms of a policy one is not expected to venture into extra liberalism that may result in rewriting a contract or substituting the terms. So also in the case of ***National Highways Authority of India v/s. Som Datt Builders, FAO (OS) no.427 of 2007***, the

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Delhi High Court observed that it was incumbent on the tribunal to interpret the contractual terms and such interpretation should be a plausible one. The Court would not interfere with the award merely because another interpretation is preferable. However, if the interpretation adopted by the tribunal is so unreasonable that no reasonable person would adopt it or so unfair so as to shock the conscience of the Court, it is an illegality which goes to the root of the matter and not a trivial one.

67. Having considered the approach of the tribunal, I do not see any sign of unreasonableness in the interpretation of the provisions by the tribunal. It is also not possible to ascertain whether the tribunal has ignored evidence. In my view the process adopted by the tribunal is transparent and across the three PFAs and the final award. Different views may have been possible, but merely because the tribunal adopted an unfavourable one, the award cannot be rendered unenforceable. Dealing with the respondents contention that merely because the respondents had not challenged the award at the seat of the arbitration did not prevent challenge resistance to enforcement, I have no hesitation in agreeing with that line of reasoning. Chapter I of Part II which deals with New York Convention Awards does not differentiate between enforcement of awards that have been unsuccessfully challenged at the seat or those which being not except for Section 48(1)(e) and Section 48(3).

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

68. In ARK Shipping Co. (supra) the award was made in Singapore and enforcement was objected to on the basis that there was no valid contract between the parties and that there was no arbitration agreement. The seat of arbitration was Singapore and the proper law of contract was English Law. Further this Court in ARK Shipping (supra) held that there is nothing in the Arbitration Act which gives the power to the Indian Courts to set aside the foreign arbitral award and/or sit over the decision concluded by the tribunal based on the provisions of the Arbitration Act about the existence of the agreement. The Court also observed that where grounds in relation to the existence of the agreement have been decided by the tribunal and against which no appeal has been preferred, it would not be appropriate to permit challenge to the foreign award under Section 34. He submitted that the emphasis is on the nature of the objection raised since it was a jurisdictional issue over which the Court at the seat in arbitration had jurisdiction. The High Court's observation on the failure to challenge the award at the seat was limited to a challenge as to the existence of a contract or existence of an agreement to arbitration.

69. In POL India Projects Limited (supra), the composition of the tribunal not being in accordance with agreement was raised at the time of enforcement of the award. Once again these issues are jurisdictional in nature and law at

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

the seat of the arbitration was applicable. The Court observed that the findings and conclusions of the tribunal as to the existence of an arbitration agreement and that the composition was in accordance with the agreement. The petitioners could not be permitted to move such a challenge after having omitted to challenge the same under section 73 of the English Arbitration Act. Section 48(1) of the Arbitration and Conciliation Act states that the parties are required to furnish proof to the Court that the parties to the agreement referred to Section 44 were, under the law applicable to them, under some incapacity or that the agreement was not valid under the applicable law and failing such an indication under the law of the country where the award was made. Secondly, proof that the composition of the arbitral tribunal or procedure adopted was not in accordance with the agreement between the parties, failing such agreement, in accordance with law of country where the arbitration took place.

70. Mr.Seervai had relied upon the Singapore Court of Appeals' observation that preventing the party from resisting enforcement without challenging the award at the seat of the arbitration unduly restricted the freedom of a party to decide on how it should object with the award and the party should be free to avail alternate systems of defence which was recognised in the New York Convention as part of model law that ***PT First Media (supra)*** follows the decision of the Supreme Court of United Kingdom in ***Dallah Real***

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Estate (supra) in which case the appellant sought enforcement of a final award made by the tribunal in Paris against the Government of Pakistan. It was held that neither the New York Convention nor the English Arbitration Act suggests that a person resisting recognition or enforcement in one country had any obligation to seek to set aside the award in the other country where it was made.

71. I have no doubt that failure to challenge the award in the seat of Arbitration would in any manner impact the right of a party to resist enforcement in this country and in this respect I am in agreement with the views expressed in ***Dallah Real Estate (supra)*** and ***PT First Media***. The Arbitration & Conciliation Act, 1996 in its current avatar also does not support the view that resisting enforcement would be subject to a prior challenge at the seat of arbitration. It does not support the view that absent a challenge in the seat of the Arbitration, a party could not resist enforcement of the award in a different jurisdiction. If that were to be so the legislature would have provided for appropriate pre-conditions to resist enforcement of foreign award and justifiably so because if an award were to be set aside in the seat, there may be no occasion to resist enforcement. On the other hand if a challenge at the seat is repelled, a losing party could still resist enforcement on available grounds. Assuming for the sake of argument that a foreign award was not challenged in

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

the seat of arbitration, nothing prevents the respondents from resisting enforcement. It is akin to judgment debtor resisting execution on just and valid grounds. Merely because the decree has not being challenged does not render resistance to its execution under legitimate legal grounds invalid. This excluded cases where a challenge in the seat was necessary such as in Ark Shipping and Pol India (Supra) but otherwise a party cannot be prevented from attempting to resist enforcement of a foreign award.

72. The 2015 amendments to Section 34 and 48 of the Act were on the basis of the Supplementary Report no.246 of the Law Commission of India and sought to prevent review on merits as done in the case of Western Geco (supra). The Court revisited the findings in the arbitration and reviewed those findings to ascertain whether they were sustainable in the light of the evidence on record. In Western Geco (supra) the challenge was not as much as of the procedure adopted by the tribunal but that on the basis of the record, the tribunal ought to have arrived at a different conclusion. This approach in Western Geco (supra) amounted to a review on merits. The Supplementary Report refers to the wider interpretation of the term "public policy" by including the Wednesbury principle of reasonableness within the expression "fundamental policy of Indian Law" alluding to the possibility of a review on merits. It is such a review on merits that the legislature sought to do away with

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

by introducing Explanation 2 to Section 34(2) and 48(2). As far as the petitioners arguments that the respondents case seeks review on merits is concerned, I agree with Mr. Seervai that it does not mean that no reference can be made to facts or documents as forming part of the record. Limited references may be justified in a given case but not a sub-cutaneous examination of the merits. Indeed I must observe that all counsel have exercised restraint in making reference to the consideration of the merits of the case by the tribunal but in my view consideration of the grounds raised by the respondents will involve detailed appreciation of evidence and its treatment by the tribunal which in my view is not permissible.

73. The other ground of challenge is that the award should shock the conscious of the Court is sought to be invoked is on the basis of the arbitrator's ruling in respect of direct sales. The tribunal in its First and Second award had rejected the respondents counter claim allegedly on a incorrect reading of clause 21.1. Although reliance was placed on ***Vikram India (supra)*** of the Supreme Court and the decision in ***Som Datt Builders(supra***), I am not able to accept the respondents contention that the interpretation of Rule 21(1) was perverse and unreasonable. Perusal of the award reveals that the arbitrator has dealt with the interpretation of clause 21.1 extensively and threadbare with reasons including those given from paragraph 72 to 115 in the Partial Final

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Award which dealing with the tribunal's view on the construction of clause 21.

74. In my view, in order to succeed on the ground of being deprived of an opportunity of being heard, one has to establish that the tribunal did not offer an aggrieved party an opportunity of presenting their case. In the facts of the case at hand, it is obvious that ACPL declined to submit the documents on the ground of confidentiality. It is another matter that the petitioners apparently had control over ACPL and could have had a say in the response of ACPL especially since it was open for the petitioners to collect the information from ACPL which it had declined to do. Had it been the petitioners case it had no control over ACPL, there was no question of obtaining the response. In my view, the tribunal was not wrong in concluding that it had no power to direct ACPL to provide documents. It was always open for the respondents to approach the Courts in the appropriate jurisdiction to seek an order of disclosure or could have applied for summoning ACPL to elicit information. However, that not having been done, it is not open to the respondents to now contend that they were denied an opportunity of presenting their case and that failure of the petitioners in procuring the information that they sought from ACPL would amount to violation of principles of natural justice.

75. The tribunal was the sole judge of the quantity and quality of evidence

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

and there can be no re-appreciation of evidence by this court. The petitioner had also contended that the question as to whether there was a material breach was considered by assessing whether there was any evidence of serious actual loss or actual adverse impact on Ravin due to acquisition of ACPL and that the tribunal had noted that ACPL could be in competition with Ravin but there was no evidence that Ravin actually lost business to ACPL and that even the commonality of clients lists was not evidence of there having been any diversion or business or targeting of Ravin's business.

76. In relation to the contention that the petitioner has been attempting to oust the respondents from Ravin and the respondent had made a similar counter claim in this respect. However, the tribunal did not consider the evidence in support of the counter claim including admission in evidence and cross examination by the petitioners witness. The respondents had attempted to demonstrate how the petitioner was conniving to wrest power from the respondent no. 1 during the integration period and in breach of the JVA. Mr Seervai submitted that the tribunal's failure to rule on the counter claim is opposed public policy and is a fundamental flaw and against the notions of justice. As against this, it is the petitioners case that such alleged breach was never pleaded. The Determination Notice of 26th March 2012 and the counter claim dated 9th September, 2012 did not allege ouster of the respondents, since

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Mr. Vijay Karia continued to be in management throughout the period of integration. Considering the nature of the business of the petitioners and its parent company it is but obvious that scale of operations were considerably large and it is one of the fundamental reasons why they proposed the expansion by acquiring to the JVA with the intention of gaining control over Ravin. This is evident from the fact that the petitioner had admittedly paid a "control premium" to Ravin.

77. As regards the allegation that the counter claims were not considered, the tribunal was the final arbiter of the merits. Allegations of concealed breach and the allegations that the tribunal did not mean any determination in relation to the respondents counter claim alleging attempts at ousting the respondent no.1 also have been dealt with by the tribunal. As already stated, there is nothing in my view that obliged the tribunal to place before the parties of the view that it intended to take and I am unable to find any support from the submissions canvassed at the bar alluding to appointment of a conflicted party as a valuer to the extent the challenge concerned alleged inconsistencies in the first and second PFA's. There is no merit in the contention that the tribunal shifted the goal post between the first and second PFA. The alleged inconsistencies only indicate that the Arbitral tribunal was actively considering all contentions on both sides. As far as the documents are concerned, I have

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

already opined that the respondents could not rely upon third party disclosures or lack of it to prove their case. I also do not find substance in the contention that critical evidence has been ignored. That aspect was entirely in the domain of the tribunal and if this Court is to enter upon a scrutiny of the awards to ascertain whether any evidence, critical or otherwise was ignored, it would entail a substantial review of the merits of the case. There can be no doubting the fact that appreciation of evidence was exclusively within the jurisdiction of the tribunal and is not open to scrutiny in these proceedings. I am therefore unable to find merit in the contention that the tribunal did not consider the counter claim or rule on it.

78. Mr. De Vitre had contended that the respondents had therefore not considered the Jaguar effect to be critical in any manner. The respondents did not argue the Jaguar issue which was not even pleaded and only their post hearing closing submissions filed in August 2013 that the respondents dealt with the "Jaguar effect". The petitioners have also refuted the contention that the "Jaguar effect" came to light only during cross examination of the petitioners' witnesses. Besides Jaguar had no business and was set up solely for purchasing office space in Mumbai. Although Mr. Seervai placed on the objects clause in the Memorandum and Articles of Association of Jaguar, in my view the objects clauses are usually varied and numerous and that by itself would

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

not be indicative of the nature of the business that the company would carry on and in that light of the matter I am of the view that the arbitral tribunal was the best judge in this context. I am unable to find that the manner in which the tribunal has dealt with incorporation of Jaguar will not justify my arriving at a conclusion that the award is unenforceable.

79. The petitioner contended that allegations of bias are made by way of an after thought and Second PFA was not revealed prior to its publication. It was submitted that there was no suggestion at any time that the recruitment notice issued by Gilbert Tweed was merely in the regular course to identify potential candidates who could be recruited for Ravin and not otherwise. It was further contended that the reaction of the respondent to the recruitment notice published by Gilbert Tweed was material inasmuch as the respondents merely alleged breach of confidentiality and nothing more and it was not suggested at the material time, that the result of the arbitration was known in advance to other parties including Gilbert Tweed and Associates. The allegation of bias was made for the first time only after the Second PFA and not before. In October 2013 when the respondents did raise the issue about statement made by Gilbert Tweed, it was only on the basis of breach and confidentiality and not of bias. The respondents after alleging bias and filing of application for revocation, changed their Advocates but continued to participate in the arbitration. They

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

sought time from the tribunal on account of change of Advocates, but refused to co-operate with Deloitte and did not furnish them the information sought. It is pertinent to mention here that the law of arbitration in the instant case was English law but the respondents made no effort to take its allegations of bias to its logical end under the English Arbitration Act on the other hand after alleging bias they continued to appear in the arbitral proceedings. On 8th July, 2016 the petitioner had filed an application seeking a final award. On 25th July, 2016 they filed application for summary rejection of the application for final award. They also filed reply to an application and the BDO observation report with full knowledge and in the face of the allegation against the tribunal. What is material to note is that even after alleging bias, the respondents continued to participate in the arbitral proceedings and took no objection whatsoever in the conduct of proceedings. Even after the allegation of bias was rejected they continued to participate in the proceeding without reservation, clearly establishing that there was no substance in the allegation of bias. The respondents also filed written submissions and participated in a six hour telephone hearing in June, 2014.

80. One of the challenges is based on the assertion that the tribunal's decision could not be one that was not contemplated by either party since an aggrieved party would be denied of an opportunity of hearing and show cause

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

why the tribunal ought not to take such view. In the facts at hand, it is contended that on the aspect of valuation the tribunal could not have left out the valuation of Power Plus despite both parties agreeing in principle that the value of Power Plus can be counted for in the valuation of the company. The tribunal disagreed and adopted an inconsistent method of valuation when neither party had advanced such a contention. According to the respondents if an Arbitrator does not express disagreement with the parties witness or expert, it would constitute violation of principles of natural justice. In the case at hand the tribunal had not recorded any disagreement with experts who had opined that ACPL and the company were competing, that such evidence of the experts was critical yet an Arbitrator did not express disagreement with the experts and grant an opportunity to deal with the Arbitrator's concerns as to why he would not accept the expert witnesses opinion. The Arbitrator should not surprise a party with his own ideas and if the tribunal tenders an award which has no basis in pleadings or arguments it renders a party unable to canvass its case and therefore is entitled to resist enforcement of an award. According to the respondents had the Arbitrator expressed his views they could have responded and failure to grant an opportunity to deal with the arbitrators views results in the awards being unenforceable and contrary to the public policy of India.

81. I am unable to appreciate the respondents contention that the arbitrator

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

was bound to express his views on expert evidence. It is open for the a tribunal to consider expert evidence without being obliged to express his views on the veracity of such evidence. The arbitrator in the instant case was under no obligation of respond to expert evidence led by the parties. No doubt it was open to the arbitrator to seek clarifications if he felt necessary. The Arbitrator was not bound to do so. More often than not consideration of witness statements, their relevancy, veracity and the impact would be considered not only when the evidence is recorded but that is at a later date prior to making of an award. An arbitrator would garner his thoughts not necessarily on being presented with the evidence but later, having considered the entire gamut of the proceedings.

82. In Gbangbola v/s. Smith and Sherrif, the Technology and Construction Court observed that a tribunal does not act fairly or impartially if does not give a party an opportunity of dealing with arguments which are not been advanced by either party and unless an opportunity is given there is a danger that the final result need not be determined fairly against the party would be ordered to pay the costs. Relying upon this observation, Mr. Seervai had submitted that it was incumbent upon the arbitration tribunal to alert the parties of the view that the tribunal was inclined to take steps especially in relation to the expert evidence given and I do not see how this judgment is of

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

any assistance to the respondents because this is an order of the Technology and Construction Court, a sub-division of the Queen Bench Division of the High Court and largely concerned with complex and technical claims. The relevance of observations in Gbangbola (supra) in the present context cannot be appreciated.

83. In Malicorp Limited (supra), a dispute was subject matter of arbitration between the company and the Government of the Arab Republic of Egypt and two others. The tribunal had awarded damages and this is came as surprise to Egypt. It has challenged to the award. The Queen's Bench Division of the High Court observed that the failure of the tribunal to ensure that Egypt was warned of these matters could constitute a serious breach of natural justice. The High Court found that the breach was too serious and the consequences for Egypt are too grave and therefore declined to permit enforcement of the award. The award was then set aside on Egypt's application. In the facts at hand, I do not find that the tribunal had acted in a manner so as to deprive either party of an opportunity to present their case. The only factor that has been relied upon to allege that the respondents were unable to present their case that the arbitrator had adopted an approach which was not anticipated by either party. The fact that an arbitrator has taken a view unanticipated by parties would not, in my view, constitute a breach of the principles of natural justice.

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

84. In Front Row Investment (supra), an award came to be challenged before the High Court in Singapore on the ground that the arbitrator had breached rules of natural justice by concluding that only one of three grounds of alleged misrepresentations had been relied upon and there was no basis on which it could be concluded that the appellant had given up the rest of the grounds. In that case the arbitrator had dismissed the appellants counter claim without considering the grounds of its counter claim in full because the arbitrator was under a misapprehension that the appellant had abandoned reliance on certain representations. This is once again the decision on facts which does not share anything in common with the instant case. This decision is therefore of no assistance to the respondents. I am therefore unable to accept the contention that omission by the tribunal in the instant case to express his views, on evidence of experts would in any manner qualify as failure to grant an opportunity to present the party's case.

85. In Richmond Mercantile (supra), a Single Judge of this Court while observing the objections to enforcement of the award were on merits also observed that a Court cannot refuse enforcement of an award on the basis of sufficiency of evidence. The Court found that the allegation that the tribunal had not recorded reasons for awarding damages had not been established. The

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

tribunal had considered the relevant provisions of contract and the tribunal was not expected to give reasons as are required to be given in the Court of Law in a judgment. In the facts of the case, the reasons recorded were to be clear and sufficient to indicate the mind of the tribunal in arriving at the conclusions. While reiterating that the powers of the Court hearing objections to enforceability are limited, this Court reiterated that it cannot go into correctness of the findings recorded by the tribunal on merits in proceedings filed under Section 46 to 48 of the Act.

86. In Associate Builders and ONGC/Western Geco the Supreme Court was dealing with the powers of the Court under Section 34 of the Arbitration Act in the case of domestic awards. The nature of jurisdiction under Section 48 was totally different and the power under Section 47 and 48 are very narrow. For those reasons, Mr. De Vitre submitted that the scope of challenge was extremely limited. In Sideralba, the attention of the Court was invited to the judgment of the Supreme Court in Shri Lal Mahal Ltd. (supra) which held that Section 48 of the Arbitration Act does not give an opportunity to have a "second look" on the foreign award at the stage of enforcement. In paragraph 45 and 46 of Shri Lal Mahal (supra) Supreme Court observed as follows :

> *"45. Moreover, Sections 48 of the 1996 Act does not give an opportunity to have a "Second look" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or*

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

ignoring / rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

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

87. The scope of enquiry under Section 48 did not permit a review on merits and that under Section 48(2)(b) enforcement of a foreign award could be refused only if it is found to be contrary to (i)the fundamental policy of Indian Law; (ii) to the interest of India and (iii) justice of morality. Thus, there being no opportunity for this Court to review a foreign award on merits, in Sideralba (supra) the Court pointed out that there was no substance in the submission that a foreign award cannot be enforced on the ground that the petitioner had not proved actual loss. The Court found on perusal of the award that the tribunal had rendered pure findings of fact and enforcement of the award could not be refused by reviewing the process of adjudication upon the findings of fact recorded by the tribunal. The Court also rejected the contention that the award was contrary to the terms of contract or based on no evidence. The Court also observed that Associate Builders was a decision rendered prior to the amendment of 2015. This Court found that in Shri Lal Mahal (supra) the Supreme Court had considered the expression "public policy of India" in

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Section 48(2)(b) and whether it should be given a meaning narrower than that in Section 34. In Shri Lal Mahal, the Supreme Court adverted to its decision in Renusagar (supra) in which it had been held that the term "public policy" used in Section 7(1)(b)(ii) of the Foreign Awards Act meant public policy of India and the Supreme Court negated the argument that recognition and enforcement of an award of GAFTA could be questioned on the ground that that contrary to the public policy of the State of New York. The Supreme Court drew a distinction while applying the rule of public policy between a matter governed by domestic laws and a matter involving conflict of laws. It also held that application of the doctrine of public policy in the field of contract laws is more limited than in the case of domestic law and the courts are slower to invoke public policy in cases involving a foreign element.

88. Mr. De Vitre had highlighted the fact that decision in Shri Lal Mahal (supra) was rendered prior to the 246th law commission report and after interpreting the judgments on the case of ONGC v/s. Saw Pipes Ltd. It was held that in case of enforcement of foreign awards, there is a departure from the meaning of "public policy" for the purposes of jurisdiction of the Court for setting aside an award under Section 34. Thus, under Section 48, there was a narrower scope for interference. In Shri Lal Mahal (supra), the Supreme Court has already held that while considering the enforceability of a foreign award

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

the Court does not exercise appellate jurisdiction. It does not enquire whether any error has been committed in rendering the award. In Sideralba (supra), objections raised by the respondents did not fall under the category of the award being contrary to the fundamental policy of Indian Law or the interest of India or justice or morality. This Court was of the view that scope of the expression "public policy" in the case of enforcement of a foreign award is very narrow and limited and is not wider than when dealing with a domestic award. The Court found that by virtue of the principles laid down in Shri Lal Mahal (supra), the challenge to domestic award is very narrow and limited and in any event not wider than those applicable by challenging a domestic award. The Court rejected the submission of counsel for the respondent that the expression "fundamental policy of Indian law" as interpreted by the Supreme Court in Associate Builders (supra) and ONGC v/s. Western Geco (supra) were applicable to a foreign award. It is further held that the Supreme Court in Associate Builders (supra) and Western Geco (supra) had affirmed the view in ONGC which dealt with a domestic award under Section 34 of the Act and observed that those principles cannot be extended to a foreign award under Section 48(2(b). Besides the principle laid down in ***Phulchand Exports Ltd. v/s. O.O.O. Patriot 2011(10) SCC 300*** applying the expression public policy as interpreted by the Supreme Court in the case of Saw Pipes (supra) to a foreign award has been overruled in Shri Lal Mahal.

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

89. The learned Single Judge while deciding the challenge in Sideralba also had occasion to consider the decision of this Court in Pol India Projects Limited which have dealt with various judgments of the Supreme Court including Shri Lal Mahal and quoting from the decision of the Delhi High Court in Penn Racquet Sports v/s. Mayor International Limited ILR 2011 Delhi 181 and observed that in Shri Lal Mahal the Supreme Court had after referring to principles laid down in Renusagar (supra) held that those principles must apply for the purposes of Section 48(2)(b) of the Act and although the expression "public policy of India" has been used in Section 34 (2)(b)(ii) and Section 48(2)(b)(ii), the concept although referred to in these two sections differs in degree. The scope of the public policy doctrine for the purpose of Section 48(2)(b) is more limited than in the case of domestic arbitral award.

90. Mr. Chinoy had contended that in view of provisions of section 16(b) and (c)the petitioners are not entitled to specific performance and that the mandatory nature of compliance was well settled law and as observed by the Supreme Court in ***Balraj Taneja & Anr. vs. Sunil Madan & Anr.(1999) 8 SCC 396 and Raj Kishore(dead) by LRs.vs. Prem Singh & Ors. (2011)1 SCC 657*** as also in ***B. Vijaya Bharathi vs. P Savitri (2018) 11 SCC 761.*** Mr. Chinoy contended that the legal pre-conditions urged are not technical in

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

nature. They embody basic principles of justice and equity and constitute fundamental principles of law. In this respect he relied upon ***Durga Prasad vs. Palden Lama & Anr.(1981 SCC Online Sikk 1)*** *and* ***NHAI vs. Gwalior Jhansi Expressway Ltd [(2018) SCC Online 688 [paras 24 and 25]***

91. Mr. Chinoy had relied upon the decision of Supreme Court in H.P. Pyarejan (supra) which dealt with the requirement on the part of the plaintiff to make an averment in the specific performance to the effect that he was always ready and willing to perform the part of the contract and this was the basic principle that the plaintiff must satisfy and that such averment was necessary. The Court held that Section 16(c) of the Specific Relief Act, the plaintiff must aver in the plaint and establish the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract and a party seeking specific performance must manifest that his conduct is blemishless throughout entitling him to specific relief. The provisions imposes a personal bar to grant relief and that pleadings manifest that the conduct of the plaintiff entitles him to get relief. Mr. Chinoy submitted that the petitioner not having made such averments, this is one of the crucial grounds available to resist enforcement.

92. Mr. Chinoy's contention that failure to make and averment as to

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

readiness and willingness to perform the contract is fatal since grant of relief in the absence of such mandatory averments would be against the fundamental policy of Indian law is in my view misconceived since the effect of absence of such averments would depend on the facts of a case In the case at hand, the respondents had not raised this contention before the tribunal. The respondents case on the other hand was that the respondents, as opposed to the petitioner, were entitled to specific performance as contemplated in clause 23.4 of the JVA. This was canvassed on the basis that if both parties were found to be in breach, the party which committed the later breach would be entitled to specific performance. The respondents contended that if at all the respondents had breached the agreement, its breach was later in point of time and therefore the respondents as against the petitioner was entitled to specific performance.

93. This in my view indicates that the absence of an averment on readiness and willingness was not urged and not a matter in issue before the tribunal but the tribunal was seized of rivals claims on specific performance under clause 23.4. The essence of the relief claimed was therefore pleaded and as contemplated in the observations of the Supreme Court in ***Syed Dastagir (supra)*** which held that a mechanical reproduction of the exact words of a statute is not necessary. No specific phraseology or language is required to be established in ascertaining whether such plea was taken or not. Absence of

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

form cannot dissolve the essence if already pleaded.

94. In ***Sideralba (supra)*** this court has already taken a view rejecting the defence of a foreign award cannot be enforced if it is in contravention of the fundamental policy of Indian law as contemplated in ***Associate Builders (supra) and Western Geco (supra).*** I am in agreement with that view. Even otherwise the contention that section 16(c) embodied the fundamental 'policy' of Indian law does not commend itself to me because the fundamental policy of a country's law would be something more basic than provisions of section 16(c), for example the presumption of innocence till proven guilty is generally speaking is part of the fundamental policy of Indian law. The expression "fundamental" entails something that is the very basis, the foundation of law. Policy as a concept encompasses the manner in which the law of the country would deal with a case viz aspects which are of basic concern to the country such as the rules of natural justice, right to privacy and the like. I am therefore unable to accept the submission that absence of a specific averment would, in the facts of this case, be fatal to the claim for specific performance as being contrary to the fundamental policy of Indian law.

95. One other issue that requires to be dealt with is Mr. Chinoy's contention that HRD Corporation (supra) does not laid on the law and that it only dealt

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

with the effect of Section 12 of the Arbitration Act. In R.N. Phillips (supra), Mr. Chinoy invited my attention to the fact that the Division Bench had then observed that it could be incorrect to say that every opinion of the Supreme Court would be binding on the High Court in India. The only opinion which would be binding would be an opinion expressed on a question that arose for determination of the Supreme Court and even though ultimately, it may be found that the particular question was not necessary for decision of a case and yet opinion was expressed by the Supreme Court on such a question then the opinion would be binding upon the High Court. He therefore submitted that merely because HRD Corporation had made certain observation and as highlighted by Mr.DeVitre need not ipso facto operate as a precedent. Mr. Chinoy relied upon a decision of the Full bench of Kaikhosroo Phirozshaw Doctor v/s. State in which the Court considered opinion by the Supreme Court even on a point which does not strictly arises for decision must be accepted by the High Court as laying down statement of law which is followed but the full bench observed that it did not read that particular observation as laying down views of the Supreme Court expressed with emphasis and after due deliberation a casual observation it was submitted did not so operated. In this manner, Mr. Chinoy had sought to contend that the decision in HRD would not qualify as a precedent, with the result that the scope of resistance to enforcement was rendered wider. The fact is that HRD had made reference to the decisions in

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

ONGC v/s. Saw Pipes and ONGC v/s. Western Geco and the observation that both Sections 34 and 48 have been brought back to the position law contained in Renusagar(supra) where public policy will include only two of three things that is fundamental policy of Indian law and justice and morality would prevail.

96. Although Mr. Chinoy may be correct in submission that the matter substantially in issue in HRD Corporation (supra) was Section 12 of the Arbitration Act, the fact is that the Supreme Court has expressed its views on the scope of challenge which is obviously far narrower than the scope of challenge under Section 34 although the scope of Section 48 was not directly in issue. I find no reason to disagree or take a different view notwithstanding, the contention that the decision in HRD Corporation (supra) is not a precedent which can be cited in support of the petitions seeking enforcement of a foreign award. The Law Commission report also observed that in Shri Lal Mahal (supra) the wider definition of public policy contemplated as in *Saw Pipes* (supra) did not apply to public policy under section 48(2). A supplementary report came to be issued by the Law Commission in February 2015 to negate the effect of Western Geco and Associated Builders which interpreted fundamental policy of Indian law. In HRD Corporation (supra) the Supreme Court had occasion to consider the 246th Law Commission report and held that

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

the definition of public policy held that Saw Pipes and Western Geco versions of public policy was not relevant any more. The fact that the scope of challenge as contemplated in ONGC v/s. Saw Pipes (supra) is no longer available cannot be disputed. HRD Corporation has since been reaffirmed in the BCCI case (supra).

97. With reference to Mr. Chinoy's other ground to resist enforcement viz, the enforcement of the Award being in contravention of the Foreign Exchange Management Act, in Penn Racquet (supra), the Delhi High Court had held that recognition and enforcement of a foreign award cannot be denied merely because it was in contravention with the laws of India. An award should be contrary to the fundamental policy of Indian law and only then enforcement could be denied. This Court had in Pol India Projects (supra) approved of the decision in Penn Racquet Sports (supra) as squarely applicable to the facts of the cases. The Court in Pol India Projects (supra) further observed that the Supreme Court had held since the expression "public policy' covers the field not covered by the words "and the law of India" which follow that expression contravention of law alone will not attract the bar of public policy and something more than the contravention of law is required and adverting to the facts of the case even if a law of guarantee could not have been issued in favour of the respondents under provisions of the Foreign Exchange Management (Guarantees) Regulation, 2000 which was acted upon by the parties simplicitor

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

violation of the provisions would not be contrary to the fundamental policy of Indian law. POL India Projects Ltd (supra) followed the Delhi High Court decision in ***SRM Exploration P.Ltd vs. N & S & N Consultants [(2012) 4 Company Law Journal 178 Delhi]*** holding that legislative intent while enacting FEMA is not to void a transaction even if it is in violation. As also of the decision of the Bombay High Court in ***Vitol SA vs Bhatia International Ltd and Noy Vallencia Engineering Spa Vs Jindal Drugs Ltd (2006) 5 Bom C.R. 155*** all of which allowed enforcement of foreign awards held and held that even if guarantees are not issued under FEMA Regulations, violation of the provisions would not be contravention of the fundamental policy of Indian law. In the facts of the case I do not find the objection on the ground of violation of FEMA as canvassed by Mr. Chinoy of substance since on facts, the fair value for the purposes of FEMA was determined at a far lower rate.

98. In conclusion I must mention that although in the affidavit in reply one of the contentions taken up was that no oral hearing was granted, this has not been canvassed as an instance of lack of a proper opportunity to present the respondents case probably because written submissions were on the record of the tribunal. No other ground has been canvassed before me. In conclusion I am of the view that the objections sought to be raised are in the nature of seeking a review on merits of the lis and calls for appreciation of evidence which cannot

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::

HIGH COURT OF JUDICATURE AT BOMBAY

be done. I am unable to accept the respondents contentions that the tribunals findings are contrary to the fundamental policy of Indian law or reveal lack of opportunity to present the respondents' case nor is it lacking in judicial approach or against basic notions of justice. The respondents have not made out a case for resisting enforcement of the awards. The awards at hand are capable of being enforced in India and the petitioners are entitled to proceed in execution. The petition must therefore be allowed. Accordingly, I pass the following order.

(I) The Awards are enforceable against the respondents. The petitioner may proceed in execution of the Awards.

(II) Till the Awards are enforced, there will be an order in terms of prayer clause (b) (vii)(a).

(III) Petition disposed in the above terms.

(IV) In view of disposal of the petition, Notice of Motion no.555 of 2017 and Chamber Summons(L)no.286 of 2017 do not survive and the same are also disposed.

(V) No costs.

(A. K. MENON, J.)

wadhwa

::: Uploaded on - 10/01/2019 ::: Downloaded on - 21/03/2019 22:44:28 :::