

Bombay High Court

Pol India Projects Ltd vs Aurelia Reederei Eugen ... on 8 April, 2015

Bench: R.D. Dhanuka

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ARBP76.12

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 76 OF 2012

POL India Projects Limited,)
a Company incorporated under the provisions)

of the Companies Act 1956, having its registered)
office at Bombay Oil Seeds and Oil Exchange)
Premises Co-operative Society Limited)
Plot Nos. 2, 3 and 4, Sector 10 Vashi, Navi)
Mumbai and its office Pol India Projects)

Limited, 734, Commodity Exchange Bldg.,)
Plot No.2, 3 & 4, Sector 19, Vashi,)
ig)
Navi Mumbai - 400 705) Petitioners

Versus

1. Aurelia Reederei Eugen Friederich GmbH)
Schiffahrtsgesellschaft & Company KG,)
a company incorporated under the Laws of)

Germany, having its office at ANNE CONWAY)

STRASEE 2, 28359 Breman Germany)

2. D. B. Shipping LLC,)
a company incorporated under the Laws of)
United Arab Emeritus having its office at)

Mina Apartments, Flat 205-A, Opposite Dubai)
Customs and Port Building,)
Next to Sea View Hotel, Bur Dubai, UAE) Respondents

ALONGWITH

ARBITRATION PETITION NO. 12 OF 2012

Aurelia Reederei Eugen Friederich GmbH)
Schiffahrtsgesellschaft & Company KG,)
a company incorporated under the appropriate)
laws of Germany, having its office at)
Anne-Conway-Strasse 2, 28359)
Bremen, Germany) Petitioners

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ARBP76.1

Versus

POL India Projects Limited,)
a company incorporated under the Companies)

Act, 1956 having its office at 15 A, 2nd Floor,)
Bharat Insurance Building, Horniman Circle,)
Fort, Mumbai - 400001) and its registered)
office at the Bombay Oil Seeds & Oil Exchange)

Premises, Co-op. Soc. Ltd., Plot 2, 3 and 4,)
Sector 10 Vashi - Navi Mumbai) Respondents

Mr.U.J.Makhija, a/w. Mr.Vishal Talsania, Mr.D.N.Motiwalla, Ms.Sacha Pandey,

Ms.Vidhya Baskar, i/b. Motiwala & CO. for the Petitioners in Arbitration Petition
No.76 of 2012 and for the Respondents in Arbitration Petition No.12 of 2012.

Mr.Zal Andhyarujina, a/w. Mr.Shivkumar Iyer, Mr.Aditya Krishnamurthy,
Mr.Arjun Mittal, Ms.Shruti Sardesai, i/b.Bose & Mitra for the Petitioners in
Arbitration Petition No.12 of 2012 and for the Respondents in Arbitration Petition
No.76 of 2012.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 10th FEBRUARY, 2015

PRONOUNCED ON : 8th APRIL, 2015

JUDGMENT :

The petitioners in Arbitration Petition No.76 of 2012 which is filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short the said Arbitration Act) have impugned the final arbitral award dated 15 th September, 2010 and seeks a declaration that there was no valid arbitration agreement between the parties. The petitioners in the said arbitration petition were the original respondents in the arbitral proceedings whereas the respondents i.e. POL India Projects Limited were the original claimants. For the sake of brevity in this order M/s.POL India Projects Limited are described as the petitioners and Aurelia Reederei Eugen Friederich GmbH Schiffahrtsgesellschaft & Company KG, is described as the respondents.

Kvm ARBP76.12

2. In so far as Arbitration Petition No.12 of 2012 is concerned, the said petition has been filed under sections 44 to 48 of the said Arbitration Act inter alia praying for a declaration that the foreign award dated 15 th September, 2011 is enforceable as a decree of this court and seeks injunction restraining the respondent, its servants and/or agents and/or assigning from transferring, utilizing, operating and removing in any manner, funds lying in its bank accounts in Mumbai and elsewhere in India to the extent of USD 870,059.24 and GBP 13,400 and for other reliefs. By consent of parties, both the petitions were heard together and are being disposed of by a common order.
3. In so far as Arbitration Petition No. 76 of 2012 is concerned, Mr.Andhyarujina, learned counsel for the respondents in the said petition has raised a preliminary objection about maintainability of this petition under section 34 of the Arbitration Act. Some of the relevant facts for the purpose of deciding both these petitions are summarized as under :-
4. Aurelia Reederei Eugen Friederich GmbH Schiffahrtsgesellschaft & Company KG had entered into a voyage charter party dated 13 th September, 2008 with one D.B.Shipping LLC, a company incorporated under the laws of UAE having its office at Dubai.
5. The petitioners have impleaded D.B.Shipping LLC as respondent no.2 to the said petition filed under section 34 of the Arbitration Act. None appeared for the said D.B.Shipping LLC.
6. On 19th September, 2008 the petitioners and the respondents entered into a contract of guarantee under which the petitioner guaranteed the performance of the said D.B.Shipping LLC under the voyage charter party. It is the case of the respondents that the said voyage charter party contains an arbitration agreement Kvm ARBP76.12 which was duly incorporated into the contract of guarantee. Clause 19(a) of the said voyage charter party which recorded an arbitration agreement is extracted as under :-

"Law and Arbitration"

(a) This Charter Party shall be governed by and constituted in accordance with English law and any dispute arising out of the Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force.

Unless the parties agree on a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On receipt by one party to the nomination in writing of the other party's arbitrator, the party shall appoint their arbitrator within 14 days, failing which the decision of the single arbitrator appointed shall be final."

In clause (25) of the charter party, it was provided as under :-

25. Law and Arbitration (state 19(a), 19(b) or 19(c) of Cl.19 if 19(c) agreed also state Place of Arbitration) (if not filled in 19(a) shall apply) (Cl.19) In the said charter party agreement in column (25), the parties have mentioned 'London'. The petitioners on behalf of the said D.B.Shipping LLC forwarded a rider to the charter party agreement. The said rider was signed by the petitioners. Clause 52 of the rider is extracted as under :-

"GA/arbitration in London as per London Arbitration Council".

7. It was the case of the respondents that the said D.B.Shipping LLC committed default in their performance of the voyage charter party resulting in the respondents suffering losses. The respondents raised various invoices against the Kvm ARBP76.12 said D.B.Shipping LLC in relation to its wrongful repudiation of the voyage charter party. However the said D.B.Shipping LLC failed and/or neglected to pay under the invoice issued by the respondents. The respondents therefore commenced arbitration proceedings against the said D.B.Shipping LLC. The respondents nominated the arbitrator in respect of the said arbitration. D.B.Shipping LLC appointed Mr.Ashwin Shankar, Advocate of this court as their arbitrator. The arbitrators appointed by the respondents and the said D.B.Shipping LLC appointed Mr.Edward Mocatta as a chairman of the arbitral tribunal.

8. The respondents simultaneously commenced the arbitration proceedings against the petitioners herein by appointing Mr.Alan Oakley as their nominee arbitrator. The petitioners appointed Mr.Ashwin Shankar, Advocate of this court as their arbitrator. The nominee arbitrators of the parties appointed Mr.Ben Horn as a chairman of the arbitral tribunal.

9. On 13th October, 2009 the Arbitral Tribunal in the arbitration proceedings filed by the respondents against D.B.Shipping LLC passed an declaratory arbitration award holding that the said D.B.Shipping LLC had entered into a valid and enforceable voyage charter party dated 13th September, 2008 with the respondents which included an arbitration agreement which provided for disputes to be resolved by the arbitration in London in accordance with English law. The said arbitral tribunal also determined that it had been properly constituted and that it had jurisdiction to determine the disputes arising under the voyage charter party. It is the case of the respondents that after the said declaratory arbitration award dated 13th October, 2009 came to be made by the said arbitral tribunal, the said D.B.Shipping LLC discontinued taking any part in the arbitration proceedings and went into complete oblivion and was not found present at its registered address. The said arbitral tribunal invited the petitioners to make submissions of the Kvm ARBP76.12 D.B.Shipping LLC in order to avoid an ex parte award being passed against D.B.Shipping LLC. The petitioners however refused to appear in the said arbitration proceedings and to make submissions. On 26 th May, 2011 the said arbitral tribunal thereafter passed ex parte final award against the said D.B.Shipping LLC inter alia holding that the said company was liable to pay to the respondents a sum of USD 870,059.24. The said D.B.Shipping LLC neither challenged the said declaratory arbitration award dated 13th October, 2009 nor the final ex parte award dated 26th May, 2011.

10. On 3rd March, 2010, the arbitral tribunal in this proceedings after considering and recording the submissions of both parties passed declaratory arbitration award holding that (a) the guarantee

issued by the petitioners on 19th September, 2008 was valid and that they guaranteed the performance of the charterers, namely D.B.Shipping LLC in respect of the charter party dated 13th September, 2008, (b) the guarantee provided for arbitration in accordance with English law as setout in clause 19(a) of the charter party, (c) tribunal had been properly constituted and (d) the tribunal had jurisdiction to determine any disputes that arose between the parties under the guarantee dated 19th September, 2008. The aforesaid view was taken in the majority award. The arbitrator nominated by the petitioners gave dissenting reasons.

11. On 15th September, 2011 the arbitral tribunal passed and published its final award inter alia holding that the petitioners were liable to pay to the respondents USD 870,059.24 togetherwith interest at the rate of 5.5% per annum compounded at three monthly from 24th October, 2008 to the date of payment.

12. In the meanwhile, the respondents filed an application under section 9 of the Arbitration Act in this court (Arbitration Petition No.524 of 2011) for interim Kvm ARBP76.12 measures. The said arbitration petition filed by the respondents was opposed by the petitioners on various grounds including maintainability of the said petition. By an order dated 8th November, 2011 this court held that Arbitration Petition No.524 of 2011 was not maintainable as the parties by choosing English law as substantive law and curial law of the contract of guarantee had excluded Part I of the Arbitration and Conciliation Act, 1996 in view of the judgment of Supreme Court in case of Videocon Industries Ltd. vs. Union of India and another,. Relevant part of the said order is extracted as under :-

2. The petition can be disposed of only on the ground of maintainability. Mr.Narichania, the learned counsel appearing on behalf of the petitioner admits that the parties are governed by the English Law in all respects. In other words, he admits that the parties are governed by the substantive law of England and that the arbitration proceedings are also governed by the English Law.

3. The petition is therefore not maintainable in view of the judgment of the Supreme Court in 'Videocon Industries Ltd.

Vs.Union of India & Anr., AIR 2011 SC 20401'.

13. The petitioners herein did not challenge the declaratory arbitration award dated 3rd March, 2010 by filing any proceedings in any court of law. The petitioners however have challenged the final ex parte award in Arbitration Petition No.76 of 2012 under section 34 of the Arbitration and Conciliation Act, 1996.

14. On 26th March, 2012 this court while admitting the Arbitration Petition No.76 of 2012 and enforcement proceedings i.e. Arbitration Petition No.12 of 2012 has kept the maintainability and/or challenge under section 34 to the foreign award in India open for final hearing.

1 AIR 2011 SC 2040 Kvm ARBP76.12

15. In response to the preliminary objections raised by the learned counsel for the respondents about maintainability of Arbitration Petition No.76 of 2012, Mr.Makhija, learned counsel for the petitioners invited my attention to some of the correspondence entered into between the parties, the deed of guarantee and also the order passed by this Court in Arbitration Petition No.524 of 2011.

16. On 12th September, 2008, the petitioners informed the broker of the respondents that the petitioners were acting only as brokers for and on behalf of the said D.B.Shipping LLC, Dubai. It is submitted by the learned counsel that the petitioners were not a party to the said charter party agreement dated 13 th September, 2008 entered between the petitioners and the respondents.

17. On 18th September, 2008 the brokers of the respondent sent an e-mail to the petitioners. The relevant portion of the said e-mail is extracted as under :-

"for good order sake, owners kindly ask to get from POL India projects on their letterhead a confirmation of due performance.

Pls confirm "

18. In response to the said e-mail dated 18th September, 2008, the petitioners issued a letter dated 19th September, 2008 to the respondents. The said letter has been treated as deed of guarantee on the part of the petitioners in favour of the respondents. Relevant portion of the said letter is extracted as under :_ Quote :

Mumbai 19-09-08 "The owners m.v.Merc Mihintale Without prejudice Shipment of scrap Ex.Malabo - Ref CP dtd 13-09-08.

Kvm ARBP76.12 This is to confirm, though D.B. Shipping LLC Dubai is the charterer of the above vessel for carriage of scrap as per terms of the referenced CP (based Gencon) POL INDIA PROJECT INDIA LIMITED - MUMBAI, joins DB SHIPPING LLC DUBAI in guaranteeing the performance of the voyage.

This letter of guarantee of performance is issued without prejudice and carries with it all the rights, liabilities and exceptions of the said charter party.

Yours faithfully For POL India Projects Ltd. Mumbai Sd/-

Copy : D.B.SHIPPING LLC - DUBAI".

unquote

19. Mr.Makhija, learned counsel appearing for the petitioners submits that the said letter of guarantee dated 19th September, 2008 did not contain any arbitration agreement between the petitioners and the respondents. In the said letter it was only stated that all the rights, liabilities and exceptions of the said voyage charter party would attach to the letter of guarantee issued by the

petitioners and it did not incorporate the arbitration clause of charter party dated 13th September, 2008. The petitioners had only guaranteed as a broker the performance of the charter party by the charterers i.e. D.B.Shipping LLC stating that all the rights, liabilities and exceptions of the charter party would be available to the parties. He submits that the respondents were fully aware of the petitioners as brokers from the beginning.

The petitioners were not party to the charter party agreement between the respondents and the said D.B.Shipping LLC.

20. Learned counsel submits that under the provisions of the Arbitration and Conciliation Act, 1996 mere reference in contract to document containing the arbitration clause does not itself cause an arbitration agreement. The contract must Kvm ARBP76.12 be in writing and reference be such as to make that arbitration clause a part of the contract. Learned counsel invited my attention to the section 7 of the Arbitration and Conciliation Act, 1996 and also sections 5 and 6 of the English Arbitration Act and would submit that the English Law and Indian Law are at variance with each other. He submits that even if the arbitration clause contained in the charter party dated 13th September, 2008 is considered as incorporated in the deed of guarantee, the said letter/deed of guarantee was signed only by the petitioners and not by the respondents. Under the Arbitration and Conciliation Act, 1996, the arbitration agreement is required to be signed by both parties to the agreement. Learned counsel placed reliance on the definition of the 'party' as contained in section 2(h) of the said Arbitration Act which provides that the party means a party to an arbitration agreement.

21. Learned counsel submits that by the said purported letter of guarantee the petitioners had only assured that the charterers would perform charter party but it did not state that the petitioners would perform charter party in place of the said D.B.Shipping LLC or had guaranteed the discharge of debts due by the said D.B.Shipping LLC to the respondents herein. He states that the said letter addressed by the petitioners would be even not considered as guarantee in law.

22. Learned counsel submits that since there was no arbitration agreement entered into between the parties at all, the entire arbitration proceedings which has culminated into an award is nullity and void and initio. The provisions of Part I of the Arbitration and Conciliation Act, 1996 are applicable to the international commercial arbitration held outside India which mandates that arbitration agreement must be by both parties and submits that since there was no arbitration agreement under the said Arbitration Act, no award made under Part II of the said Kvm ARBP76.12 Arbitration Act can be enforced in India. Learned counsel submits that the said letter dated 19th September, 2008 addressed by the petitioners can be considered atmost as an assurance that the said D.B.Shipping LLC would perform their part of the charter party and could never be read to mean that the petitioners were liable as party charter party or liable under guarantee.

23. Learned counsel submits that even if the petitioners had not challenged the declaratory arbitration award rendered by the arbitral tribunal which was nullity and void and initio, the petitioners are not prevented from challenging the final award under section 34 of the Arbitration and Conciliation Act, 1996. He submits that since the respondents had proposed to file a petition for

enforcement of foreign award in Mumbai and since the respondents had filed a petition under section 9 of the Arbitration Act in Mumbai for interim relief, the petitioners have filed the petition under section 34 of the Act in this court which has a territorial and pecuniary jurisdiction to try, entertain and dispose of the petition under section 34 for impugning such foreign award.

24. Learned counsel for the petitioners submits that the respondents had filed the arbitration petition under section 9 of the Arbitration & Conciliation Act in this court on the premise that Part-I of the Arbitration Act was applicable. He submits that merely because the said arbitration petition filed under section 9 was withdrawn by the respondents, it would not mean that Part-I of the Arbitration Act was not applicable. The respondents themselves have accepted the position that Part-I was applicable to the said proceedings filed under section 9. Since the petition under section 9 was filed in this court by the respondents, this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 is thus maintainable. He submits that even in the affidavit in reply filed by the petitioners in the said Kvm ARBP76.12 arbitration petition filed under section 9 by the respondents, it was the contention of the petitioners that Part-I of the Arbitration Act was applicable to the parties. Learned counsel invited my attention to the relevant part of the affidavit in reply filed to oppose the said petition filed under section 9 by the respondents in support of this contention.

25. Learned counsel invited my attention to the averments made by the respondents in the said arbitration petition filed under section 9 of the Arbitration Act in which it was averred by the respondents that the guarantee was issued by the petitioners at Mumbai, the charter party agreement was signed at Mumbai, this Court therefore, had jurisdiction to entertain the said petition. He submits that in view of the averments made by the respondents in the petition filed under section 9 of the Arbitration Act, the respondents cannot be allowed now to urge that Part-I of the Arbitration Act is not applicable to the parties and this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 by the petitioners in this court is not maintainable.

26. On the issue as to whether the arbitration agreement existed between the parties or not and whether the doctrine of incorporation would apply to the facts of this case or not is concerned, learned counsel submits that the arbitration agreement is an independent agreement and was not incorporated in the letter of guarantee. It has to be specifically incorporated otherwise arbitration agreement would not exist and would not be binding on the parties. The petitioners had also confirmed and had guaranteed performance of the contract as contemplated by the brokers of the respondents by a letter dated 18th September, 2008. In support of the submission, the arbitration agreement in the charter party agreement between the respondents and D.B. Shipping LLC was not incorporated in the letter of Kvm ARBP76.12 guarantee, learned counsel placed reliance on the following judgments :-

(a). Judgment of the Supreme Court in the case of M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited, 2 and in particular paragraphs 14 to 24 and 33 to 35.

(b). Judgment of the Court of Appeal in the case of Federal Bulk Carriers INC vs. C. Itoh & Co. Ltd. & Ors.,³ :

(c). Judgment of the Court of Appeal in the case of Skips A/S Nordheim & Others. vs. Syrian Petroleum Co. Ltd. & Petrofina S.A.,⁴

(d). Judgment of the Queen's Bench Division (Commercial Court) in

(e).

the case of The "Delos"⁵ :

Judgment of the Queen's Bench Division (Commercial Court) in the case of Siboti K/S vs. BP France S.A.⁶ :

(f). Judgment of the Privy Council in the case of T.W. Thomas & Co. Limited vs. Portsea Steamship Company, Limited, ⁷ :

(g). Judgment of the Supreme Court in the case of S.N. Prasad vs. M/s.Monnet Finance Ltd. & Ors.⁸ (paragraphs 6 and 7) :

27. Learned counsel submits that there was no London Arbitration Council as referred in the alleged arbitration agreement. The composition of the arbitral tribunal by the respondents was thus not in accordance with the alleged arbitration agreement. The petitioners had raised this issue before the arbitral tribunal 2 (2009) 7 SCC 696 3 (1989) 1 Lloyd's Law Reports, 103 4 (1983) 2 Lloyd's Law Reports, 592 5 (2001) 1 Lloyd's Law Reports, 703 6 (2003) 2 LLR 364 7 (1912) Appeal cases page 1 8 AIR (2011) SC 442 Kvm ARBP76.12 challenging their jurisdiction on the ground that the composition of the arbitral tribunal was not in accordance with the alleged agreement as there was no London Arbitration Council. He submits that the arbitral tribunal thus if could be constituted, it could be only by the court and not by the parties. He submits that since the alleged agreement was totally vague and the appointing authority could not be identified, such clause could not have been acted upon by either party.

Learned counsel submits that the arbitral tribunal in this case has followed the ruling rendered by the arbitral tribunal in the arbitration proceedings filed by the respondents against D.B. Shipping LLC.

28. Learned counsel placed reliance on the judgment of this court in the case of Oil and Natural Gas Corporation Ltd. vs. Oil Field Instrumentation,⁹ and in particular paragraphs 2, 6, 8, 10, 12 to 14 and it is submitted that a party can always challenge the composition of the arbitral tribunal which was constituted contrary to the terms of the agreement between the parties. He submits that even if the petitioners had appointed their nominee arbitrator, that would not amount to waiver.

29. Learned counsel placed reliance on the judgment of the Supreme Court in the case of Dharma Prathishthanam vs. Madhok Construction (P) Ltd.,¹⁰ and it is submitted that the arbitrator appointed by the respondents itself was illegal since the alleged arbitration had referred to the London Arbitration Council. Since the London Arbitration Council was not in existence, the court

only could have appointed arbitral tribunal. Merely because the petitioners had also nominated their arbitrator and had appeared under protest before the arbitral tribunal, the defect in appointment of the arbitral tribunal by parties was not cured. There was no waiver 9 2004(6) Bom.C.R.100 10 (2005) 9 SCC 686 Kvm ARBP76.12 on the part of the petitioners.

30. Learned counsel for the petitioners placed reliance on the judgment of this Court in the case of Jimmy Construction Pvt. Ltd., Nagpur vs. Union of India and others,¹¹ and in particular paragraphs 8, 9 and 11 and it is submitted that if the composition of the arbitral tribunal is improper and not in accordance with the arbitration agreement, the entire proceedings would be nullity and the award would fall under section 34(2)(ii)(b) of the Arbitration & Conciliation Act, 1996.

31. Learned counsel for the petitioners placed reliance on the judgment of the Andhra Pradesh in the case of Chinoy Chalani & Co. & Ors. vs. Y. Anjiah,¹² and it is submitted that the petitioners had raised an objection before the arbitral tribunal about their composition not being in accordance with the alleged arbitration agreement and thus there was no waiver and/or estoppel against the petitioners.

32. Learned counsel invited my attention to paragraphs 5, 7, 8 and 30 of Arbitration Petition No.12 of 2012 filed by the respondents for enforcement of the foreign award and submits that the respondents had pleaded oral arbitration agreement against the petitioners. It is submitted that the alleged arbitration clause referred in the charter party agreement was superseded by the amendment and the words "London Council of Arbitration" was inserted in the contract. The respondents had relied upon the old arbitration clause in the petition filed for enforcement. The arbitral tribunal has referred to and relied upon the charter party agreement and has held that under the English Law such arbitration agreement is permissible. Learned counsel submits that since there was no proper law agreed upon, even if the declaratory arbitration award is not challenged by the petitioners, 11 (2008) 3 Mah.L.J.141 12 AIR 1958 Andhra Pradesh 384 (Vol.45,C.113) (1) Kvm ARBP76.12 the petitioners are entitled to raise such issue on the ground of nullity while opposing the enforcement of the foreign award under section 48 of the Arbitration & Conciliation Act, 1996.

33. Learned counsel submits that under sections 5 and 6 of the English Arbitration Act, it is clearly contemplated that the arbitration agreement has to be in writing. In the declaratory arbitration award rendered by the arbitral tribunal, the arbitral tribunal has however, held that the oral arbitration agreement is valid which is contrary to sections 5 and 6 of the English Arbitration Act.

34. In support of the submission that under section 7 of the Arbitration & Conciliation Act, 1996, the arbitral tribunal is not only required to be in writing but is also required to be signed by both the parties. Learned counsel placed reliance on the judgment of this Court in the case of Pramod Chimanbai Patel vs. Lalit Constructions and another,¹³ and in particular paragraphs 5 to 7.

35. Learned counsel submits that the arbitral tribunal has rendered a finding that the arbitration agreement existed between the parties merely on the basis of two letters exchanged between the parties i.e. one from the respondents asking the petitioners for guaranteeing performance of the said

D.B. Shipping LLC and another letter addressed by the petitioners agreeing to be the guarantor for securing the performance on behalf of D.B. Shipping LLC. Letter dated 18 th September, 2008 was not even signed by the respondents but was signed by their broker. Merely on the basis of these two letters, the arbitral tribunal could not have come to the conclusion that the arbitration agreement forming part of the charter party agreement between the respondents and D.B. Shipping LLC would stand 13 2002(3) Mh.L.J.846 Kvm ARBP76.12 incorporated in the letter of guarantee executed by the petitioners.

36. Learned counsel submits that the appointment of the arbitrator had to be by consent of both the parties. Unilateral appointment of the arbitrator by the respondents was nullity and was illegal. The petitioners had appointed the arbitrator under protest on the ground that the London Arbitration Council had no authority to appoint any arbitrator.

37. Learned counsel submits that since the petitioners were not party to the arbitration agreement, the impugned award rendered by the arbitral tribunal against the person who was not a party to the agreement, the award is illegal. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of Sukalu Ram Gond vs. State of M.P. & Ors., 14 and in particular paragraphs 4 and 5.

38. Learned counsel placed reliance on the judgment of the Allahabad High Court in the case of Om Prakash vs. Union of India,¹⁵ and in particular paragraphs 4 and 5 and submits that since there was no London Arbitration Council, the appointment of the arbitrator, if any, could be done only by the court and not by the parties unilaterally.

39. Learned counsel placed reliance on the commentary of Russell on Arbitration Twenty - Third Edition in support of the submission that in case arbitration clause being vague or if there was no agreed procedure for appointment of arbitrator, the appointment of the arbitrator can be done only by the Court and not by the parties. Learned counsel for the petitioners submits that even under 14 (1994) 5 SCC 570 15 AIR 1963 Allahabad 242 (V 50 C 70)(1) Kvm ARBP76.12 section 44 of the Arbitration & Conciliation Act, 1996, the arbitration agreement has to be in writing. If the agreement is null and void, in-operative or incapable of being performed, the Court has discretion not to refer the parties to arbitration. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of Shin-Etsu Chemical Co. Ltd. vs. M/s.Aksh Optifibre Ltd. & Another,¹⁶ and in particular paragraphs 14 to 20, 37, 56, 85, 93, 112 and

113.

40. Learned counsel submits that even under section 48 of the Arbitration & Conciliation Act, 1996, there is no waiver against the statutes. Even if the declaratory arbitration award is not challenged by the petitioners, the petitioners are entitled to raise an objection that the said declaratory arbitration award is nullity and without jurisdiction under section 48 of the Arbitration & Conciliation Act, 1996 while opposing the enforcement of the foreign award. Learned counsel submits that even if the petitioners have not challenged the final award under the English Law, the petitioners are still entitled to oppose the enforcement of the such foreign award under section 48 of the Arbitration &

Conciliation Act, 1996. There is no question of any res-judicata applicable to these proceedings. He submits that the petitioners could wait till the final award came to be delivered by the arbitral tribunal which has now been impugned in these proceedings.

41. Learned counsel for the petitioners submits that that the letter of guarantee issued by the petitioners was improper, illegal and contrary to the provisions of the Foreign Exchange Management (Guarantees) Regulation, 2000 (FEMA) and in particular Regulations 3 and 5, which read thus :-

"Regulation - 3 :

16 AIR 2005 SC 3766 Kvm ARBP76.12 Prohibition Save as otherwise provided in this regulations, or with the general or special permission of the Reserve Bank, no person resident in India shall give a guarantee or surety in respect of or undertake a transaction by whatever name called, which has the effect of guaranteeing a debt, obligation or other liability owed by a person resident in India to, or incurred by, a person resident outside India.

Regulation - 5 :

Guarantees which may be given by persons other than an authorised dealer :

A person other than an authorised dealer may give a guarantee in the following namely :

a) a person resident in India being an exporting company may give a guarantee for performance of a project outside India, or for availing of credit facilities, whether fund based on non fund based, from a bank or a financial institution outside India in connection with the execution of such project :

Provided that the previous approval for undertaking the project has been duly obtained from the approving authority in India ;

Explanation :- for the purpose of this Regulation, the "approving authority" means the authority referred to in Regulation 18 of Foreign Exchange management (transfer and issue of foreign security) Regulation, 2000 for promoting or setting up such company or subsidiary are continued to be complied with ;

Provided further that the guarantee under this clause may also be given by an authorised dealer in India ;

c) An agent in India of a shipping or Airline Company incorporated outside India may give a guarantee on behalf of such company in connection with its obligation or liability owed to any statutory or government authority in India."

Kvm ARBP76.12 The Petitioners therefore respectfully state and submit that the alleged guarantee was illegal and contrary to the provisions of Section 34 and therefore void, being against public

policy."

42. Learned counsel submits that though this objection was raised by the petitioners before the arbitral tribunal, the arbitral tribunal has not considered this issue in the final award rendered by the arbitral tribunal. Learned counsel invited my attention to the majority as well as minority award rendered by the arbitral tribunal and would submit that since the letter of guarantee itself was contrary to and prohibited under the provisions of the said FEMA Regulations, the impugned award is in conflict with the public policy and thus such award can be opposed under section 48(2)(ii)(b) of the Arbitration & Conciliation Act, 1996. Learned counsel submits that section 48(i)(a) of the Arbitration Act has to be read with section 44 of the Arbitration & Conciliation Act, 1996. Since the arbitration agreement was not in writing and in any event not incorporated in the letter of guarantee and was even otherwise not in accordance with sections 5 and 6 of the English Arbitration Act, the entire proceedings were nullity and without jurisdiction.

43. In support of the plea that the letter of guarantee was contrary to law and was prohibited, the entire proceedings were without jurisdiction, reliance is placed on the judgment of the Supreme Court in the case of Mannalal Khetan & Others vs. Kedar Nath Khetan & Others, 17 and in particular paragraphs 19 to 21. Learned counsel also placed reliance on the judgment of the Madras High Court in the case of Mrs. Shoba Viswanathan vs. D.P. Kingsley,¹⁸ and in particular paragraphs 20 to 22, 36, 37, 43 and 47 and on the judgment of the Division Bench of this Court in the case of Sakuma Exports Ltd. vs. Louis Dreyfus Commodities & Uisse S.A.,¹⁹ 17 (1977) 2 SCC 424 18 1996 Madras Law Journal Reports 96 19 (2013) 6 Bom.C.R.218 Kvm ARBP76.¹²

44. The next submission of learned counsel for the petitioner is that since the respondents did not obtain any leave to enforce the arbitral tribunal as contemplated under section 66 of the English Arbitration Act, the respondents could not have filed the petition under section 48 of the Arbitration & Conciliation Act, 1996 in this Court for seeking enforcement of a foreign award. In support of this submission, learned counsel placed reliance on the judgment of the Queen's Bench Division (Commercial Court) in the case of African Fertilizers & Chemicals Nig Ltd. vs. BD Shipsnavo GMBH & Co Reederi KG, 20 and in particular paragraphs 13 to 28. Learned counsel also placed reliance on the judgment of Queen's Bench Division (Commercial Court) in the case of West Tankers INC vs. Allianz Spa & Another, 21 which has been upheld before the Court of Appeal.

45. Learned counsel submits that the declaratory arbitration award even if not challenged by the petitioners, it would not amount to res-judicata under section 11 of the Code of Civil Procedure, 1908. He submits that for the purposes of applicability of section 11 of the Code of Civil Procedure, 1908, the earlier proceedings has to be decided in a suit by the Court.

46. Learned counsel submits that the finding of the arbitral tribunal in the declaratory arbitration award that the arbitral agreement existed and the tribunal had jurisdiction is not final. The finding of the arbitral tribunal is always subject to final order of the Court. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of Renusagar Power Co. Ltd. vs. General Electric Company & Another,²² and in particular paragraph

55. 20 (2011) 2 Lloyd's Law Reports, 531 21 (2011) 2 Lloyd's Law Reports 117 22 AIR 1985 SC 1156(1)
Kvm ARBP76.12

47. Mr. Andhyarujina, learned counsel for the respondents (Aurelia Reederei Eugen Friederich GmbH Schiffahrtsgesellschaft & Company KG) on the other hand submits that the impugned award rendered by the arbitral tribunal is a foreign award. The arbitration proceedings were held in London in accordance with English Arbitration Act and in accordance with the arbitration agreement entered into between the parties. This petition filed under section 34 of the Arbitration and Conciliation Act, 1996 is not maintainable. Part I of the Arbitration and Conciliation Act, 1996 does not apply to the foreign award. He submits that Clause 19(a) of the voyage charter party which recorded an arbitration agreement alongwith amendment thereto between the respondents and D.B.Shipping LLC stood incorporated in the letter of guarantee issued by the petitioners. According to the said arbitration clause, the parties were thus governed by and constituted in accordance with English law and any dispute arising out of the said letter of guarantee was required to be referred to arbitration in accordance with Arbitration Act 1950 and 1996 or any statutory modification or enactment thereof. Learned counsel submits that the arbitration petition filed in this court under section 34 of the Act is thus not maintainable.

48. It is submitted by the learned counsel that the parties had agreed to be bound by the standard form of agreement. Learned counsel invited my attention to the charter party agreement and in particular clause 25. Reliance is also placed on copy of the standard form of Gencon charter party which was applicable to the parties. Clause 19 of the said Gencon charter provides for the arbitration agreement. He submits that even the letter of guarantee dated 19 th September, 2008 issued by the petitioners refers to Gencon i.e. General Conditions of Contract which stood incorporated in the said letter of guarantee in toto. Though an opportunity was given by the arbitral tribunal which was adjudicating the claims of Kvm ARBP76.12 the respondents against D.B.Shipping LLC to continue the said proceedings in view of the said D.B.Shipping LLC not appearing in the arbitration proceedings though served, the petitioners did not appear in those proceedings.

49. Even in the arbitration proceedings initiated by the respondents against the petitioners, after the arbitral tribunal rendered an declaratory arbitration award, the petitioners stopped appearing before the arbitral tribunal. He states that the petitioners had already raised an issue about existence of the arbitration agreement and about the constitution of the arbitral tribunal by filing interim reply before the arbitral tribunal. The arbitral tribunal has already rendered a finding in the declaratory arbitration award that the arbitration agreement between the parties existed and the tribunal was properly constituted. The petitioners did not choose to challenge the said declaratory arbitration award though could have challenged the same under the provisions of English Arbitration Act. In support of this submission, the learned counsel placed reliance on section 58 and it is submitted that an award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on both parties however it does not affect the right of the person to challenge an award by available arbitral process of appeal or by review or in accordance with the provisions of the said Part I of the English Arbitration Act. Reliance is also placed on sections 67 and 68 and also 70 and 71 of the English Arbitration Act and it is submitted that even such declaratory arbitration award ought to have been challenged under those provisions before the appropriate court in London

in addition to the final award.

50. Since the petitioners have chosen not to challenge the declaratory arbitration award holding that the arbitration agreement exist and the composition of the arbitral tribunal was properly constituted, the petitioners cannot be permitted to Kvm ARBP76.12 challenge the issue of existence of arbitration agreement or of alleged improper constitution of the arbitral tribunal at this stage in this proceedings under section 34 of the Arbitration and Conciliation Act, 1996 and also cannot oppose the enforcement of the final award on those grounds. The petitioners not having challenged the declaratory arbitration award within 28 days of the date of such award and also not having challenged the final award within the time prescribed before the appropriate court in London, the petitioners cannot be allowed to challenge the final award in this proceedings under section 34. Both the awards rendered by the arbitral tribunal have achieved finality and are binding on both the parties.

51. Learned counsel submits that even those awards could have been challenged only on the grounds setout in section 70 of the English Arbitration Act and not outside the purview of the said provisions. Learned counsel placed reliance on section 72 of the English Arbitration Act and submits that since the petitioners were parties to the arbitral proceedings and even if such party had not taken any part in the proceedings could still question whether there was a valid arbitration agreement or not and also about the improper constitution of the arbitral tribunal or that the matter had not been submitted in accordance with the arbitration agreement by proceeding in the court for declaration, injunction or for other appropriate relief. Such party could also challenge the award by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him or by an application under section 68 on the ground of all serious irregularity having affected him.

52. Learned counsel submits that since the petitioners have not challenged the declaratory arbitration award in accordance with the provisions of English Kvm ARBP76.12 Arbitration Act, 1996, the petitioners have lost their right to object and cannot be permitted to raise such objection at the later stage to the substantive jurisdiction of the arbitral tribunal on any ground which was the subject of the ruling. In support of the aforesaid submissions, learned counsel placed reliance on the judgment of this court delivered on 9th May, 2014 in case of Perma Container (UK) Line Limited vs. Perma Container Line (India) Pvt. Ltd. 23 in arbitration petition and in case of Perma Container Line (India) Pvt. Ltd. vs. Perma Container (UK) Line Limited and in particular paragraphs 12, 100 to 107, 111, 112, 116 and 117.

53. Learned counsel placed reliance on the judgment of this court in case of Harkirat Singh vs. Rabobank International Holding B.V. Co-operative Centrale Raiffeisen²⁴ delivered on 20th January, 2015 in an appeal and in particular paragraphs 23 to 26 and would submit that since the parties had chosen the law of governing arbitration, Part I is necessarily excluded and thus petition filed under section 34 of the Arbitration and Conciliation Act for challenging such an foreign award is not maintainable in this court.

54. Learned counsel also placed reliance on the judgment of this court delivered on 22nd January, 2014 in case of HSBC PI Holdings (Mauritius) Limited vs. Avitel Post Studios Limited & Ors.²⁵ in

arbitration petition and in particular paragraphs 76 to 80 and submits that since the petitioners have not challenged the declaratory arbitration award rendered by the arbitral tribunal, the said award has become final and conclusive on the issue of jurisdiction and on existence of arbitration agreement between the parties and thus the petitioners are barred by principles of estoppel in re-agitating the same issue in these proceedings.

23 Arbitration Petition No.259 of 2013 alongwith Arbitration Petition No.406 of 2013 25 Arbitration Petition No.1062 of 2012 Kvm ARBP76.12

55. Mr. Andhyarujina learned counsel also placed reliance on the judgment of Division Bench of this court in case of Sakuma Exports Limited (supra)¹⁹ and in particular paragraphs 9 to 20 and would submit that this court has no jurisdiction to entertain, try and dispose of this petition under section 34 of the Arbitration and Conciliation Act, 1996.

56. Learned counsel submits that the findings of governing law applicable to the parties rendered by the arbitral tribunal by declaring declaratory arbitration award has become final and binding. No such issue can be agitated once again in the present petition. Principles of res judicata applies to the parties. Reliance is strongly placed on the judgment of this court in case of Perma Container (UK) Line Limited (supra)²³ on this issue and judgment of this court in case of HSBC PI Holdings (Mauritius) Limited (supra)²⁵.

57. In so far as submission of Mr.Makhija, learned counsel for the petitioners that the petition for enforcement of the foreign award is not maintainable on the ground that the respondents did not obtain any leave of the English Court under section 66 of the English Arbitration Act is concerned, learned counsel submits that the said provisions under section 66 of the English Arbitration Act does not apply and no leave of the English Court was required to be obtained by the respondents for filing application for enforcement of the foreign award in this court under section 46 of the Arbitration and Conciliation Act, 1996. Learned counsel distinguished the judgment relied upon by Mr.Makhija on this issue. He submits that there is no bar for enforcement for foreign award under the New York Convention. He submits that under section 66 of the English Arbitration Law, a 19 (2013) 6 Bom.C.R.218 23 Arbitration Petition No.259 of 2013 alongwith Arbitration Petition No.406 of 2013 25 Arbitration Petition No.1062 of 2012 Kvm ARBP76.12 discretion is given to the parties to apply for leave of the English Court for the purpose of enforcement of such award in the English Court and it does not affect the enforcement of an award to which the New York Convention applies. In support of this submission, learned counsel placed reliance on sections 100 to 104 of the English Arbitration Act. He submits that such leave is contemplated for the purpose of avoiding any inconsistency in the two judgments of the same court for the benefit of the successful party. Mr. Andhyarujina placed reliance on the judgment of Supreme Court in case of Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd.²⁶ and in particular paragraph 31 and would submit that the foreign award stands as a decree and there is no question of the said award being made rule of court again.

58. Learned counsel placed reliance on the judgment of this court in case of Mitsui OSK Lines Ltd.(Japan) vs. Orient Ship Agency Pvt. Ltd.(India) ²⁷ delivered on 28th January, 2014 in arbitration petition and in particular paragraphs 2, 5, 20, 30, 34 and 35 on the issue of estoppel.

Learned counsel also placed reliance on the judgment of the Division Bench delivered on 29 th September, 2014 in case of M/s.Orient Ship Agency Pvt. Ltd. (India) vs. Mitsui OSK Lines Limited (Japan) 28 in appeal dismissing the appeal arising out of the order and judgment delivered in Arbitration Petition No.842 of 2009 and also placed reliance on the order passed by the Supreme Court dismissing the petition arising out of the said two judgments and order delivered by this court.

59. Learned counsel placed reliance on the judgment of Supreme Court in case of Reliance Industries Limited and another vs. Union of India 29 and in particular 26 (2001) 6 SCC 356 27 Arbitration Petition No.842 of 2009 29 (2014) 7 SCC 603 Kvm ARBP76.12 paragraphs 6, 71, 74 and 75 and would submit that petition under section 34 would not be maintainable.

60. On the issue whether the arbitration agreement forming part of the charter party agreement stood incorporated in the letter of guarantee or not, it is submitted that the entire contract between respondent and the said D.B.Shipping LLC was lifted and incorporated in the letter of guarantee including the arbitration agreement. Learned counsel distinguished the judgment of Supreme Court in case of M.R.Engineers and Contractors Private Limited (supra) 2 relied upon by the petitioners. He submits that the petitioners was fully aware and had knowledge of the arbitration clause in the standard form contract which was applicable to the charter party agreement and stood incorporated in the letter of guarantee. It is submitted that the bill of lading is a document of title. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of Alimenta S.A. vs. National Agricultural Co-operative Marketing Federation of India Ltd. and Another³⁰ and in particular paragraph (12) thereof.

He submits that the petitioners were fully aware of the contract between the respondents and the said D.B.Shipping LLC. The petitioners had admittedly signed the said contract on behalf of the D.B.Shipping LLC which admittedly contained arbitration agreement. The said arbitration agreement stood incorporated in the letter of guarantee.

61. Learned counsel for the respondents placed reliance on the judgment of Supreme Court in case of Groupe Chimique Tunisien SA vs. Southern Petrochemicals Industries Corpn. Ltd.³¹ and in particular paragraph (7) in support 2 (2009) 7 SCC 696 30 (1987) 1 SCC 615 31 (2006) 5 SCC 275 Kvm ARBP76.12 of this submission that the arbitration agreement recorded in the charter party agreement between the respondents and the said D.B.Shipping LLC stood incorporated under section 7(5) of the Arbitration and Conciliation Act, 1996 in the letter of guarantee.

62. Learned counsel placed reliance on the unreported judgment of this court in case of United Shippers Limited vs. Tata Power Company Limited 32 in arbitration application and in particular paragraph (5) thereof in support of the aforesaid submission and would submit that the entire agreement including standard form contract entered into between the respondents and the said D.B.Shipping LLC stood incorporated in the letter of guarantee issued by the petitioners which included arbitration agreement.

63. Learned counsel invited my attention to paragraph (29) of the declaratory arbitration award and would submit that the arbitral tribunal has rendered a finding on the issue that the arbitration agreement in the contract entered into between the respondents and D.B.Shipping LLC stood incorporated in the letter of guarantee. The said finding of the arbitral tribunal having not been impugned and set aside is thus binding on the petitioners. He submits that the petitioners being guarantors played very active part as manager in negotiating terms between the respondents and D.B.Shipping LLC. The petitioners had negotiated the said contract on behalf of the said D.B.Shipping LLC. Even the charter party agreement referred to the guarantee. Learned arbitral tribunal had considered all these aspects in the declaratory arbitration award and had rendered a finding which has achieved finality.

32 Arbitration Application No.50 of 2007 Kvm ARBP76.12

64. Learned counsel for the respondents invited my attention to clause 19(a) of the charter party which was varied by clause 52. He submits that the parties were to provide information in Box 25. Under part 19(a) it was clearly agreed that the English Arbitration Act would apply. The proper law thus agreed between the parties was English law. The seat of the arbitration was agreed to be in London. Clause 52 of the amendment provided for "GA/arbitration in London as per London Arbitration Council". It is submitted that since there was no London agreement Council, the provisions of the English Arbitration Act would apply for appointment of arbitrator and for all other purposes. The respondents had accordingly nominated their arbitrator. The petitioners had also nominated their arbitrator. The chairman was appointed by two nominee arbitrators appointed by the parties. The composition of the arbitral tribunal was thus in accordance with the agreement arrived at between the parties and in accordance with the provisions of the English Arbitration Act. He submits that in any event, the court has to interpret the arbitration agreement in business like manner in case the clause is alleged to be vague. He submits that the arbitral tribunal had been constituted as already provided in clause 19(a) of the charter party. The findings rendered by the arbitral tribunal is final and binding. The arbitral tribunal has interpreted clause 19(a) Gencon 1994 in the declaratory arbitration award. The petitioners had not shown any proof that under the English Law, there was no such procedure for appointment of arbitrator as followed by the parties.

65. Learned counsel submits that whether arbitration agreement existed or not, whether composition of arbitral tribunal was proper or not are not the grounds of objection provided under section 48 of the Arbitration and Conciliation Act, 1996. Learned counsel submits that scope of objections provided under section 48 of the Act is very limited. In support of this submission, learned counsel for the Kvm ARBP76.12 respondents placed reliance on the judgment of Supreme Court in case of Shri Lal Mahal Limited vs. Progetto Grano SPA³³ and in particular paragraphs 22 to 28 and 45 to 46, judgment of Delhi High Court in case of Penn Racquet Sports vs. Mayor International Limited,³⁴ (paragraphs 31 and 44) and on the judgment of this court in case of Perma Container (UK) Line Limited vs. Perma Container Line (India) Pvt. Ltd. (supra)²³ on this issue.

66. Learned counsel submits that for the purpose of opposing enforcement of a foreign award, the petitioners have to make out a case under section 48 that the arbitral tribunal had committed an error of the provisions of the English Law which the petitioners have failed to show in this

proceeding. None of the grounds set out in section 48 of the Arbitration and Conciliation Act are made out by the petitioners.

67. In so far as submission of the learned counsel for the petitioners that the letter of guarantee itself was in violation of the provisions of FEMA and thus the final award based on such illegal contract cannot be enforced in India is concerned, learned counsel for the respondents would submit that the permission of Reserve Bank of India was not required for execution of such letter of guarantee. In any event since the petitioners did not take the permission of the Reserve Bank they were solely responsible. He submits that the transaction was not void as such. The intent of FEMA was not to void the transaction. At most the penalty can be levied under the provisions of the said Act in case of any violation of the nature alleged by the petitioners. The petitioners had raised this objection before the arbitral tribunal. The arbitral tribunal in the declaratory arbitration award has rendered a 33 (2014) 2 SCC 433 34 ILR (2011) Delhi 181 23 Arbitration Petition No.259 of 2013 along with Arbitration Petition No.406 of 2013 Kvm ARBP76.12 finding that the local law has no relevance to the enforcement of the guarantee in the arbitral proceedings.

68. Learned counsel submits that the issue of FEMA has been dealt with by the Supreme Court in case of Renusagar Power Co. Ltd. vs. General Electric Company & Anr. (supra)²² and also in case of Shri Lal Mahal Limited (supra)³³.

Learned counsel submits that even if any such permission was required before entering into such letter of guarantee, ex-facto permission also could be obtained by the petitioners. Even if any breach of FEMA is committed of the nature alleged by the petitioners, it would not amount to breach of any fundamental policy of India. In support of this submission, learned counsel invited my attention to section 13 of FEMA which provides for imposition of penalty for violation.

Learned counsel submits that the provisions of FERA considered by the Supreme Court in case of Renusagar Power Co. Ltd. vs. General Electric Company & Anr. (supra) were totally different than the provisions of the FEMA. The judgment of the Supreme Court in case of Renusagar Power Co. Ltd. vs. General Electric Company & Anr. (supra) is thus distinguishable in the facts of this case in so far as the said issue is concerned.

69. In support of the aforesaid submission, learned counsel for the respondents placed reliance on the judgment of this court in case of Vitol S.A. vs. Bhatia International Limited³⁵ delivered on 15th September, 2014 in Notice and in particular paragraphs 23, 24, 42 to 45. Learned counsel placed reliance on the judgment of Delhi High Court in case of SRM Exploration Pvt.Ltd. vs. N & S & N Consultants S.R.O.³⁶ and in particular paragraphs 3, 9 to 11. Learned counsel 22 AIR 1985 SC 1156(1) 33 (2014) 2 SCC 433 36 (2012) 4 Company Law Journal 178 (Delhi) Kvm ARBP76.12 for the respondents also placed reliance on the judgment of this court in case of Noy Vallesina Engineering Spa vs. Jindal Drugs Limited ³⁷ and in particular paragraphs 51 and 52.

70. Mr.Makhija, learned counsel for the petitioners in rejoinder submits that even under section 44(a) of the Arbitration and Conciliation Act, 1996 under Part II, arbitration agreement is required to be in writing. If there is no arbitration agreement entered into between the parties, the arbitral

award can not derive jurisdiction to make an arbitral award. If arbitration agreement does not exist, award rendered cannot be enforced under section 48 of the Act.

71. Learned counsel invited my attention to the letter of guarantee and submits that all the provisions of the charter party agreement entered into between the respondents and the said D.B.Shipping LLC were not incorporated. The petitioners had categorically made it clear that the rights and liabilities of the petitioners would be restricted. The petitioners had only guaranteed the performance of the voyage. The letter of guarantee has to be read with e-mail dated 18th September, 2008. The arbitration agreement is a separate agreement and unless specifically incorporated, it does not come into existence. He submits that unless the arbitration agreement existed, second part of clause 19 of the charter party agreement would not apply at all.

72. Learned counsel submits that since clause 19(a) was a printed term of the charter party and the clause 52 which was provided as and by way of rider to clause 19(a) was typed, in case of any inconsistency between the printed term and a typed term, a typed term has to be followed. In support of this submission, 37 (2006) 5 Bom.C.R.155 Kvm ARBP76.12 learned counsel placed reliance on the judgment of Queen's Bench Division in case of Bravo Maritime (Chartering) Est. vs. Alsayed Abdullah Mohamed Baroom³⁸. Learned counsel also placed reliance on the judgment of Queen's Bench Division in case of Navrom vs. Callitsis Ship Management S.A. ³⁹ and on the judgment of the Supreme Court in case of M.K.Abraham and Company vs. State of Kerala and another⁴⁰ and in particular paragraph (21) thereof. Relying upon the aforesaid three judgments, learned counsel submits that since clause 19(a) of the charter party agreement is superseded by clause (52), there was no agreement recorded in clause 52. In case of failure of the arbitration procedure, under section 18 of the English Arbitration Act, parties were required to approach the court for the purpose of appointment of arbitration and parties could not appoint arbitrator of their own. The entire proceedings were thus nullity. In support of this submission, learned counsel placed reliance on the commentary of Russel on arbitration.

73. In so far as judgment of this court in case of Vitol S.A.(supra)³⁵ relied upon by Mr. Andhyarujina is concerned, Mr.Makhija distinguished the said judgment on the ground that the facts in that matter were totally different. He submits that the petitioners do not fall under the category provided under regulations 4 and 5.

Under regulation 3, the petitioners could not have given such guarantee at all and the same was prohibited. The judgment of this court in case of Vitol S.A.(supra) is distinguished on the ground that in the said judgment the court has considered the situation where there was a provision for getting permission post-facto and thus the said judgment is not applicable to the facts of this case.

74. Mr.Makhija, learned counsel placed reliance on the judgment of Supreme 38 (1980) 2 LLR 481 at page 487 ³⁹ (1987) 2 LLR 276 at pages 277 to 279 ⁴⁰ (2009) 7 SCC 636 Kvm ARBP76.12 Court in case of Mannalal Khetan and others vs. Kedar Nath Khetan and others (supra)¹⁷ and in particular paragraphs 19 to 22 and would submit that even if there was a provision for penalty, prohibited acts are not enforceable. Learned counsel submits that the purpose of the enactment of FEMA is to preserve the foreign exchange and thus the nature of transaction entered into between the

petitioners and the respondents is specifically prohibited. Learned counsel for the petitioners placed reliance on the judgment of Madras High Court in case of Mrs. Shoba Viswanathan (supra)¹⁸ and in particular paragraphs 21, 23, 31, 33 to 35 and 43, 47 and submits that the letter of guarantee being in violation of FEMA, the award rendered by the arbitral tribunal is not enforceable.

75. In so far as submission of Mr. Andhyarujina that there was no violation of fundamental policy of India is concerned, learned counsel for the petitioners submits that since the petitioners were not parties to the arbitration agreement, the petitioners could not be dragged into the arbitration.

76. On the issue that the petitioners had alleged to have participated in the formation of the contract between the respondents and the said D.B. Shipping LLC, learned counsel for the petitioners submits that all the correspondence prior to the execution of the charter party agreement between the respondents and the D.B. Shipping LLC did not form the part of the charter party and no reliance thereon could be thus placed by the respondents.

77. Learned counsel placed reliance on the judgment of Queen's Bench in case of Siboti K/S (supra)⁶ and in particular paragraph (24) and would submit that mere notice of term of the charter party in the agreement is not sufficient for the purpose 17 (1977) 2 SCC 424 18 1996 Madras Law Journal Reports 96 6 (2003) 2 LLR 364 Kvm ARBP76.12 of existence of an arbitration agreement. Incorporation of the arbitration agreement specifically is must.

REASONS AND CONCLUSIONS Whether Arbitration Petition No.76 of 2012 filed under section 34 of the Arbitration and Conciliation Act, 1996 challenging the impugned foreign award is maintainable ?

78. It is not in dispute that the respondents herein i.e. Aurelia Reederei Eugen Friederich GmbH Schiffahrtsgesellschaft & Company KG had entered into a voyage charter party dated 13th September, 2008 with D.B. Shipping LLC. The respondents is a company incorporated under the appropriate law of Germany having its office at Germany. The petitioners and the respondents had entered a contract of guarantee dated 19th September, 2008 under which the petitioners guaranteed the performance of D.B. Shipping LLC under the voyage charter party. In the Column No.25 of the charter party, clause 19(a) of the voyage charter party was referred to which provided for arbitration in London in accordance with the Arbitration Act, 1950 and 1979 and/or any statutory modification or re-inactment thereof. In the said Column No.25, respondents and the said D.B. Shipping LLC had filled up the place as "London". The Gencon charter was made applicable to the said contract including clause 19(a).

79. The said charter party dated 13th September, 2008 was thereafter amended by a rider. The said rider was signed by the petitioners on behalf of the said D.B. Shipping LLC. Clause 52 of the said rider provided as under :-

"GA/arbitration in London as per London Arbitration Council".

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80. The dispute arose between the respondents and the said D.B.Shipping LLC and also between the respondents herein. The respondents invoked separate arbitration proceedings against the said D.B.Shipping LLC and also against the petitioners herein. The respondents nominated an arbitrator. The petitioners also nominated their nominee arbitrator. Both the nominee arbitrators nominated the chairman of the arbitration arbitral tribunal.

81. A perusal of the objections raised by the petitioners before the arbitral tribunal on 16th February, 2009 indicates that the petitioners had questioned the jurisdiction competence and the composition of the arbitral tribunal. It was the contention of the petitioners that the petitioners did not recognize the validity of the contract alleged arbitration clause, the invocation of the arbitration and any claim made by the owner against the charterers or the petitioners. The petitioners filed the said reply under protest and with a view to avoid ex-parte order being passed against the petitioners. It was contended by the petitioners that the charter party was an alleged contract between the owners and the charterers. Its arbitration clause was restricted to its parties/signatories.

82. It was contended that the brokers even if found to be a guarantors could not be bound by the terms of arbitration clause. The petitioners would continue to mention their objections and protest to the validity of those proceedings. The petitioners called upon the arbitral tribunal to decide the preliminary issue as to whether tribunal had jurisdiction over the dispute raised by the respondents and also to decide as to whether they had jurisdiction against the petitioners who were acting as brokers. The petitioners also called upon the tribunal to decide whether they had been properly constituted and whether all the parties were given adequate opportunities to appoint their arbitrator on the panel. The petitioners enquired Kvm ARBP76.12 whether the tribunal members were of any London Arbitration Council. The petitioners called upon the tribunal to determine as to which law would apply for determining the preliminary issue raised by the petitioners. The petitioners made it clear that the petitioners were not seeking to invoke any power of adjudication of the said arbitral tribunal. In the said reply, the petitioners also contended that such a guarantee would be unenforceable and contrary to law. Reliance is placed on section 3 of the Foreign Exchange Management (Guarantees) Regulations, 2000 (for short the said Regulations of 2000). The petitioners also did not admit that they were acting as guarantors of the charterers obligation.

83. On 3rd March, 2010, the majority of the arbitrators rendered a declaratory award. The arbitrator nominated by the petitioners rendered dissenting reasons. In the said declaratory arbitration award majority of the arbitrators after referring to the agreement entered into between the parties and also the charter party between the respondents and the said D.B.Shipping LLC and after considering the objections raised by the petitioners held that the words 'without prejudice' mentioned on the letter of guarantee were misplaced on the ground that they were relevant only to settlement discussion between the parties following commencement of legal proceedings otherwise they had no effect under English Law when included in an agreement. They after considering the correspondence and the documents rendered a finding that it was clear from the e-mail of the petitioners dated 9th September, 2008 that whilst they purported to be the charterers' brokers they were also the managers of the said charterers'.

84. The tribunal held that their e-mail suggested that the charterers were nominated simply to facilitate the documentation relating to the cargo and that they were the real operator of the vessel, arranging such matters and P & I cover.

Kvm ARBP76.12 Therefore despite their protestations that they were only the brokers, their own evidence was that they played a significantly bigger role as managers of the charter. This accords with the evidence since otherwise there would be no reason why they would provide a guarantee for the charterers' performance. The guarantee was signed by the petitioners.

85. The arbitral tribunal also rendered a finding that in accordance with Section 4 of the Statute of Frauds Act, 1977, the requirements for a guarantee to be enforceable was that the guarantee must be recorded in writing and it must be signed by the guarantor. It is held that the guarantee dated 19 th September, 2008 was signed and stamped by the guarantors and was conclusive evidence of the validity of guarantee under English law. The arbitral tribunal also held that in case the petitioners on their own evidence were both the brokers involved in the negotiation and the charterers' effective managers for the charter in question and were therefore fully aware of the terms negotiated/agreed, including the fact that the charter party provided for arbitration in London in accordance with English law.

86. It is held that the petitioners had offered to provide their guarantee during the negotiations as evidenced by the fixture recap. It was therefore clear from the evidence that they offered to provide the guarantee and they knew that the charter party provided for arbitration in accordance with English law. It is held that since the petitioners as guarantors were aware of the terms agreed under the charter party and issued the guarantee with a specific reference to the terms of that document, that they intended those terms to have contractual effect to the guarantee. It is held that in the absence of any reference to the applicable law and method of dispute resolution in the guarantee, it was sufficient to show that the petitioners had Kvm ARBP76.12 intended to include the provision in the charter party for arbitration in London in accordance with English law. The arbitral tribunal has held that the provision to refer the disputes to arbitration and avail themselves of English law is a right as setout in the guarantee.

87. The arbitral tribunal also held that the defence of the petitioners that their liability was limited to that of their brokerage was misplaced. Their role as guarantor was entirely separate to that of a broker. It is held that by agreeing to become the guarantors for the charterers' performance of the charterers, the petitioners accepted different responsibilities and liabilities to those of a broker. In the said interim declaratory award, the arbitral tribunal held that the guarantee issued by the petitioners was valid. The guarantee provided for arbitration in accordance with English law. The tribunal had been properly constituted and had jurisdiction to determine all and any disputes arising under and/or out of the guarantee. The declaration made by the arbitral tribunal was by way of the declaratory arbitration award. It is not in dispute that the petitioners did not challenge the said declaratory arbitration award in any proceedings.

88. The respondents had filed a petition (524 of 2011) under section 9 for interim measures in this court after the arbitral tribunal had rendered the said interim declaratory arbitration award. In the

said arbitration petition it was averred by the respondents that Part I of the Arbitration and Conciliation Act, 1996 was applicable. The said petition was opposed by the petitioners herein by filing affidavit in reply. It was the case of the petitioners that the letter of guarantee dated 19th September, 2008 did not contain any arbitration clause between the parties. It was averred that under Indian law, the arbitration agreement is required to be signed by both the parties which condition was not satisfied in this case. It Kvm ARBP76.12 was averred by the petitioners that the provisions of Part I of the Arbitration and Conciliation Act, 1996 were applicable to International Commercial Arbitration held outside India. It was also contended that no award made under Part II could be enforced in India. The petitioners contended that the foreign award which the respondents herein were seeking to enforce were made under Part II of the Arbitration and Conciliation Act, 1996. Reliance is placed on section 44 of the Arbitration and Conciliation Act, 1996 which defines a foreign award. It was contended that since the letter of guarantee was not signed by the respondents, it would not amount to arbitration agreement. The petitioners also placed reliance on the provisions of Foreign Exchange Management (Guarantees) Regulations, 2000.

89. The said arbitration petition appeared before this court on 8th November, 2011. This court recorded a statement of the learned counsel for the respondents that the parties were governed by the English law in all respect and were governed by the substantive law of England and thus the arbitration proceedings were also governed by the English law. This court placed reliance on the judgment of the Supreme Court in case of Videocon Industries Ltd. (supra)¹ and in view of the said judgment of the Supreme Court dismissed the said arbitration petition. It is not the case of the petitioners that the respondents herein had made a wrong statement before this court to the effect that the parties were governed by English law in all respect and were governed by substantive law of England and the arbitration proceedings were governed by English Law. It is also not the case of the petitioners that the judgment of Supreme Court in case of Videocon Industries Ltd. (supra) was not applicable to the facts of that case and that the petition was wrongly dismissed by this court.

90. A perusal of the averments made by the petitioners in Arbitration Petition 1 AIR 2011 SC 2040 Kvm ARBP76.12 No.76 of 2012, clearly indicates that the respondents company is incorporated under the law of Germany and having its registered office at Germany. It is also not in dispute that the declaratory arbitration award and final award rendered by the arbitral tribunal are foreign awards. The arbitration proceedings were international commercial arbitration within the meaning of section 2(1)(f) of the Arbitration and Conciliation Act, 1996. Even in the affidavit in reply filed by the petitioners in the proceedings under section 9 which were filed by the respondents, it was the case of the petitioners that the said declaratory arbitration award was a foreign award and was falling under Part II of the Act. The submission of the learned counsel for the petitioners however is that since it was the case of the respondents themselves in the said petition filed under section 9 of the Arbitration and Conciliation Act, 1996 that Part I of the said Act was applicable to the said proceedings and therefore Arbitration Petition No.76 of 2012 filed under section 34 of the Arbitration and Conciliation Act, 1996 also which is under Part I is maintainable in this court. It is the case of the petitioners that merely because the respondents had made a submission before this court that the parties were governed by the English law or the law of England that would not oust the jurisdiction of this court for entertaining this petition under section 34 of the Arbitration and Conciliation Act, 1996.

91. Under section 58 of the Arbitration Act, 1996 (hereinafter referred to as the English Arbitration Act for the sake of gravity) an award made by the arbitral tribunal pursuant to the arbitration agreement is final and binding on both the parties and on any persons claiming through or under them however subject to the right of a person to challenge the said award by any available arbitration process of appeal or review or in accordance with the provisions of Part I of the said English Arbitration Act.

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92. Under section 67 of the said English Arbitration Act, a party to the arbitral proceedings has a right to apply to the court for challenging any award of the arbitral tribunal as to its substantive jurisdiction or for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. On such application challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may either confirm the award or vary the award or set aside the award in whole or in part. The said provisions makes it clear that the party may loose a right to object in view of section 73. A right to apply was subject to the restoration of section 70(2) and (3).

93. Under section 68 of the said English Arbitration Act, a party to the arbitration proceedings may apply to the court for challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. Types of serious irregularities are provided under sub-

section (2) of section 68. If the tribunal exceeds its powers otherwise than by exceeding its substantive jurisdiction, Section 68 of the English Arbitration Act can be invoked amongst other grounds. A party may loose a right to object under section 73 if the said proceedings are not filed. The court on such application has power to remit the award to the tribunal in whole or in part, for reconsideration.

94. Under section 69 of the English Arbitration Act, the party to the arbitration proceedings may also file an appeal to the court on a question of law arising out of an award made in the proceedings. In such appeal, the court has power to confirm vary, remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination or set aside the award in whole or in part. Under section 70 of the English Arbitration Act an application or appeal has to be filed Kvm ARBP76.12 within 28 days from the date of the award on the grounds setout therein. Section 71 provides for the effect of the order passed by the court under sections 67, 68 or 69 with respect to an award.

95. Section 72 of the English Arbitration Act provides that a person alleged to be a party to the arbitration proceedings but takes no part in the proceedings may question (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief. He also has the same right as a party to the arbitral proceedings to challenge an award by an application under section 67 on the

ground of lack of substantive jurisdiction in relation to him or by an application under section 68 on the ground of serious irregularity within the meaning of that section affecting him.

96. Section 73 of the English Arbitration Act, provides for 'loss or right of party to object' which reads thus :-

Loss of right to object.

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection--

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and Kvm ARBP76.12 could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling--

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award, does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

97. A perusal of the aforesaid provisions of English Arbitration Act makes it clear that the petitioners who had raised an objection about existence of arbitration agreement, composition of arbitral tribunal etc. had a right and remedy of challenging such declaratory arbitration award by filing an appropriate proceedings within the time prescribed under English Arbitration Act on the ground set out therein. Even if according to the petitioners, they were not governed by the English law and that there existed no arbitration agreement or that the composition of the arbitral tribunal was not in accordance with the agreement, once the declaratory arbitration award came to be passed by the arbitral tribunal, the same ought to have been challenged by the petitioners by exercising its remedy available under the provisions of English Arbitration Act and the petitioners not having exercised such remedy under the provisions of English Arbitration Act has lost its right to object the correctness of such declaratory arbitration award in this proceeding filed under section 34 or while

raising objection to the enforcement of the foreign award under section 48 in the arbitration petition filed by the respondents.

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98. Division Bench of this court in case of Sakuma Exports Limited (supra)¹⁹, after adverting to the judgment in case of Bhatia International vs. Bulk Trading S.A.⁴¹ and several other judgments including the judgment of Supreme Court in case of Bharat Aluminium Company vs. Kaiser Aluminium Technical Services (BALCO)⁴², in case of Videocon Industries Ltd. (supra)¹, in case of Yograj Infrastructure Limited vs. Ssang Yong Engineering and Construction Company Limited⁴³ has held that if the party had accepted the English law as the governing law of the contract and the seat of the arbitration would be in London, the dispute would be settled according to the law of England. It is held that where the proper law governing the contract is expressly chosen by the parties, in the absence of an unmistakable intention to the contrary govern the arbitration agreement. In an application for challenging the validity of an arbitral award under section 34, the court would necessarily have to revert to the law governing the arbitration agreement. Paragraph (20) of the said judgment in case of Sakuma Exports Limited (supra) read thus :-

20. In the present case, the parties have specifically made their contract subject to the rules of the Refined Sugar Association, London. Leaving no ambiguity of interpretation the contract mandates that the rules of the Refined Sugar Association, London are incorporated "as fully as if the same has been expressly inserted" in the contract. The governing law of the contract is English law. All disputes arising out or in conjunction with the contract were to be referred to the Refined Sugar Association for settlement in accordance with the rules relating to arbitration of the Association. The law in the U.K. is, therefore, the substantive law of the contract. The seat of the arbitration is in the U.K. Parties have made it clear ¹⁹ (2013) 6 Bom.C.R.218 ⁴¹ (2002) 4 SCC 105 ⁴² (2012) 9 SCC 552 ¹ AIR 2011 SC 2040 ⁴³ (2011) 9 SCC 735 Kvm ARBP76.12 that the rules of the Refined Sugar Association would govern the resolution of their disputes. Rule 8 of the Rules of the Refined Sugar Association (on which there is no dispute between the parties during the course of the hearing of the appeal) provides as follows:

"8. For the purpose of all proceedings in arbitration, the contract shall be deemed to have been made in England, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise, notwithstanding, and England shall be regarded as the place of performance. Disputes shall be settled according to the law of England wherever the domicile, residence or place of business of the parties to the contract may be or become.

The seat of the Arbitration shall be England and all proceedings shall take place in England. It shall not be necessary for the award to state expressly the seat of the arbitration."

The terms of the purchase contract as well as Rule 8 of the Rules of the Refined Sugar Association would make it clear that disputes shall be settled in accordance with the law of England wherever the domicile, residence or place of business of parties to the contract may be or become. Moreover, for the purposes of all proceedings in arbitration, the contract shall be deemed to have been made in England and England shall be regarded as the place of performance. The seat of the arbitration shall be England and all proceedings shall take place in England. On the basis of these provisions, it has been submitted that parties have, by the terms of their agreement, impliedly excluded the provisions of Part-I. We find merit in the submission. It is clear from the terms and conditions which have been accepted by the parties in the purchase contract, read with Rule 8 that parties have accepted English law as the governing law of the contract; that the seat of the arbitration would be London; that disputes shall be settled according to the law of England which would include the resolution of disputes and that all proceedings shall take place in England.

Alternatively, even if it were to be held that parties have not provided for the curial law governing the arbitration, the Kvm ARBP76.12 decision in Bhatia International does not prohibit the exclusion of the application of Part-I on account of the proper law of the contract being a foreign law. Where the proper law governing the contract is expressly chosen by the parties, which they have done in the present case by selecting English law as the proper law of the contract, that law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement. The arbitration agreement, though it is collateral or ancillary to the main contract is nevertheless a part of the contract. In an application for challenging the validity of an arbitral award under Section 34, the Court would necessarily have to revert to the law governing the arbitration agreement, which, in our considered view, would be the law of England.

99. Supreme Court in case of Reliance Industries Limited (supra)²⁹ in paragraphs 70 to 76.2 has held that once the parties have agreed that the jurisdictional seat of arbitration would be London and the arbitration governed by the proper law of arbitration would be law of England and provisions of Part I of Arbitration and Conciliation Act, 1996 were not applicable to the arbitration agreement.

100. Division Bench of this court in case of Harkirat Singh (supra)²⁴ has held that if the jurisdictional seat of the arbitration is in London, Part I of the English Arbitration Act, 1996 would apply. Part I of the said English Arbitration Act, 1996 and in particular sections 67 and 68 which deals with challenges to an arbitral award are mandatory provisions having effect notwithstanding any agreement to the contrary. It is held that the parties having chosen the juridical seat of arbitration at London, had subjected themselves to the English law by virtue of section 2, read with section 4 and sections 67 and 68 of the English Arbitration Act, 1996. It is held that the award in question thus could be challenged by the appellant only before the English Courts under Sections 67 and 68 of the English Arbitration Act, 1996 and not under section 34 of the Arbitration and Conciliation Act, 1996. The Division Bench held that the petition filed under section 34 of the Arbitration and Conciliation Act, 1996 was thus not maintainable.

101. This court in case of Perma Container (UK) Line Limited (supra)²³ has held that since the seat of arbitration was in England, Arbitration Act 1996 (English Arbitration) would apply which provides for a remedy to impugn the arbitral award, unsuccessful party having failed to avail of such remedy under English Arbitration Act, the petition filed under section 34 of the Arbitration and Conciliation Act, 1996 was not maintainable and is rejected. Paragraphs 103 to 105 of the said judgment read thus :-

103. In my view the judgment of Division Bench of this Court in case of Sakuma Exports Ltd. (supra) which is rendered after considering the judgments of Supreme Court in various judgments referred to aforesaid is squarely applicable to the facts of this Case. It is not in dispute that the arbitration was held at London and the main agreement as well as arbitration agreement was subject to laws of England. In my view, the parties by implied agreement have excluded applicability of entire Part-I of Act including Section 34. In my view, arbitration petition filed by the respondent under Section 34 for impugning the foreign award is thus not maintainable in this Court.

104. This Court in its judgment delivered on 22/01/2014 in case of HSBC PI Holdings (Mauritius) Ltd Vs. Avitel Post Studioz Ltd., after considering the judgment of Supreme Court in case of Bhatia International, Sumitomo Heavy Industries, NTPC and Bharat Aluminium (supra) has held that in so far as applicability of the law of governing based on arbitration is concerned, the seat of arbitration would determine the governing law of arbitration agreement. Since, in this case, the parties have agreed that the law of arbitration agreement would be law of England and seat of arbitration was London, 23 Arbitration Petition No.259 of 2013 alongwith Arbitration Petition No.406 of 2013 Kvm ARBP76.12 this Court, in my view, has no territorial jurisdiction to entertain the petition under Section 34 for impugning such foreign award. Paragraphs 73 to 76 of the judgment of this Court which are relevant for the purpose of deciding this petition and apply to the facts of this case read thus :

73. It is not in dispute that petitioner had invoked arbitration agreement which was forming part of the agreement entered into between the parties. On perusal of clause 15 of the agreement, it is clear that it was not intended by the parties that the Indian law would apply to the main agreement as well as to the arbitration agreement. Admittedly arbitration proceedings were held at Singapore in accordance with Singapore International Arbitration Rules. Respondents have participated in the said proceedings before the Arbitral Tribunal. It is also not in dispute that the parties had agreed that the seat of arbitration shall be at Singapore. In my view, agreement to arbitrate at Singapore has a closer and real connection with the place where the parties had chosen to arbitrate. Arbitration agreement would be thus governed by the law of Singapore and not Indian law. In my view principles of law laid down by the Supreme Court in case of Sumitomo Heavy Industries Ltd. (supra) and in case of National Thermal Power Corporation (supra), shall be squarely applicable to the facts of this case. Judgment of the Supreme Court in case of Bharat Aluminium (supra), has been interpreted by the Division Bench of this court in case of Konkola Copper Mines (PLC) (supra) in which it is held by the Division Bench of this court that the entire judgment of the Supreme Court in case of Bharat Aluminium (supra), would not apply with prospective effect. It is held that in so far as

applicability of the law of governing based on arbitration is concerned, the seat of the arbitration agreement would determine the governing law of arbitration agreement. In this case also the express choice of the parties was that seat of the arbitration would be at Singapore and thus in my view, the seat of the arbitration would govern by law of agreement i.e. law of Singapore and not Indian law in this case. I am respectfully bound by the judgment of the Supreme Court in case of Sumitomo Kvm ARBP76.12 Heavy Industries Ltd. (supra), in case of National Thermal Power Corporation (supra) and judgment of the Division Bench of this court in case of Konkola Copper Mines (PLC) (supra) which in my view squarely apply to the facts of this case.

74. In my view judgment of Supreme Court in case of National Thermal Power Corporation (supra) is of no assistance to the respondents but assist the case of the petitioner. In view of the aforesaid reasons, I am of the view that there is no merits of the submission of the learned senior counsel for the respondents that clause 16.4 of the agreement does not oust Indian law. In my view issue of arbitrability has to be decided under the law of arbitration agreement which is law of Singapore in this case and thus whether dispute raised by the petitioner was arbitrable or not would have been decided as per law of Singapore and not as per Indian Law. In my view, since there is no dispute that allegations of fraud, forgery and fabrication etc. can be decided under the laws of Singapore by the learned tribunal, there is no merit in the submission of Mr.Rohatgi, learned senior counsel that such issue has to be decided only as per Indian law.

75. The next submission of Mr.Rohatgi, on this issue was that if any award is passed by the arbitral tribunal, the same would have to be brought in India for enforcement and would be subjected to the Indian legal process and as per Indian law, since allegations of fraud, fabrication and forgery cannot be decided by arbitrator, such award would not be enforceable in India under Indian law.

76. It is not in dispute that the arbitral tribunal which has held hearing at Singapore and has applied laws of Singapore has rendered a jurisdictional award in this matter. The arbitral tribunal has considered the objections raised by the respondents herein that the arbitral tribunal did not have jurisdiction to decide the allegations to forgery, fraud and fabrication and has rendered the Kvm ARBP76.12 jurisdictional award holding that under law of Singapore, the arbitral tribunal has jurisdiction to decide such allegations. Admittedly the respondents have not challenged the said jurisdictional award in any proceedings at Singapore under the laws of Singapore. Question that arises is whether such jurisdictional award can be relied upon in this proceedings by the petitioner in view of the respondents not having challenged the said jurisdictional award rejecting the plea of jurisdiction raised by the respondents, without filing an application for enforcement of the said award. Question also arises is that whether present petition filed under section 9 of the Arbitration and Conciliation Act, 1996 is an application for enforcement of the jurisdictional award, interim award or is simplicitor for interim measures against the respondents independently. Submission of the respondents is that if as per law of India, if final relief cannot be enforced in India in view of the subject matter of the difference being not capable of settlement by arbitration under the law of India or if enforcement of the award would be contrary to public policy of India, interim measures in that situation can not be granted by this court under section 9 of the Act.

105. In my view, the law of arbitration agreement, which in this case, is law of England, would apply to the application for impugning the foreign arbitral award. The Arbitration Act 1996 (English Arbitration) would apply also since the seat of arbitration was in England at Wales and Northern Ireland which provides for a remedy to impugn an arbitral award, which the respondent has failed to avail of. This petition is thus not maintainable in this Court and deserves to be rejected.

102. This court in case of HSBC PI Holdings (Mauritius) Limited (supra) 25 has held that since the arbitration proceedings were held at Singapore in accordance with Singapore arbitration rules, the party having agreed that seat of arbitration should be at Singapore, the arbitration agreement would be governed by the law of 25 Arbitration Petition No.1062 of 2012 Kvm ARBP76.12 Singapore and not Indian law. It is held that the express choice of the parties that the seat of arbitration would be at Singapore and seat of arbitration would be governed the law of arbitration i.e. law of Singapore and not Indian law. This court also considered the effect of the parties not challenging the declaratory arbitration award in the said judgment. This court held that the principles of issue estoppel is applicable in the case of a question of fact or the question of law or to a mixed question of fact and law. Since the petitioner in that case had not challenged the declaratory arbitration award made by the arbitral tribunal, the said proceedings had become final and conclusive on the issue of jurisdiction and the respondents were barred by the principles of estoppel in re-agitating the same issue in the said proceedings. Paragraphs 76 to 80 of the judgment of the learned Single Judge in case of HSBC PI Holdings (Mauritius) Limited (supra)25 read thus :-

76. It is not in dispute that the arbitral tribunal which has held hearing at Singapore and has applied laws of Singapore has rendered a jurisdictional award in this matter. The arbitral tribunal has considered the objections raised by the respondents herein that the arbitral tribunal did not have jurisdiction to decide the allegations to forgery, fraud and fabrication and has rendered the jurisdictional award holding that under law of Singapore, the arbitral tribunal has jurisdiction to decide such allegations. Admittedly the respondents have not challenged the said jurisdictional award in any proceedings at Singapore under the laws of Singapore.

Question that arises is whether such jurisdictional award can be relied upon in this proceedings by the petitioner in view of the respondents not having challenged the said jurisdictional award rejecting the plea of jurisdiction raised by the respondents, without filing an application for enforcement of the said award. Question also arises is that whether present petition filed under section 9 of the Arbitration and Conciliation Act, 1996 is an application for enforcement of the jurisdictional award, interim award or is simplicitor for interim measures against the respondents independently. Submission 25 Arbitration Petition No.1062 of 2012 Kvm ARBP76.12 of the respondents is that if as per law of India, if final relief cannot be enforced in India in view of the subject matter of the difference being not capable of settlement by arbitration under the law of India or if enforcement of the award would be contrary to public policy of India, interim measures in that situation can not be granted by this court under section 9 of the Act.

77. It is not in dispute that under law of Singapore, arbitral tribunal has jurisdiction to decide the allegations of fraud, forgery and fabrication in arbitration proceedings. In my view, Dr. Tulzapurkar,

learned senior counsel for the petitioner is right in his submission that the subject matter of difference in the arbitration proceedings before the arbitral tribunal was claim for damages made by the petitioner which was capable of settlement by arbitration even under law of India. The learned senior counsel is right in his submission that the subject matter of the difference if not capable by settlement of arbitration under the laws of India cannot be enforced in India and not the allegations of fraud, fabrication and forgery etc. In my view there is no merit in the submission of Mr.Rohatgi that under law of Singapore, allegations of fraud, forgery and fabrication was not capable of settlement by arbitration. I am of the view that the subject matter of the reference was whether petitioner was entitled to claim damages from the respondents which was capable of settlement by arbitration even under laws of India. Be that as it may, since no application is made by the petitioner for enforcement of the jurisdictional award, submission of the learned counsel for the respondents that conditions of section 48 (2) (a) and (b) for enforcement of foreign award would apply to this application under section 9 for interim measures has no merits. In my view reliance placed by Mr.Rohatgi on paragraph (39) of the judgment of the Supreme Court in case of Booz Allen and Hamilton Inc. (supra) is misplaced.

78. Next question that arises for consideration is whether such jurisdictional award rendered by the arbitral tribunal by applying laws of Singapore can be referred to and relied upon by the petitioner in this proceedings and is binding on the Kvm ARBP76.12 parties or not.

79. Dr.Tulzapurkar, learned senior appearing for petitioner has pressed in service the law of estoppel on this issue against the respondents and placed reliance on several judgments of Supreme Court and judgment of this Court on the issue that principles of estoppel and res judicata are based on public policy and justice. Supreme Court in case of Hope Plantations Ltd.(supra), Bhanu Kumar Jain (supra), Ishwar Dutt (supra), Arjun Singh (supra) and this court in case of Indo- Pharma Pharmaceutical Works Private Limited has considered this issue at length, relevant paragraphs thereof are highlighted in earlier part of this judgment. It is held that principles of estoppel and res judicata are based on public policy and justice. Issue of arbitrability and jurisdiction having been concluded cannot be agitated by the same parties in another proceedings being barred by law of estoppel. It operates as estoppel in any subsequent proceedings if in the earlier proceedings between the parties, the issue had been determined. It is held that res judicata could be applicable to different stages of the same suits as to findings on the issues.

80. Having taken a view that law of Singapore would apply to the parties in this proceedings and under laws of Singapore, respondents would have remedy of challenge the interim awards before the appropriate court at Singapore and the respondents not having challenged the said jurisdictional award and interim award, in my view the said jurisdictional award and interim award made by the arbitral tribunal between the same parties arising out the same agreement in the arbitration proceedings have become final and conclusive on the issue of jurisdiction and the respondents are barred by the principles of estoppel in re-agitating the same issue in this proceedings. The principles of law laid down by the Supreme Court and this court in various judgments referred to aforesaid by the petitioner are squarely applicable to the facts of this case and are binding on this court. In my view there is no merit in the submission of Mr.Rohatgi, learned senior counsel that the issue raised by the respondents was a pure question of law and the doctrine of the estoppel could never apply to

such Kvm ARBP76.12 question of law or to a jurisdictional question. In my view the principles of issue estoppel is issue applicable in case of question of fact or a question of law or to a mixed question of fact and law. The estoppel operates against the respondents and not against any law.

103. The Division Bench of this court in appeal (196 of 2014) arising out of the judgment delivered by the learned Single Judge in case of HSBC PI Holdings (Mauritius) Limited (supra)²⁵ has upheld the issue of law decided by the learned Single Judge. It is held that the law of arbitration shall be laws of Singapore.

104. The learned Single Judge of this court in case of Mitsui OSK Lines Ltd.

(Japan) (supra)²⁷ has considered a similar situation and arbitration agreement and has also considered the provisions of arbitration laws of Japan which were applicable to the parties thereof including the provisions for challenge to an arbitration award and the effect of not challenging such arbitral award. Paragraphs 2, 5, 20, 30, 34, 35, 42 and 43 of the said judgment in case of Mitsui OSK Lines Ltd.(Japan) (supra) read thus :-

2. The petitioner company is incorporated under the laws of Japan and is engaged in shipping business. Respondent Company is carrying on business of agency of ocean transportation. On or about 1st April 1964, petitioner and the respondent entered into an agency agreement by which the petitioner appointed the respondent as an agent of ship's business, cargo business, passenger business and other related activities and duties in the Western Coast of India and in North Calicut. Article 17 of the said agreement provided for disputes being adjudicated upon by arbitration. Article 17 of the said agreement is extracted as under :

"ARTICLE 17 : any difference of opinion or any claim or dispute arising out of this Agreement shall be settled by arbitration in Tokyo. Each party shall appoint one arbitrator 25 Arbitration Petition No.1062 of 2012 27 Arbitration Petition No.842 of 2009 Kvm ARBP76.12 with power to such arbitrators to appoint, if necessary, an umpire. Any such arbitration shall be deemed a reference to arbitration under the provisions of the 'Code of Civil Procedure of Japan 1890 regarding Arbitration Proceedings' or any statutory modification or reenactment thereof for the time being in force."

5. On 10th June 2002, petitioner invoked arbitration clause and nominated Mr Mitsuhiro Toda as arbitrator and called upon the respondent to appoint their arbitrator. Respondent did not appoint any arbitrator. Petitioner filed an application under Section 11 of the Arbitration Act before the Supreme Court. In those proceedings, it was contended by the respondent that Section 11(6), (8) and (12) of the Arbitration Act would not be applicable as the arbitration agreement provided that arbitration was to be conducted in Tokyo (Japan) and was governed by law of arbitration applicable in Japan, particularly Code of Civil Procedure of Japan, 1890. by an order dated 24 th July 2002, the Supreme Court held that the proposed arbitration was to be governed by Japanese law and the place of arbitration was also Tokyo and thus Indian Courts did not have jurisdiction to pass any orders for appointment of arbitrators. By letter dated 14th August 2002, petitioner informed the respondent that they would apply to Japanese Court for nomination of an arbitrator on behalf of the

respondent. Since respondent did not appoint any arbitrator, petitioner applied to the Tokyo District court for nomination of an arbitrator as per the terms of agency agreement and provisions of Code of Civil Procedure of Japan 1890 regarding arbitration proceedings. The respondent appeared through their advocate in those proceedings. Tokyo District Court nominated Mr Hiroki Okabe as arbitrator on behalf of the respondent by an Order and Judgment dated 9th February 2005. Respondent impugned the said Order and Judgment dated 9th February 2005 passed by the Tokyo District Court in the Tokyo High Court. By an order dated 22nd June 2005, the Tokyo High Court upheld the order of Tokyo District Court. Respondent challenged the order of Tokyo High Court before the Supreme Court of Japan. By an Order dated 25th October 2012, the Supreme Court of Japan upheld the order passed by the Tokyo Kvm ARBP76.12 High Court.

20. Mr Zaiwala, learned senior counsel placed reliance on section 792, 797, 800 to 802 of the Arbitration Law of Japan and submits that arbitral tribunal was empowered to proceed with arbitration and make an award even if contention of jurisdiction was raised by the respondents. Award rendered by the arbitral tribunal is final, conclusion and binding between the parties. Respondent did not file any application for challenging the impugned award before the Japan Court admittedly. Under Article 44 (2) three months time was prescribed for challenging an arbitral award. Section 792, 797, 800 , 801 and 802 of the Arbitration Law of Japan Law read thus :

Section 792.

(1)The parties may challenge an arbitrator on the same grounds and on the same conditions as they were entitled to challenge a Judge.

(2)Apart from the provisions of the preceding Sub- Section, an arbitrator nominated otherwise than by an arbitration agreement may be challenged if he unduly delays the exercise of his office.

(3)Persons who are under disability, deaf, dumb, or deprived of or suspended from the enjoyment of public rights may, if nominated to be arbitrators, be challenged.

Section 797.

If the parties contend that the arbitration procedure entered upon is not one which is to be allowed, or in particular, that no legally binding agreement of arbitration has been made, or that the arbitration agreement does not relate to the controversy to be settled, or that the arbitrators have no power to exercise their office, nevertheless the arbitrators may proceed with their function and make an award.

Section 800.

As between the parties the award shall have the same effect as a final and conclusive judgement of a Court of Justice.

Kvm ARBP76.12 Section 801.

(1) Application to set aside an award may be made in any of the following cases:

1. Where the arbitration was one which ought not to have been allowed;
2. Where the award orders a party to do an act which is prohibited by law;
3. Where in the arbitration procedure the parties were not lawfully represented;
4. Where the parties were not heard in the arbitration procedure;
5. Where the award does not show the ground on which the decision was made;
6. Where for any of the reasons specified in 4, 5, 6, 7 and 8 of Section 338(1) of the Code of Civil Procedure a motion for a new trial is to be allowed.

(2) Where otherwise agreed between the parties, an award cannot be set aside for the reasons specified in 4 and 5 in the preceding Sub-Section.

Section 802.

(1) Execution by virtue of an award can be carried out only if it is pronounced to be allowed by an execution-judgment.

(2) No such execution-judgment as is referred to in the preceding Sub-Section shall be given, if there exists any ground upon which application for setting aside an award can be made.

30. It is not in dispute that the respondent has not challenged the said award dated 2nd February 2009 in the country in which it was made. It is the case of the petitioner that since the said award has achieved finality, petitioner is entitled to seek enforcement of the said award in this Court since the properties of the respondent are situated within the territorial jurisdiction of this Court. Petitioner has annexed a certified copy of the agency agreement dated 1st April 1964 with addendum to this petition. Petitioner has annexed the original award dated 2nd February 2009 which is duly signed and authenticated by the learned arbitrators and Secretary of the Tokyo Maritime Arbitration Commission. Petitioner has also Kvm ARBP76.12 filed an affidavit of Mr Masahiro Amemiya, a lawyer practicing in Japan. In the said affidavit, the lawyer practicing in Japan has stated that he has attended the arbitration on behalf of the petitioner in Japan and had read an award dated 2nd February 2009. Deponent of the said affidavit has stated that the award has been made in pursuance of the submission to arbitration which is valid under the laws of Japan. The subject matter of the award is capable of settlement under the laws of Japan and is also capable of settlement by arbitration under the laws of India. The award is in accordance with the reference and in conformity with the law governing the arbitration procedure and in accordance with the Code of Civil Procedure of Japan 1890. The award has been made in Japan which has acceded to the New York Convention on 20 th June 1961. The learned advocate has stated that to his knowledge, no application for setting aside of the award has been made by the respondent or proceedings to

challenge the award has been made by the respondent within the period of three months from the date of receipt of the award by the respondent on 4th May 2009 and thus the said award has become final in Japan is not open to opposition or appeal in Japan. It is stated that the said award is not contrary to public policy or the law of India.

Petitioner has also annexed copy of the arbitration law of Japan and also the extract of the arbitration procedure.

34. On perusal of the order passed by Tokyo District Court dated 9th February, 2005 in the petition filed by the petitioner for appointment of arbitrator against the respondents pursuant to the order passed by the Supreme Court of India, it is clear that the respondents had opposed the appointment of arbitrator on various grounds including the ground that the agency agreement including arbitration agreement became void. It was also pleaded by the respondents that there was change of method of transportation in the year 1981 and since then the respondents were supposed to do agency business of transportation by containers pursuant to oral agreement or exchange of letters between the parties. The respondents had pleaded oral agreement for such alleged changes in the nature of work carried out by the respondents. The respondents had also pleaded duress on the part of the petitioner. By the said Kvm ARBP76.12 order dated 9th February, 2005 the Tokyo District Court held that there was no evidence that the parties rescinded or concluded a new agreement which differed from the agency agreement. The parties had agreed at the time of concluding addendum that all terms and conditions of the agency agreement remained unchanged in almost all the addendum and thus arbitration agreement remained in force upto the date of passing the said order. It is held by the Tokyo District Court that it was clear that all the addendum of evidence from KO9-1 to KO9-10 were concluded with reference to agency agreement from their wordings and there was no evidence of duress of the petitioner and the argument of the respondents could not be accepted on that point. The Tokyo District court also rejected the submission of the respondents that the practice of the transaction between the parties considerably changed after 1981 would mean that the agency agreement had come to an end. It is held that the parties continued the transaction based on the agency agreement inspite of the change of the practice and thus argument of the respondent could not be accepted. The Tokyo District Court also dealt with the submission of the respondents that the said proceedings should be stayed because the suit regarding the same dispute is now pending in India. It is held that where the arbitration agreement exists in force, as held by the said court, the court should appoint an arbitrator promptly regardless the other suit being pending or not and rejected the contention of the respondent. The Tokyo District Court accordingly appointed the arbitrator on behalf of the respondent and rejected all such contentions. High Court of Tokyo as well as Supreme Court of Japan has rejected the appeals filed by the respondents. The Arbitral tribunal has thereafter rendered the arbitral award which is subject matter of enforcement in this petition. Respondents have admittedly not challenged the said award under law of arbitration of Japan. Under section 800 of the Law of Arbitration of Japan, as between the parties the award shall have the same effect as a final and conclusive judgment of the court of justice. The said award is binding on both the parties.

35. I am therefore of the view that the order passed by the Kvm ARBP76.12 Tokyo District Court rejecting the contentions including stay of arbitration in view of the pendency of civil suit in this

court, that arbitration agreement had become void in view of change of terms and conditions etc. are final and binding on the parties. Appeal filed by the respondents before the High Court of Tokyo and Supreme Court of Japan impugning the order passed by the Tokyo District Court are rejected. In my view, respondents thus cannot be allowed to agitate those issues in this proceedings.

42. In so far as judgment of this court in case of Jindal Drugs Limited (supra) relied upon by Mr. Kamat, learned counsel for the respondents is concerned, it is held by this court that a comparison of provision of section 48 and section 34 of the Arbitration and Conciliation Act shows that the grounds on which a domestic award can be challenged as also the grounds on which a party can resist enforcement of a foreign award are identical. It is held that when enforcement of award is sought against the petitioner, it can resist the enforcement of the award on the same grounds on which it could have challenged the award under section 34 of the Act. Supreme Court in its recent judgment in case of Shri Lal Mahal Ltd. vs. Progetto Grano S.P.A. JT 2003 (11) SC 84 has held that enforcement of foreign award would be refused under section 48 (2) (b) only if such enforcement would be contrary to (I) fundamental policy of Indian law or (II) the interests of India or (III) justice or morality. It is held that the wider meaning given to the expression 'public policy of India' occurring in section 34 (2)

(b) (II) in case of Saw Pipes decided by the Supreme Court is not applicable where objection is raised to the enforcement of the foreign award under section 48 (2) (b). Supreme Court has held that for the purposes of section 48 (2) (b), the expression public policy of India must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the three categories enumerated in *Renusagar Power Co. Limited v. General Electric Co.* It is held that although the same expression 'public policy of India' is used both in section 34 (2) (b) (ii) and section 48 (2) (b) and the concept of 'public policy in India' is same in nature in both the sections but its Kvm ARBP76.12 application refers in degree in so far as these two sections are concerned. The application of public policy of India doctrine for the purpose of section 48(2) (b) is more limited than the application of the same expression in respect of the domestic arbitral award. Paragraphs 25 to 28 of the judgment of Supreme Court in case of *Shri Lal Mahal Ltd.* (supra) reads thus :

25. In our view, what has been stated by this Court in *Renusagar Power Co. Limited v. General Electric Co.* MANU/SC/0195/1994 : 1994 Supp (1) SCC 644 with reference to Section of the Foreign Awards Act must equally apply to the ambit and scope of Section 48(2)(b) of the 1996 Act. In *Renusagar Power Co. Limited v. General Electric Co.* MANU/SC/0195/1994 : 1994 Supp (1) SCC 644 it has been expressly expounded that the expression "public policy" in Section of the Foreign Awards Act refers to the public policy of India. The expression "public policy" used in Section was held to mean "public policy of India". A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in *Renusagar Power Co. Limited v. General Electric Co.* MANU/SC/0195/1994 : 1994 Supp (1) SCC

644. For all this there is no reason why *Renusagar Power Co. Limited v. General Electric Co.*

MANU/SC/0195/1994 : 1994 Supp (1) SCC 644 should not apply as regards the scope of inquiry Under Section 48(2)(b). Following *Renusagar Power Co. Limited v. General Electric Co.* MANU/SC/0195/1994: 1994 Supp (1) SCC 644, we think that for the purposes of Section 48(2)(b), the expression "public policy of India" must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the three categories enumerated in *Renusagar Power Co. Limited v. General Electric Co.* MANU/SC/0195/1994 : 1994 Supp (1) SCC 644. Although the same expression 'public policy of India' is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the Sections but, in our *Kvm ARBP76.12* view, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

26. We are not persuaded to accept the submission of Mr. Rohinton F. Nariman that the expression "public policy of India" in Section 48(2) (b) is an expression of wider import than the "public policy" in Section of the Foreign Awards Act. We have no hesitation in holding that *Renusagar Power Co. Limited v. General Electric Co.*

MANU/SC/0195/1994 : 1994 Supp (1) SCC 644 must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award Under Section 34 is concerned, the principles laid down in *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited* MANU/SC/0314/2003: (2003) 5 SCC 705 would govern the scope of such proceedings.

27. We accordingly hold that enforcement of foreign award would be refused Under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in *Oil and Natural Gas Corporation Limited v.*

Saw Pipes Limited MANU/SC/0314/2003: (2003) 5 SCC 705 is not applicable where objection is raised to the enforcement of the foreign award Under Section 48(2)(b).

28. It is true that in *Phulchand Exports Limited v.*

O.O.O. Patriot MANU/SC/1217/2011: (2011) 10 SCC 300, a two-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the Appellant therein that the meaning given to the expression "public policy of India" in Section 34 in *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited* MANU/SC/0314/2003 : (2003) 5 SCC 705 must be applied to the same expression occurring in Section *Kvm ARBP76.12* 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in paragraph 16 of the Report that the expression "public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law and is overruled.

43. In my view none of the objections raised by the respondents are covered by any of the grounds of objections under section 48 of the Arbitration and Conciliation Act, 1996. None of the grounds raised by the respondents indicates that the enforcement of award would be contrary to the public policy of India. Supreme court of India in case of Shri Lal Mahal Ltd. (supra) has laid down the principles that only if enforcement would be contrary to fundamental policy of Indian law, the interest of India or justice or morality, enforcement of such award can be refused under section 48 (2)

(b). I am respectfully bound by the judgment of the Supreme Court. In view of the judgment of the Supreme Court in case of Shri Lal Mahal Ltd.(supra), reliance placed by Mr.Kamat, learned counsel appearing for respondents on the judgment of this court in case of Jindal Drugs Limited (supra) would be totally misplaced being contrary to the principles laid down by this court are overruled by the Supreme Court on that issue.

105. The appeal as well as Special Leave Petition arising out of the said judgment dated 28th January, 2014 in case of Mitsui OSK Lines Ltd.(Japan) (supra)²⁷ are dismissed.

106. In my view, the award rendered by the arbitral tribunal was a foreign award rendered in international commercial arbitration. The parties were governed by the laws of England. The jurisdictional seat of arbitration was at London. The parties were thus governed by the provisions of Arbitration Act, 1996 (English Arbitration). The said Arbitration Act specifically provides for remedy of 27 Arbitration Petition No.842 of 2009 Kvm ARBP76.12 challenge under sections 67 and 68 which remedy has to be exercised within the time prescribed under the said Act. The petitioners admittedly not having challenged the said declaratory arbitration award and also the final award, both the awards have become final. In my view, the petitioners are estopped from challenging the said award. Since Part I of the Arbitration and Conciliation Act, 1996 is not applicable to the parties, the arbitration petition filed under section 34 of the Arbitration and Conciliation Act, 1996 is thus not maintainable. The law on this issue is not longer res-integra. In my view, the learned counsel for the respondents has rightly placed reliance on the above referred judgments of the Supreme Court and this court which are squarely applicable to the facts of this case. I am respectfully bound by the law laid down by the Supreme Court and this court.

107. In so far as submission of the learned counsel for the petitioners that the respondents having filed a petition in this court under section 9 of the Arbitration and Conciliation Act, 1996 under Part I and thus the petition filed by the petitioners under section 34 is maintainable in this court is concerned, in my view there is no merit in this submission of the learned counsel. A perusal of the affidavit in reply filed by the petitioners in those proceedings clearly indicates that it was the case of the petitioners themselves that the declaratory arbitration award rendered by the arbitral tribunal was a foreign award. A perusal of the order passed by the learned Single Judge of this court in the said arbitration petition clearly indicates that in view of the judgment of Supreme Court in case of Videocon Industries Ltd. (supra)¹, the respondents had accepted the legal position that the parties were governed by the laws of England and English Arbitration Act would apply.

1 AIR 2011 SC 2040 Kvm ARBP76.12

108. This court followed the judgment of Supreme Court in case of Videocon Industries Ltd. (supra)¹ and accepted the legal submission made by the respondents which was in consonance with the law laid down by the Supreme Court in case of Videocon Industries Ltd. (supra). It is thus clear that this court in the said order did not accept the submission of the petitioners that Part I was applicable to the parties.

109. On the contrary this court accepted the submission of the respondents that the parties were governed by laws of England and the provisions of English Arbitration Act was applicable. The petitioners did not oppose the statement made by the respondents that Part I was not applicable or that the English law was applicable to the parties or that the reliance placed by the respondents on the judgment of Videocon Industries Ltd. (supra) was misplaced. This court dismissed the said arbitration petition filed under section 9 by applying the principles laid down by the Supreme Court in case of Videocon Industries Ltd. (supra). The petitioners having accepted the said order passed by this court, in my view cannot be allowed to now urge that since the respondents had filed the said petition filed under section 9 in this court, consequently arbitration petition filed by the petitioners under section 34 of the Arbitration and Conciliation Act for impugning the foreign award also would be maintainable in this court and that Part I of the Arbitration and Conciliation Act, 1996 would be applicable.

110. A perusal of the order passed by this court in the arbitration petition filed by the respondents under section 9 concludes the issue that the parties were governed by the English law for all the purposes. In my view, the said order passed by this court thus assist the respondents and not the petitioners. The petitioners thus could 1 AIR 2011 SC 2040 Kvm ARBP76.¹² not have filed the petition under section 34 of the Arbitration and Conciliation Act, 1996 on the premise that the petition under section 9 was filed by the respondents in this court under Part I of the Arbitration and Conciliation Act, 1996. In these circumstances in my view there is thus no merit in this submission of the learned counsel for the petitioners.

111. The next question that arises for consideration of this court is whether the petitioners can be allowed to agitate the issue of there being no arbitration agreement between the petitioners and the respondents or that the composition of the arbitral tribunal was not in accordance with the alleged arbitration agreement or not either under section 34 or while raising the objections under section 48 to the enforcement of the foreign award in the Arbitration Petition No.12 of 2012 filed by the respondents or not. In my view both these issues were raised by the petitioners in the objections filed before the arbitral tribunal and have been negated by the arbitral tribunal by rendering declaratory arbitration award which could be challenged only by adopting remedy provided under sections 67 and 68 of the English Arbitration Act within the time prescribed. The petitioners having chosen not to exercise that remedy available under English Arbitration Act, the petitioners have lost its right to challenge the said findings and conclusion rendered by the arbitral tribunal in the said declaratory arbitration award and thus those issues have become final and cannot be allowed to be challenged either under section 34 or even while raising objection under section 48 to the enforcement of the foreign award.

112. Be that as it may, a perusal of the record clearly indicates that the petitioners have played a major role not only of a broker but also of the manager of the said D.B.Shipping LLC. The arbitral tribunal has considered this aspect and has Kvm ARBP76.12 rendered a finding. The arbitral tribunal has also held that the petitioners were fully aware of the terms and conditions of the charter party applicable to the respondents and the said D.B.Shipping LLC. A perusal of the record indicates that the said rider to the charter party agreement was signed by the petitioners themselves on behalf of the said D.B.Shipping LLC. Even in the said rider to the original charter party agreement, there was a reference to the guarantee. There was also a reference to the guarantee in the correspondence exchanged between the parties. A perusal of the letter of guarantee signed by the petitioners also indicates that there was a reference to the entire Gencon which admittedly included arbitration agreement. The entire terms and conditions of the charter party agreement which incorporated the Gencon stood incorporated in the letter of guarantee including the arbitration agreement.

113. Supreme Court in case of *Alimenta S.A.* (supra)³⁰ has noticed that there has been a long continued practice in England that the arbitration clause is not incorporated into the bill of lading by general words unless it is explicitly done in clear words either in the bill of lading or in the charter party. Supreme Court held that the parties were aware of the arbitration clause of an earlier contract, the subject matter of which is different from the contract which is being entered into by them, but incorporate the terms of the earlier contract by reference by using general words and thus there would be no bar to such incorporation merely because the subject matter of the two contracts were different, unless, however, the incorporation of the arbitration clause would be insensible or unintelligible. In my view, judgment of Supreme Court in case of *Alimenta S.A.* (supra) would apply to the facts of this case.

30 (1987) 1 SCC 615 Kvm ARBP76.12

114. In this case also the petitioners had played a major role in negotiations of the agreement between the respondents and the said D.B.Shipping LLC and had acted not only as a broker but also a manager. The petitioners were the signatory to the rider to the charter party agreement which included arbitration agreement and stood incorporated in the letter of guarantee. In my view, thus there is no substance in the submission of the learned counsel for the petitioners that the arbitration clause incorporated in the charter party agreement was not incorporated in the letter of guarantee.

115. In so far as submission of the learned counsel for the petitioners that the respondents were not a signatory to the charter party agreement which contained arbitration agreement and thus the arbitration agreement in the said charter party agreement would not be an arbitration agreement within the meaning of section 7 of the Arbitration and Conciliation Act, 1996 is concerned, the said charter party agreement has been acted upon by the respondents and the said D.B.Shipping LLC.

In the letter of guarantee, there was a reference of the Gencon and the charter party entered into between the respondents and the said D.B.Shipping LLC in toto including Gencon. The said letter of guarantee is acted upon by the parties. In my view the condition of section 7(5) of the Arbitration and Conciliation Act, 1996 thus were satisfied.

116. In case of Groupe Chimique Tunisien SA (supra)³¹, Supreme Court has considered this issue and has held that under section 7(5) of the Arbitration and Conciliation Act, if there is reference in a contract to a document containing arbitration clause, such reference constitutes an arbitration agreement, if the contract was in writing and the reference was such as to make that arbitration clause a part of the contract. Paragraph 7 of the judgment of the Supreme Court in 31 (2006) 5 SCC 275 Kvm ARBP76.12 case of Groupe Chimique Tunisien SA (supra) which squarely applies to the facts of this case read thus :-

7. The purchase orders placed by the respondent with the peti-

tioner are the contracts between the parties and they are subject to FAI Terms which contain the arbitration clause. Sub-section (5) of Section 7 specifically provides that where there is refer- ence in a contract (in this case, the purchase order) to a docu-

ment containing an arbitration clause (in this case, FAI Terms), such reference constitutes an arbitration agreement, if the con- tract is in writing and the reference is such as to make that ar- bitration clause a part of the contract. The case squarely falls under Section 7(5) of the Act and there is an arbitration agree- ment between the parties as per clause 15 of FAI Terms.

117. Learned Single Judge of this court in case of United Shippers Limited (supra)³² has considered a similar situation and has held that the provisions of the MOU did not restrict the incorporation of only a part of the second contract. It incorporated the whole. The learned Single Judge has also in the said judgment adverted to the judgment of the Supreme Court in case of M.R.Engineers and Contractors Private Limited (supra)² relied upon by the petitioners and has held that there was incorporation of the entire contract including arbitration clause.

118. In so far as judgment of Supreme Court in case of M.R.Engineers and Contractors Private Limited (supra) relied upon by the learned counsel for the petitioners is concerned, in my view the judgment of Supreme Court is clearly distinguishable in the facts of this case. In this case, there is reference to the entire contract of charter party including Gencon which includes arbitration agreement. The petitioners were also fully aware of the said arbitration agreement as signatory to the rider to the charter party agreement. The judgment of the Supreme Court in 32 Arbitration Application No.50 of 2007 2 (2009) 7 SCC 696 Kvm ARBP76.12 case of M.R.Engineers and Contractors Private Limited (supra)² thus does not assist the petitioners.

119. In so far as submission of the learned counsel for the petitioners that since there was no arbitration agreement between the petitioners and the respondents, the entire arbitration proceedings were without jurisdiction and nullity and thus even if the declaratory arbitration award is not challenged by the petitioners, the petitioners can challenge the final award is concerned, in my view there is no merit in this submission of the learned counsel. The findings and conclusion rendered by the arbitral tribunal that there existed arbitration agreement and that the composition of the arbitral tribunal was in accordance with the agreement and the English Arbitration Act and the said award not having challenged under Arbitration Act 1996 (English

Arbitration), petitioners cannot be allowed to challenge the said declaratory arbitration agreement.

120. In my view, there is no substance in the submission of the learned counsel for the petitioners that on the ground that there being no alleged agreement between the parties, the issue of nullity could be raised by the petitioners under section 48 of the Arbitration and Conciliation Act while opposing enforcement of an foreign award. As this court has held that the petitioners not having challenged interim declaratory award as well as final award in accordance with the provisions of English Arbitration Act and both these awards have become final and binding between the parties, no such objection can be allowed under section 48 of the Arbitration and Conciliation Act.

121. In so far as submission of the learned counsel that a party can challenge a 2 (2009) 7 SCC 696 Kvm ARBP76.12 composition of arbitral tribunal any time and even under the provisions of section 34 or at the stage of section 48 is concerned, in my view since the petitioners have not challenged the findings and conclusion of the arbitral tribunal rejecting such plea in the declaratory arbitration award under the provisions of English Arbitration Act, the petitioners have lost their right to challenge those findings. Petitioners cannot be allowed to challenge those findings under section 34 or under section 48.

122. In so far as judgment of this court in case of Oil and Natural Gas Corporation Ltd. (supra)⁹ is concerned, this court has considered section 16 of the Arbitration and Conciliation Act, 1996 and has held that even if the party has participated in the appointment of the arbitral tribunal, he can raise an objection about the constitution of arbitral tribunal under section 16(2) of the Act. The said judgment of this court does not apply to the facts of this case at all since the parties were governed by the English Arbitration Act. In my view, the reliance placed on the judgment of this court in case of Oil and Natural Gas Corporation Ltd.

(supra) is thus totally misplaced.

123. In so far as judgment of this court in case of Jimmy Construction Pvt. Ltd., Nagpur (supra)¹¹ relied upon by the petitioners is concerned, a perusal of the said judgment indicates that the appointment of the arbitrator by the Union of India was illegal and contrary to the terms of the contract. The petitioner in that matter had raised an objection about the constitution of the arbitral tribunal and having not succeeded in that challenge had challenged the same in the petition under section

34. In my view the provisions of English Arbitration Act in so far challenge to the declaratory arbitration award and provisions under section 16 read with section 34 9 2004(6) Bom.C.R.100 11 (2008) 3 Mah.L.J.141 Kvm ARBP76.12 of the Arbitration and Conciliation Act, 1996 are different. Under section 16 of the Arbitration and Conciliation Act, 1996 if plea of jurisdiction is not accepted by the learned arbitrator, the petitioner has a right to challenge the said order alongwith the final award under section 34 of the Arbitration and Conciliation Act, 1996. However, under the provisions of English Arbitration Act if the jurisdictional or declaratory award is not challenged within the time prescribed before the appropriate court, such award becomes final and the party loses right to challenge said award in future. The reliance placed by the learned counsel on the

judgment of this court in case of Jimmy Construction Pvt. Ltd.,Nagpur (supra)¹¹ does not apply to the facts of this case and the reliance thereof is thus misplaced.

124. In so far as judgment of Andhra Pradesh High Court in case of Chinoy Chalani and Co. and others (supra) ¹² is concerned, in my view the said judgment of Andhra Pradesh does not apply to the facts of this case. Reliance placed by the learned counsel for the petitioners on the judgment of Andhra Pradesh High Court in case of Chinoy Chalani and Co. and others (supra) is totally misplaced.

125. In so far as submission of the learned counsel for the petitioners that the appointment of the arbitrator by the respondents unilaterally was illegal as the arbitrators could be appointed only by the court is concerned, a perusal of the record indicates that both the parties had nominated their arbitrator. There is thus no merit in this submission of the learned counsel for the petitioners that the arbitrator was appointed unilaterally. Under the provisions of the English Arbitration Act, the parties are permitted to nominate their own arbitrator for the purpose of constitution of the tribunal.

¹¹ (2008) 3 Mah.L.J.141 ¹² AIR 1958 Andhra Pradesh 384 (Vol.45,C.113) (1) Kvm ARBP76.12

126. In so far as submission of the learned counsel for the petitioners that the petitioners were not a party to the arbitration agreement and thus award is illegal is concerned, in my view there is no merit in the submission of the learned counsel.

The arbitration agreement stood incorporated in the letter of guarantee and thus the petitioners were party to the arbitration agreement. Reliance placed on the judgment of the Supreme Court in case of Sukalu Ram Gond (supra)¹⁴ is totally misplaced.

127. In so far as submission of the learned counsel for the petitioners that even under section 44 of the Arbitration and Conciliation Act, 1996 arbitration agreement has to be in writing and since there was no arbitration agreement in writing, even the court could not have referred the parties to arbitration is concerned, in my view there is no merit in this submission of the learned counsel. In the charter party agreement, there was a reference to arbitration agreement to be read with a rider to the said charter party agreement. The said document was in writing. Reliance placed on section 44 is misplaced. Reliance placed on the judgment of the Supreme Court in case of Shin-Etsu Chemical Co.Ltd.(supra)¹⁶ is thus misplaced.

128. In so far as submission of the learned counsel for the petitioners that since the petitioners had raised an objection about the lack of arbitration agreement and about the composition of the arbitral tribunal being illegal, there was no waiver on the part of the petitioners and thus the findings of the arbitral tribunal in the declaratory arbitration award would not amount to res judicata or that the condition of section 11 of the Code of Civil Procedure not having been satisfied, there would be no res judicata and/or estoppel is concerned, under the provisions of English ¹⁴ (1994) 5 SCC 570 ¹⁶ AIR 2005 SC 3766 Kvm ARBP76.12 Arbitration Act since the petitioners have failed to challenge the declaratory arbitration award as well as final award within the time prescribed, both the awards

have become final and binding and the petitioners have lost their right to challenge the said awards.

129. The next submission of the learned counsel for the petitioners is that in view of the rider to the original charter party agreement and in view of the inconsistency between the arbitration clause in the Gencon, which was a printed clause and the clause in the rider was a typed clause, the typed clause would prevail and not what was provided in the printed agreement. In my view there is no merit in this submission of the learned counsel for the petitioners. The rider to the charter party agreement was not in substitution of the original clause 25 of the charter party agreement which provided for applicable of Gencon. Certain information which was required to be filled in clause 25 were provided by the said rider. Be that as it may, there was no inconsistency between the two clauses. Reliance thus placed by the learned counsel on the judgment of Supreme Court in case of *M.K.Abraham and Company (supra)*⁴⁰, judgment of Queen's Bench Division in case of *Bravo Maritime (Chartering) Est. (supra)*³⁸ and judgment of Queen's Bench Division in case of *Navrom (supra)*³⁹ is misplaced.

130. The next submission of the learned counsel for the petitioners is that since in the rider to the charter party agreement, the clause provided that the arbitration in London as per London Arbitration Council and admittedly there being no London Arbitration Council in existence, such clause could not be construed as an arbitration agreement. It is also the submission of the petitioners that since there ⁴⁰ (2009) 7 SCC 636 ³⁸ (1980) 2 LLR 481 at page 487 ³⁹ (1987) 2 LLR 276 at pages 277 to 279 Kvm ARBP^{76.12} was no London Council of Arbitration, arbitrators could not have been appointed by the parties but could be only appointed by the appropriate court in London. The arbitration clause in the charter party agreement was not substituted or deleted by the rider. Only the additional information is provided by the said rider. The petitioners had raised this issue before the arbitral tribunal and the same has been negated in the declaratory arbitration award which award has become final and binding. No such issue thus can be raised by the petitioners at this stage under section 34 or under section 48. Be that as it may, even if there was no London Arbitration Council, the other part of the arbitration agreement being clear and could be operated.

131. In my view the words 'London Arbitration Council' inserted in the rider would not make an arbitration clause otiose or non existent. If any part of the arbitration agreement is vague or does not give any sensible meaning, the court has to interpret such clause in a business like manner and in such a way that the parties are encouraged to refer their disputes to arbitration. Court has to consider the intention of parties. In my view thus there is no substance in the submission of the learned counsel for the petitioners that there was no arbitration agreement or that such agreement could not be construed as an arbitration agreement in view of there being no London Arbitration Council in existence.

132. In so far as second submission of the learned counsel that since there was no London Council of Arbitration, the parties could not have nominated their arbitrator and that the tribunal could be constituted only by the court is concerned, it is not in dispute that both the parties had nominated their arbitrator and those two nominee arbitrators had appointed the chairman of the arbitral tribunal. The appointment of the arbitral tribunal was in consonance with the arbitration Kvm

ARBP76.12 agreement and under the provisions of the English Arbitration Act. The arbitral tribunal has already rendered a finding on that issue in the declaratory arbitration award which has achieved finality. Be that as it may, since there was no London Arbitration Council, the arbitral tribunal could be appointed in accordance with the provisions of English Arbitration Act and thus in my view the appointment of the arbitral tribunal was proper and not illegal as canvassed by the petitioners.

133. In so far as judgment of the Supreme Court in case of Dharma Prathishthanam (supra)¹⁰ relied upon by the petitioners is concerned, the Supreme Court has held that one party cannot usurp the jurisdiction of the court and proceed to act unilaterally. In that matter arbitrator was appointed unilaterally by one of the party without consent of the other party and contrary to the arbitration agreement.

In that context, the Supreme Court held that the arbitrator appointed unilaterally by one party was illegal. In this case however both the parties had appointed their nominee arbitrator and the nominee arbitrator had appointed the chairman of the arbitral tribunal in accordance with the arbitration agreement and as per provisions of the English Arbitration Act. The said judgment of the Supreme Court in case of Dharma Prathishthanam (supra) thus does not assist the petitioners.

134. In so far as judgment of Supreme Court in case of S.N.Prasad(supra)⁸ is concerned, the guarantor in that matter was not a party to the arbitration agreement and had only indicated his willingness to stand guarantor but he did not execute the loan agreement or any deed of guarantee. The Supreme Court in that situation held that the second guarantor was not a party to the loan agreement containing arbitration clause between the lender and borrower and could not be subjected to the arbitration award. However, in this case the petitioners have not only executed 10 (2005) 9 SCC 686 8 AIR (2011) SC 442 Kvm ARBP76.12 the letter of guarantee but the charter party agreement between the respondents and the said D.B.Shipping LLC stood incorporated including arbitration agreement in the letter of guarantee. Judgment of Supreme Court in case of S.N.Prasad (supra)⁸ thus does not assist the petitioners.

135. In so far as judgment relied upon by the petitioners in case of Federal Bulk Carriers Inc (supra)³ judgment in case of Skips A/S Nordheim and others (supra)⁴, judgment in case of Siboti K/S (supra)⁶ and judgment in case of T.W.Thomas & Co. Limited (supra)⁷ are concerned, since the entire contract entered into between the respondents and D.B.Shipping LLC including arbitration agreement stood incorporated in the letter of guarantee, the judgment relied upon by the petitioners in the aforesaid four cases do not assist the petitioners. The facts of those cases are even otherwise totally different and are clearly distinguishable with the facts of this case.

136. In so far as submission of the learned counsel for the petitioners that the findings of the arbitral tribunal on their jurisdiction is not final and is subject to the final order of the court is concerned, the petitioners have placed reliance on the judgment of the Supreme Court in case of Renusagar Power Co. Ltd. vs. General Electric Company & Anr. (supra)²². The Supreme Court in the said judgment has held that there is nothing in the general law of arbitration either in English or Indian which prevents the arbitrators or an umpire from deciding questions of their own jurisdiction provisionally or tentatively and to proceed to make their awards 8 AIR (2011) SC 442 3 (1989) 1

Lloyd's Law Reports, 103 4 (1983) 2 Lloyd's Law Reports, 592 6 (2003) 2 LLR 364 7 (1912) Appeal cases page 1 22 AIR 1985 SC 1156(1) Kvm ARBP76.12 on that basis, though it is clear that their provisional or tentative decision on questions of their own jurisdiction would be subject to the final determination by the court and if the court takes a contrary view their award will not be given effect to and that was the scheme of the Foreign Awards Act. In my view reliance placed by the learned counsel for the petitioners on the judgment of Supreme Court in case of Renusagar Power Co. Ltd. vs. General Electric Company & Anr.

(supra)22 is misplaced. Since the parties in this case were governed by the English law and the provisions of English Arbitration Act were applicable, the petitioners not having challenged the declaratory arbitration award as well as final award under the provisions of English Act the petitioners have lost their right to challenge those awards in any other proceedings including this proceedings. The Supreme Court has not considered the provisions of the English Arbitration Act which provides for remedy of challenge to interim, jurisdictional and final award and the effect of not challenging such awards.

137. The next submission of Mr.Makhija, learned counsel for the petitioners is that since the respondents have not obtained any leave under section 66 of the Arbitration Act, 1996 (English Arbitration) before seeking enforcement of the foreign award in this court, the said foreign award cannot be enforced by this court. In support of this submission, learned counsel placed reliance on the judgment in case of African Fertilizers and Chemicals NIG Ltd. (Nigeria) (supra) 20, judgment in case of West Tankers INC vs.Allianz Spa and another (supra) 21 and judgment in case of West Tankers INC vs.Allianz Spa and another (The "Front Comor")44 .

22 AIR 1985 SC 1156(1) 20 (2011) 2 Lloyd's Law Reports, 531 21 (2011) 2 Lloyd's Law Reports 117 44 (2012) 1 LLR 398 Kvm ARBP76.12

138. A perusal of section 66(4) read with sections 100 and 104 of the English Arbitration Act, clearly indicates that the provisions prior to section 104 would not affect any right to rely upon or enforce at New York Convention Law or common law under section 66. In my view if the respondents would have applied for enforcement of the declaratory arbitration award or final award in England under the provisions of English Arbitration Act, the respondents would have required leave of the appropriate court under section 66. For the purpose of enforcement of such award in India under section 46, no such leave of the foreign court was required. In my view Mr. Andhyarujina, learned counsel for the respondents has rightly placed reliance on the judgment of the Supreme Court in case of Fuerst Day Lawson Ltd.(supra)26 and in particular paragraph (31) thereof in support of his submission that a separate proceedings for enforceability of the foreign award and for making it a rule of the court or decree is not warranted.

139. The next submission of Mr.Makhija, learned counsel for the petitioners is that under the provisions of Foreign Exchange Management (Guarantees) Regulations, 2000 and in particular Regulation (3) thereof, the petitioners could not have executed any such letter of guarantee in favour of respondents without any prior permission of the Reserve Bank of India whereby any of the obligation or liability of the said D.B.Shipping LLC could have been guaranteed by the petitioners.

He submits that such guarantee without prior permission of the Reserve Bank of India is specifically prohibited under regulation (3) of the Foreign Exchange Management (Guarantees) Regulations, 2000. In the hearing held on 13th March, 2015, learned counsel however submitted that under Regulation (3), such guarantee itself could not have been executed by the petitioners at all. It is submitted that since the said document itself was illegal and 26 (2001) 6 SCC 356 Kvm ARBP76.12 in contravention of law, the arbitral award based on such document entered into in contravention of law also would be nullity and in conflict with public policy of India. Learned counsel submits that the award thus can be opposed on the ground set out in section 48(2) (ii) (b) of the Arbitration and Conciliation Act, 1996.

140. Learned counsel submits that even if there is a provision for payment of penalty the transaction which is prohibited and is in contravention of law does not cease to be a prohibited transaction. Even if any penalty is required to be paid, such transaction which is prohibited and in violation of law cannot be legalized. The arbitral award based on such illegal contract cannot be enforced. Learned counsel placed reliance on the judgment in case of Mannalal Khetan and others (supra)¹⁷ and in particular paragraphs 19 to 20 which read thus :-

19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. (See *Mellis v. Shirley L.B.*) A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a con-

tract: if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what act the statute prohibits, but what contracts it pro-

hibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See *St. John Shipping Corporation v. Joseph* 17 (1977) 2 SCC 424 Kvm ARBP76.12 Rank.) (See also *Halsbury's Laws of England*, 3rd Edn., Vol. 8, p. 141.)

20. It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim *A pactis privatorum publico juri non derogatur* means that private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by impli-

cation forbidden by statute, no court can lend its assistance to give it effect. (See *Mellis v. Shirley L.B.*) What is done in contravention of the provisions of an Act of the legislature cannot be made

the subject of an action.

141. Learned counsel for the petitioners also placed reliance on the judgment of Madras High Court in case of Mrs.Shoba Viswanathan (supra)¹⁸ and in particular paragraphs 20, 22, 36, 37, 43 and 47 of the said judgment which read thus :-

20. Submission No. 2: Admittedly, the defendant is a foreign national long before 1981. Plaintiff is also aware of the same. The schedule immovable property which belongs to a non-

citizen can be conveyed only after obtaining permission of the Reserve Bank of India. Sec.31(1) of the Foreign Exchange Regulation Act, 1973 (for short, FERA) reads thus:- "No person who is not a citizen of India and no company (other than a banking company) which is not incorporated under any law in force in India shall, except with the previous general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise an immovable property situate in India."

22. Sec.50, FERA says that if any person contravenes any of the provisions of the Act, he shall be liable for penalty. The said Section reads thus:-

"If any person contravenes any of the provisions of this Act (other than Sec.13, clause (1) of Sub-sec.(1) of Sec.18, Sec.18-A and clause (a) of sub-sec. (1) of sec.19 or of any 18 1996 Madras Law Journal Reports 96 Kvm ARBP76.12 rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention of five thousand rupees, whichever is more as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer)."

Rules have also been framed under FERA for getting permission. As per directions of the Reserve Bank of India, under Sec.23-A.1, permission must be obtained anterior to any transaction contemplated under Sec.31 of FERA. There are also prescribed Forms as to how to make the applications and what is to be done about the sale proceeds. Unless and until the said form is filled up, and permission is granted, no sale of a property by a foreigner can be recognised. Even if as between two contracting parties the title may pass, while exercising the discretion under Sec. 20 of the Specific Relief Act, court will have to consider whether it should be a party to a transaction for which permission is not obtained from the Reserve Bank of India.

36. If a specific performance decree is passed that will amount to allowing the parties to bypass the provisions of FERA. The question whether permission has to be granted or not is matter which has to be decided only by the Reserve Bank of India, and the Court cannot supervise the exercise of such statutory powers by the Reserve Bank of India. When a transaction is permitted only after obtaining permission from a Statutory authority over whom the Court has no control, the relief of specific

performance will not be usually granted. It is not enforcing a contract alone. It has to take into consideration the rights of the Reserve Bank of India and also the national interest.

37. The learned counsel for the defendant also brought to our notice a decision of the Delhi High Court reported in *Ajit Prashad Jain v. N.K.Widhani and others*, A.I.R. 1990 Delhi 42, corresponding (1990) 26 E.C.C.284. Paragraph 26 of the Kvm ARBP76.12 judgment was read before us. In that case it was held that Sec.31 of FERA is not a bar for granting a decree for specific performance and the question whether there was any violation of the Act will arise only at the time of execution of the sale deed. The learned Judge held in the said decision that under Sec.54 of the Transfer of Property Act, an agreement itself will not create an interest in the property and, therefore, the agreement cannot be termed as void and the provisions of Sec.31 of FERA do not bar the grant of relief of specific performance and the question of permission of Reserve Bank of India will arise only at the time of execution. With due respect to the learned Judge, we cannot agree with the view taken by the learned Judge. No Court shall pass a decree which cannot be executed. While exercising the discretion, the Court will also see whether it could pass an executable decree and if, ultimately, the Reserve Bank of India refuses permission, the decree, in effect, becomes a waste paper. The discretion exercised under Specific Relief Act is judicial discretion, and this also will have to be taken into consideration while granting the relief.

43. The position of law is clear that when the enforcement of the contract is against any provision of law, that will amount to enforcement of an illegal contract. The contract per se may not be illegal. But its enforcement requires compliance of statutory conditions, failure of which will amount to statutory violation. A Court which is expected to enforce the law, cannot be a party to such a decree.

47. For the reasons mentioned above, we accept the submission of learned counsel for the defendant that if a decree is granted as prayed for, it will be against the provisions of Sec. 23 of the Indian Contract Act. The court will be reluctant to exercise a discretion in favour of the plaintiff in such a case.

142. Per contra, the submission of the learned counsel for the respondents is that no prior permission of the Reserve Bank is required for executing a letter of guarantee as canvassed by the petitioners under regulation (3) of the Foreign Kvm ARBP76.12 Exchange Management (Guarantees) Regulations, 2000. In any event since such permission is not obtained before execution of letter of guarantee by the petitioners the petitioners themselves are responsible for the same. Learned counsel submits that in any event such permission can be obtained post facto. Learned counsel placed reliance on section 13 of the Foreign Exchange Management Act, 1999 which provides for payment of penalty in case of contravention of any of the provisions of the Act and submits that since there is provision of payment of penalty, the transaction entered into without permission of the authority even if required does not become void. Section 13 of the Foreign Exchange Management Act, 1999 read thus :-

13. Penalties.-(1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorization s

issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

(2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or she l be retained outside India in accordance with the directions made in this behalf.

Explanation.- For the purposes of this sub-section, "property"

Kvm ARBP76.12 in respect of which contravention has taken place, shall include-

- (a) deposits in a bank, where the said property is converted into such deposits;
- (b) Indian currency, where the said property is converted into that currency; and
- (c) any other property which has resulted out of the conversion of that property.

143. Mr. Andhyarujina, learned counsel placed reliance on the judgment of Delhi High Court in case of SRM Exploration Pvt. Ltd. (supra) 36 and in particular paragraphs 11 and 12 and would submit that the guarantee executed without prior permission of the Reserve Bank of India would not be a void transaction.

Paragraphs 11 and 12 of the said judgment of Delhi High Court read thus :-

11. We have perused the provisions of FEMA, 1999 Section 3 thereof prohibits dealing in or transferring of any foreign exchange save as otherwise provided therein or under the Rules & Regulations framed thereunder without general or special permission of RBI. We are unable to find any provision therein voiding the transactions in contravention thereof. We may mention that the predecessor legislation to FEMA namely FERA 1973 vide Section 47 prohibited entering into any contract or agreement directly or indirectly evading or avoiding any operation of the said Act or any provision thereof. However Sub Section (3) thereof also provided that such prohibition shall not prevent legal proceedings being brought in India for recovery of a sum which apart from the provision of FERA would be due. However the legislature while re-enacting the law on the subject has chosen to do away with such a provision. We are of the view that the same shows a legislative intent to not

void the transaction even if in violation of the said Act. Thus we are of the opinion that the plea of the appellant Company in this regard is without any force.

12. The pleadings of the appellant Company are conspicuously 36 (2012) 4 Company Law Journal 178 (Delhi) Kvm ARBP76.12 silent as to why Mr. Ravi Chilukuri who has a substantial stake in the appellant Company and who from the documents filed by the respondent is the face/promoter of the appellant Company and/or of the Group of Companies to which the appellant Company belongs signed the Guarantee Declaration, Promissory Notes and as to how the Resolution aforesaid of the Board of Directors of the appellant Company landed with the respondent. Similarly though it is contended that comfort letter aforesaid issued by the Bankers of the appellant Company does not refer to the transaction in question but there is no explanation as to for which transaction it was obtained from the bank. The appellant obviously had a stake in the Stock Purchase and Sale Agreement (supra), for the appellant Company to stand guarantee for the same. The world is a shrinking place today and commercial transactions spanning across borders abound. We have wondered whether we should be dissuaded for the reason of the transaction for which the appellant Company had stood surety/guarantee being between foreign companies. We are of the opinion that if we do so, we would be sending a wrong signal and dissuading foreign commercial entities from relying on the assurances/guarantees given by Indian companies and which would ultimately restrict the role of India in such international commercial transactions.

144. Learned counsel placed reliance on the judgment of this court in case of Noy Vallesina Engineering Spa (supra)³⁷ and in particular paragraphs 51, 52 and 53 which read thus :-

51. The next challenge to the award on merits is that enforcement of the award will be contrary to the prevalent Foreign Exchange Laws. It is submitted that the respondent had invoked the arbitration clause under ECAAP. In the same arbitration proceedings the Petitioner filed a counter claim, which has been awarded by the arbitral tribunal in favour of the Petitioner. So far as ECAAP is concerned, it has not been approved by the Reserve Bank of India. It is submitted that making of payment under a contract which has not been approved by the RBI is contrary to the provisions of the 37 (2006) 5 Bom.C.R.155 Kvm ARBP76.12 Foreign Exchange Regulations Act and therefore, it is opposed to the public policy of India.

52. In reply it is submitted that the submissions of the respondent is incorrect and misconceived as it ignores the provisions of Section 47 of FERA 1973. The Petitioner relies on the observations of the Supreme Court in paragraphs 81 to 83 of its judgment in the case of (Renusagar Power Co. Ltd.

v/s. General Electric Co.) 1994 Supp.(1) 644 : A.I.R. 1994 S.C. 860. It is submitted that the respondent has claimed that permission is required under Section 9 of the FERA, which is not obtained by the Petitioner. According to the Petitioner, under section 9 of FERA no permission is required for entering into a contract. Permission is required only for making payment. Thus, a contract which has the provisions for making payment, if entered into without obtaining permission under Section 9 would

be valid, only before making payment under that contract permission will be required to be obtained. It is further submitted that the permission that is contemplated by Section 9 of FERA is not a prior permission. Therefore, even ex-post-facto permission can also be obtained. In any event, it is submitted that because the award is made in an arbitration which was under ECAAP, which has not received the permission of RBI, the award cannot be faulted. At the most, at the time of execution if the petitioner has not obtained permission of RBI by then the respondent may be able to resist payment without the petitioner obtaining the permission of the Reserve Bank of India. In my opinion, the objection raised on behalf of the respondent is entirely covered by the judgment of the Supreme Court in the case of Renusagar, against the respondent. The observations of the Supreme Court from paragraphs 81 to 83 of that judgment are relevant. They read as under:-

81. As regards the second submission of Shri Venugopal that the enforcement of the Arbitral Award would constitute violation to Section 9(1) of FERA which imposes prohibition to make any payment to or for the credit of any person resident outside India except in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or Kvm ARBP76.12 unconditionally by the Reserve Bank. The submission is that in view of the earlier order of the Government of India dated August 1, 1969 refusing to approve rescheduling of payments the bar of Section 9 will operate and no order for enforcement of the award can be made. The High Court in this regard has placed reliance on the provisions of Section 47(3) of FERA which provides as follows:-

"Neither the provisions of this Act nor any term (whether expressed or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term would be due, whether as debt, damages or otherwise, but-

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any Court as they apply in relation to other sums;

(b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and

(c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requisition."

82. In *Dhanrajaspal Gobindram v. Shamji Kalidas and Co.* 1961 (3) S.C.R. 1020 : A.I.R. 1961 S.C. 1285, this Court has construed the provisions of section 21 of the Foreign Exchange Regulation Act, 1947. Sub-section (3) of section 21 of the said Act was more or less similar to section 47(3) of FERA.

This Court has held:

"Sub-section (3) allows legal proceedings to be brought Kvm ARBP76.12 to recover sum due as a debt, damages or otherwise, but no steps shall be taken to enforce the judgment, etc. except to the extent permitted by the Reserve Bank. The effect of these provisions is to prevent the very thing which is claimed here, namely, that the Foreign Exchange Regulation Act arms persons against performance of their contracts by setting up the shield of illegality. An implied term is engrafted upon the contract of parties by the second part of sub-section (2) and by sub-section (3) the responsibility of obtaining the permission of the Reserve Bank before enforcing judgment, decree or order of Court, is transferred to the decree-holder. The section is perfectly plain, though perhaps it might have been worded better for which a 'model existed in England (p.1031) (of SCR): (at p.1290 of A.I.R.)."

83. To the same effect is the law laid down by the House of Lords in England in (Contract and Trading Co.Ltd. v. Barbey), 1960 A.C. 244 wherein the following observations from the judgment of Somerwell LJ. in (Cummings v. London Bullion Company Ltd.), 1952 (1) K.B. 327, have been quoted with approval:

"The person entitled to the payment issues a writ. The fact that permission has not been obtained is not a defence to the action. On the one hand, the plaintiff can obtain judgment, the money due under the judgment being subject to Part II of the Act and the Rules to which I have referred. The defendant assuming that he is admitting liability, apart from the provisions of the Act, can make a payment into Court. The Act is not to be used to enable the defendant to retain the money in his pocket but to control its reaching its destination, namely, the plaintiff" (p.253).

53. It is clear from the above quoted paragraphs of the judgment of the Supreme Court that an award cannot be set aside because at the time of entering into the contract, permission of the Reserve Bank of India was not obtained. If such a permission is necessary, it can be obtained by the party Kvm ARBP76.12 concerned before he receives actual payment. The contention, therefore, has no force and is, therefore, rejected. I have not been pointed out any law which prevents the Arbitral Tribunal from making an award for payment of money to a foreigner pursuant to a contract, which has not been approved by the R.B.I. In the absence of any such provision, no fault can be found with the award on this count.

145. Learned counsel placed reliance on the judgment of this court delivered on 15th September, 2006 in case of Vitol S.A. (supra)³⁵ in Notice No.618 of 2011 and in particular paragraphs 42 to 45 and 49 which read thus :-

42. It would, therefore, be material to see the precedents under Section 16 itself. The case of Texmaco Ltd. & Anr. Vs. Deputy Director, Enforcement Directorate, 1997 Company Cases Vol. 88 Pg.228, was a contract under private international law between India and Malaysia. Certain machinery was to be supplied by a Indian company in Malaysia. The machinery had to be erected. The Indian company was entitled to receive the amount CIF for the supply of the machinery as also erection

charges. The machinery was found to be defective. The Malaysian concern called upon the Indian Company to withdraw its claim on account of erection charges and raised a counter claim. The Indian company wrote off its claim on account of erection charges and the Malaysian concern restricted its claim only for defective material. The RBI called upon the Indian party to show the circumstances under which part amount was written off. A Show Cause Notice was issued.

An adjudication order was passed by the Dy. Director, Enforcement Directorate. It was contended by the Indian company that it applied for permission of the RBI to give up its claim against the Malaysian firm later. It was held that in the absence of the word "previous" before the word "permission", ex post facto permission could have been granted by the RBI. Relying upon the case of LIC of India Vs. Escorts Ltd. (1986) 1 SCC 264 Section 29 (1) of FERA came to be interpreted. It was held that a permission under FERA may be sought at any time, even subsequent to the acts sought Kvm ARBP76.12 to be restricted.

It was held that the commission of the acts envisaged under Section 16 do not contemplate offences under those sub clauses. The offence would be completed, if the acts were done without the permission of the RBI and unless there was a positive decision on the part of the RBI to grant or refuse the permission the offence was not complete.

Consequently the offence under Section 8 of FEMA r/w the notification dated 3rd May, 2000 of the RBI would go the same way.

43. Mr. Chinoy has relied upon the judgment in the case of Director of Enforcement Vs. MCTM Corporation Pvt. Ltd. & Ors.(1996) 2 Supreme Court Cases 471 to show that the same analogy was applied under Section 10 of the FERA, 1947 which was analogous to Section 16 of the FERA, 1973 so that the person, who had the right to receive FE could not refrain from doing or taking any action which would have effect of delaying or ceasing the receipt of such FE. It is held that the default would be complete on the failure to get FE receivable in India repatriated within the reasonable time after the right to receive the same accrues. It is observed that the reasonable time would depend upon the circumstances of each case and cannot depend upon any general formula. It is observed that if the delay in repatriation was not unreasonable there would be no contravention of Section 10 (1) (a) of FERA.

In this case the delay in receiving the amount due is of 7 weeks with a corresponding consideration of payment of lesser amount if the negotiations fructified and the amended contract or new contract was executed.

There would, therefore, be no contravention of Section 8 of FEMA.

44. Later in the case of SRM Exploration Pvt. Ltd., Vs. N & S & N Consultants S R O, MANU/DE/2056/2012, considering the provisions of FERA as well as FEMA, the Supreme Court has held that Section 3 of FEMA prohibits dealing with or contravening FE without the general or special permission of RBI. However, the transactions cannot be declared void if they are in

contravention thereof. The Court has considered Section Kvm ARBP76.12 47 (3) of FERA which prohibited entering into any contract or agreement directly or indirectly for evading or avoiding FERA. However, FEMA has done away with such a provision. Consequently such contracts cannot be declared void.

45. Hence the award in this case would not be in contravention of FEMA. There are no directions passed which are contrary to FEMA in the award. The merits of the case are alone considered which cannot be gone into by this Court to interfere with the award.

49. In the case of Shri Lal Mahal Ltd. Vs. Progetto Grano Spa, (2014) 2 Supreme Court Cases 433 in paragraph 24 following the case of Renusagar Power Co. Ltd. Vs. General Electric Co., 1994 Supp (1) SCC 644 it was held that the defence of public policy taken up under Section 7(1) (b) (ii) of the Foreign Awards Act should be construed narrowly. It is observed that the concept of public policy must be construed as applied in the field of private international law and consequently to be against public policy it should be contrary to:

(i) fundamental policy of Indian law ; or

(ii) the interests of India; or

(iii) justice or morality.

146. Learned counsel appearing for the respondents submits that the scope of objection under section 48 of the Arbitration and Conciliation Act, 1996 is extremely limited. None of the grounds setout in section 48 are satisfied by the petitioners in this case. Learned counsel submits that enforcement of a foreign award can be refused only if it is contrary to the fundamental policy of Indian law, interests of India or justice or morality and not on any other ground. Reliance is placed on the judgment of Supreme Court in case of Shri Lal Mahal Limited (supra)33 and in particular paragraphs 22, 23 to 28, 45 to 47 which read thus :-

22. It is not necessary to narrate in detail the facts in Renusagar. Suffice it to say that Arbitral Tribunal, GAFTA in 33 (2014) 2 SCC 433 Kvm ARBP76.12 Paris passed an award in favour of General Electric Company (GEC) against Renusagar. GEC sought to enforce the award passed in its favour by filing an arbitration petition under Section 5 of the Foreign Awards Act in the Bombay High Court.

Renusagar contested the proceedings for enforcement of the award filed by GEC in the Bombay High Court on diverse grounds. Inter alia, one of the objections raised by Renusagar was that the enforcement of the award was contrary to the pub-

lic policy of India. The Single Judge of the Bombay High Court overruled the objections of Renusagar. It was held that the award was enforceable and on that basis a decree in terms of the award was drawn. Renusagar filed an intra-court appeal but that was dismissed as not maintainable. It was from these orders that the matter reached this Court. On behalf of the par-

ties, multifold arguments were made. A three-Judge Bench of this Court noticed diverse provisions, including Section 7(1)

(b)(ii) of the Foreign Awards Act which provided that a foreign award may not be enforced if the court dealing with the case was satisfied that the enforcement of the award would be contrary to public policy.

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

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

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

This Court held that the words "public policy" used in Section 7(1)(b)(ii) of the Foreign Awards Act meant public policy of India. The argument that the recognition and enforcement of the award of the Arbitral Tribunal, GAFTA can be questioned on the ground that it is contrary to the public policy of the State of New York was negated. A clear and fine distinction was drawn by this Court while applying the rule of public policy between a matter governed by domestic laws and a matter involving conflict of laws. It has been held in unambiguous terms that the application of the doctrine of "public policy" in *Kvm ARBP76.12* the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when purely municipal legal issues are involved.

24. Explaining the concept of "public policy" vis-à-vis the enforcement of foreign awards in *Renusagar*, this Court in paras 65 and 66 of the Report stated: (SCC pp. 681-82) "65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act, 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Arbitra-

tion (Protocol and Convention) Act, 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression 'public policy' covers the field not covered by the words 'and the law of India' which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. ... This would mean that 'public policy' in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned

with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be Kvm ARBP76.12 contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

(emphasis supplied)

25. In *Saw Pipes* the ambit and scope of the Court's jurisdiction under Section 34 of the 1996 Act was under consideration. The issue was whether the court would have jurisdiction under Section 34 to set aside an award passed by the Arbitral Tri-

bunal, GAFTA which was patently illegal or in contravention of the provisions of the 1996 Act or any other substantive law governing the parties or was against the terms of the contract. This Court considered the meaning that could be assigned to the phrase "public policy of India" occurring in Section 34(2)

(b)(ii). Alive to the subtle distinction in the concept of "en-

forcement of the award" and "jurisdiction of the court in setting aside the award" and the decision of this Court in *Renusagar*, this Court held in *Saw Pipes* that the term "public policy of India" in Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it be-

comes final. Having that distinction in view, with regard to Section 34 this Court said that the expression "public policy of India" was required to be given a wider meaning. Accordingly, for the purposes of Section 34, this Court added a new category -- patent illegality -- for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against public policy. Award could also be set aside if it was so unfair and unreasonable that it shocks the conscience of the court.

26. From the discussion made by this Court in *Saw Pipes* in para 18, para 22 and para 31 of the Report, it can be safely observed that while accepting the narrow meaning given to the expression "public policy" in *Renusagar* in the matters of enforcement of foreign award, there was departure from the said meaning for the purposes of the jurisdiction of the Court in setting aside the award under Section 34.

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27. In our view, what has been stated by this Court in *Renusagar* with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must apply equally to the ambit and scope of Sec-

tion 48(2)(b) of the 1996 Act. In *Renusagar* it has been expressly ex- posed that the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression "public policy" used in Section 7(1)(b)(ii) was held to mean "public policy of India". A dis- tinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in *Renusagar*. For all this there is no reason why *Renusagar* should not apply as regards the scope of in- quiry under Section 48(2)(b). Following *Renusagar*, we think that for the purposes of Section 48(2)(b), the expression "pub- lic policy of India" must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in *Renusagar*. Al- though the same expression "public policy of India" is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the con-

cept of "public policy in India" is same in nature in both the sections but, in our view, its application differs in degree inso-

far as these two sections are concerned. The application of "public policy of India" doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same ex- pression in respect of the domestic arbitral award.

28. We are not persuaded to accept the submission of Mr Ro- hinton F. Nariman that the expression "public policy of India" in Section 48(2)(b) is an expression of wider import than the "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act. We have no hesitation in holding that *Renusagar* must ap- ply for the purposes of Section 48(2)(b) of the 1996 Act. Inso- far as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in *Saw Pipes* would govern the scope of such proceedings.

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45. Moreover, Section 48 of the 1996 Act does not give an op- portunity 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. Pro-

cedural defects (like taking into consideration inadmissible ev- idence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

46. In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report ob-

tained 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 con- tractual

agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Ap-

peal.

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

147. Learned counsel also placed reliance on the judgment of Delhi High Court in case of Penn Racquet Sports (supra)³⁴ and in particular paragraph (44) which read thus :-

44. As held by the Supreme Court, the recognition and enforcement of a foreign award cannot be denied merely because the award is in contravention of the law of India. The 34 ILR (2011) Delhi 181 Kvm ARBP76.12 award should be contrary to the fundamental policy of Indian law, for the Courts in India to deny recognition and enforcement of a foreign award. The other grounds recognized by the Supreme Court to refuse recognition and enforcement of a foreign award are that the award is contrary to the interests of India, or justice or morality. Merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality.

148. This court after hearing the learned counsel for the parties at length had closed the hearing for pronouncement of the judgment. However, during the course of dictation of the judgment, this court came across the judgment of Division Bench of this court in case of Videocon Industries Limited vs. Intesa Sanpaolo S.P.A.⁴⁵ delivered on 19th July, 2014. This court accordingly placed the matter on board for directions and invited the attention of the learned counsel to the judgment of Division Bench this court on the issue raised by the petitioner whether prior permission of Reserve Bank was mandatory before executing any letter of guarantee in favour of the respondent. This court thereafter heard both the learned counsel on this issue. Mr. Andhyarujina, learned counsel appearing for the respondent strongly placed reliance on the said judgment of the Division Bench and would submit that the law laid down by the Division Bench would squarely apply to the facts of this case. On the other hand, Mr. Makhija, learned counsel appearing for the petitioner would submit that the said judgment is clearly distinguishable in the facts of this case. He submits that the Division Bench has not considered the submission that under regulation (3) of Foreign Exchange Management (Guarantees) Regulation, 2000, no such guarantee could have been executed at all. He submits that it was not the submission of the petitioner that no such letter of guarantee as executed by the petitioner could have been executed 45 2014 SCC Online Bom.1276 Kvm ARBP76.12 without prior permission of the Reserve Bank of India. But it was the case of the petitioner that no such

guarantee could have been executed at all under the said Foreign Exchange Management (Guarantees) Regulation, 2000. Mr. Andhyarujina in rejoinder on this issue submits that it was not the case of the petitioner that no such letter of guarantee could have been executed by the petitioner at all either before arbitral tribunal or in their argument before this court at any point of time.

149. Paragraphs 2, 11(c), 28 to 34 of the judgment of the Division Bench in case of Videocon Industries Limited (supra)⁴⁵ which are relevant for the purpose of deciding this issue read thus :-

2. The petition for winding up of Videocon was instituted by the Bank, which is a bank incorporated under the Laws of Italy. It is the case of the Bank that in the month of October 2006 Videocon approached the Bank for financial assistance to the tune of Euros 35 Millions for its first generation step down subsidiary viz. VDC Technologies S.P.A. (the Subsidiary). As a condition to secure the financial assistance, Videocon offered and ultimately issued a guarantee letter styled as 'Patronage Letter' on 5 June 2007 in favour of the Bank. Under loan agreement dated 6 June 2007, the Bank advanced financial assistance to the tune of Euros 35 Million to the Subsidiary, in which the terms and conditions for such advance, came to be set out. Clause 7.1 of the loan agreement, inter alia required the Subsidiary to maintain sufficient balance in its current account to repay the loan installments. There was a breach of this provision and consequent default in payment of the very first loan installment. The Bank, therefore, took up the issue of default with the Subsidiary.

11(c). Videocon also has the defence that the Patronage Letter was issued in breach of the statutory provisions under the Foreign Exchange Management Act, 1999 ("FEMA") because prior permission of the Reserve Bank of India was not obtained before issuing such Patronage Letter. This contention was raised by Videocon in its affidavit in reply to the winding up petition. At the hearing of the winding up petition before the learned Company Judge, Videocon had not abandoned the said defence but at the hearing Videocon was not in a position to substantiate its defence. The fact that the defence was not abandoned would also be clear from the written submissions submitted after conclusion of the arguments and, therefore, this Court may not proceed on the basis that Videocon had abandoned its defence that issuance of Patronage Letter was illegal as in violation of the statutory provisions of FEMA. In view of such illegality, the Bank is not entitled to prosecute the winding up petition, even if it were to be held that the winding up petition is based on the Patronage Letter and not merely on the basis of the decree of the Turin Court.

28. Section 3 of the FEMA by itself does not contain any prohibition against issuance of any letter of guarantee without permission of RBI. However, the statutory regulations being Foreign Exchange Management (Guarantees) Regulations, 2000 provide as under:

"Reg. 3 : Save as otherwise provided in these regulations, or with the general or special permission of the Reserve Bank, no person resident in India shall give a guarantee or surety in respect or, or undertake a transaction, by whatever name called, which has the effect of guaranteeing, a debt, obligation or other liability owed by a person resident in India to, or incurred by a person resident outside India."

While Regulation 4 refers to guarantees which may be given by authorised dealers, Regulation 5 deals with guarantees which may be given by persons other than authorised dealers.

A person other than the authorised dealer may give a guarantee in the specified cases. The relevant clause being (b) reads as under:

"5(b) a company in India promoting or setting up outside India, a joint venture company or a wholly owned subsidiary, may give a guarantee to or on behalf of the latter in connection with its business."

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29. It is true that Videocon which is a person resident in India gave such a guarantee for its subsidiary with registered office in Italy which is a person resident outside India. Learned counsel for Videocon vehemently submitted that since no special permission of the Reserve Bank is on record and no general permission was granted at the time of issuance of the letter of guarantee in 2007, it may be held that the Patronage letter was null and void ab initio.

30. It is not possible to accept the above contention for several reasons. In the first place the words "or with the general or special permission of Reserve Bank" cannot be construed as prior permission of the Reserve Bank. Where the Regulations contemplate that prior permission or prior approval of the Reserve Bank is required to be obtained, it is so specified. For instance, Regulation 3.A imposes restriction of obtaining overseas guarantee in the following terms:

"3.A No corporate registered under the Companies Act, 1956 (1 of 1956) shall avail domestic rupee denominated structured obligations by obtaining credit enhancement in the form of guarantee by international Banks, international financial institutions or joint venture partners, except with the prior approval of the Reserve Bank." [Emphasis supplied] Hence, it cannot be said that the Patronage letter issued in 2007 could not be issued without prior approval or prior special permission of the Reserve Bank.

31. Secondly, on 27 May 2011 the Reserve Bank issued circular No. 69 providing for performance guarantees to be issued by Indian parties and generally permitted issuance of guarantees by an Indian party to step down subsidiary of a joint venture or wholly owned subsidiary under general permission in the following terms:

"Issue of guarantee by an Indian Party to step down subsidiary of JV / WOS under general permission:

(a) Currently Indian Parties are permitted to issue corporate guarantees on behalf of their first level step down operating JV Kvm ARBP76.12 /WOS set up by their JV / WOS operating as a special Purpose Vehicle (SPV) under the Automatic Route, subject to the condition that the financial commitment of the Indian party is within the extant limit for overseas direct investment. As a measure of further liberalization, it has been decided that irrespective of whether the direct subsidiary is an operating company or a SPV, the Indian promoter entity may extend corporate

guarantee on behalf of the first generation step down operating company under the Automatic Route, within the prevailing limit for overseas direct investment. Such guarantees will have to be reported to the Reserve Bank in Form ODI, as hitherto, through the designated AD concerned.

(b) Further, it has also been decided that issue of corporate guarantee on behalf of second generation or subsequent level step down operating subsidiaries will be considered under the Approval Route, provided the Indian Party directly or indirectly holds 51 per cent or more stake in the overseas subsidiary for which such guarantee is intended to be issued." The said circular came to be further clarified by Foreign Exchange Management (Guarantees) (Fourth Amendment) Regulations, 2013 contained in Notification dated 8 may 2013.

Relevant portion of amended Regulation 5 (b) reads as under:

"(ii) An Indian Party promoting or setting up outside India, a Joint Venture (JV) or a Wholly Owned Subsidiary (WOS), may give a guarantee to or on behalf of the first generation step down operating company in connection with its business."

32. Though learned counsel for Videocon submitted that the aforesaid amendment came into force from 27 May 2011 and therefore long after issuance of the Patronage letter, it is necessary to see how Reserve Bank itself looked at such a situation in the year 2007. Question Nos. 34 and 35 and the answers given to the respective questions by the Reserve Bank in the Appendix II of the Foreign Exchange Management Manual 2007 Edition contain "Frequently Asked Questions", which inter alia, read as under:

Q. 34 Can an Indian Party have a JV/WOS through a Special Purpose Vehicle (SPV) under the Automatic Route?

Kvm ARBP76.12 A. Yes. Direct investment through the medium of a SPV is permitted under the Automatic Route.

Q. 35 Can an Indian Party directly fund such stepsubsidiaries?

A. Where the JV/WOS has been established through a SPV all funding to the operating subsidiary should be routed through the SPV only. However, in the case of guarantees to be given to the step down subsidiary these can be given directly by the Indian Party provided such exposures are within the permissible financial commitment of the Indian Party. [Emphasis supplied]

33. Answer to Q. 35 leaves no manner of doubt that it was permissible for Videocon to give Guarantees for its step down subsidiary provided such exposures were within the permissible financial commitments of Videocon. Now the question whether the guarantee of 38 Million Euro was within the permissible financial commitments of Videocon such as turnover and other relevant financial performance was solely within the knowledge of Videocon and therefore the question whether the issuance of Patronage Letter by Videocon on 5 June 2007 was within its permissible financial commitments would be a question of fact or at the most a mixed question of law and fact. It

is, therefore, not open to Videocon now to contend that even after having abandoned the defence before the learned Company Judge, it is still entitled to raise such a defence on the ground that it is a pure question of law. As indicated above, neither in the affidavit in reply nor at the hearing before the learned Company Judge, Videocon had given any justification for raising its defence that issuance of the Patronage letter in 2007 was in breach of the statutory requirements or that it was not within its financial commitments. Since Reserve Bank itself had permitted issuance of such guarantees for the step down subsidiaries directly by Indian party, it cannot be said that there was any breach of any statutory requirements, much less any inherent illegality.

34. In any view of the matter, it is also necessary to know that Videocon had never contended in any of its Kvm ARBP76.12 correspondence between 2007 till giving reply to the statutory notice that the Patronage Letter was issued in contravention of the provisions of FEMA or in breach of any other legal requirements. The defence is, therefore, raised for the first time only after receiving statutory notice i.e. after almost four years of issuance of the Patronage Letter. Assuming that Videocon have committed any wrong in issuing the Patronage Letter without obtaining permission of the Reserve Bank, as per the settled legal position, it is not open to a party to take advantage of its own wrong. In *Eurometal Ltd. v. Aluminium Cables and Conductors (U.P) Pvt. Ltd.* [(1983)53 Comp Cas 744 Cal and *SRM Exploration Pvt. Ltd. v. N & S & N Consultants S.R.O* [(2012) 4 Comp L.J. 178 (Del)], Calcutta and Delhi High Courts respectively have frowned upon company facing a winding up petition taking up such dishonest defence. In these decisions High Courts have taken the view that in matters of commercial transactions involving crores of amount where the company facing winding up proceedings had stood a guarantor, if any such defence were to be accepted, we would be giving a wrong signal and dissuading foreign commercial entities from relying on the guarantees given by Indian Companies and which would ultimately undermine the role of India the world of trade and commerce. We could not agree less. We, therefore, do not find any merit in submissions of Dr. Tulzapurkar that the order of admission of the winding up petition was erroneous on any such count.

150. A perusal of the record clearly indicates that the petitioner had not only in execution of letter of guarantee in favour of the respondent so as to secure the performance of the said D.B.Shipping LLC but had also participated in the execution of the charter party agreement between the respondent and the said D.B.Shipping LLC. Even in the correspondence entered into with the respondent prior to the date of the execution of such charter party agreement, some of which were signed by the petitioner on behalf of the said D.B.Shipping LLC, there was a reference to such letter of guarantee to be given by the petitioner. A perusal of the Kvm ARBP76.12 record also indicates that though the said letter of guarantee was issued by the petitioner admittedly on 19th September, 2008, the petitioner did not raise any issue any time prior to the date of filing reply before the arbitral tribunal raising objection about violation of FEMA.

151. A perusal of the judgment of the Division Bench in case of *Videocon Industries Limited* (supra)⁴⁵ makes it clear that the Division Bench had considered the similar issue in the said judgment. The appellant before the Division Bench had issued a patronage letter which was in the nature of a deed of guarantee. The respondent in the said proceedings had filed a winding up petition against the appellant based on such deed of guarantee against the appellant. One of the

issue raised by the appellant in those proceedings was that the said letter of guarantee patronage letter was issued in breach of the statutory provisions under the Foreign Exchange Management Act, 1999 and the said Foreign Exchange Rules 2000, no such letter of guarantee could have been enforced by the respondent. Considering these arguments and the issue raised by the parties, the Division Bench of this court has after dealing with section (3) of FEMA and also regulation 3 of the Foreign Exchange Management (Guarantees) Regulation, 2000, has categorically held that the word "or with the general or special permission of Reserve Bank"

cannot be construed as prior permission of the Reserve Bank. It is held that where the Regulations contemplate that prior permission or prior approval of the Reserve Bank is required to be obtained, it was so specified.

152. The Division Bench considered regulation 3(a) and accordingly held that it could not be said that the said letter of guarantee (patronage letter) could not be issued without prior approval or prior special permission of the Reserve Bank. Division Bench in the said judgment also considered the judgment of Delhi High 45 2014 SCC Online Bom.1276 Kvm ARBP76.12 Court in case of SRM Exploration Pvt.Ltd.(supra)³⁶ and has held that in matters of commercial transactions involving crores of amount where the company facing winding up proceedings had stood as a guarantor, if any such defence were to be accepted, the court would be giving a wrong signal and dissuading foreign commercial entities from relying on the guarantees given by Indian Companies and which would ultimately undermine the role of India, the world of trade and commerce. This court also considered the conduct of the appellant by holding that the defence now raised by the appellant that the said patronage letter was issued in contravention of provisions of FEMA or in breach of any other requirements was only after receiving statutory notice i.e. after almost four years of issuance of the patronage letter. It is held that even if the appellant therein had committed any wrong in issuing the patronage letter without obtaining permission of the Reserve Bank, as per the settled legal position, it was not open to a party to take advantage of its own wrong. In my view, the judgment of the Division Bench in case of Videocon Industries Ltd.(supra) squarely applies to the facts of this case.

Division Bench has already interpreted the regulation of Foreign Exchange Management (Guarantees) Regulation, 2000 and has also considered the conduct of the appellant who had not raised any such objections for several years and has held that no such prior permission of the Reserve Bank was required for issuing such letter of guarantee. In this case also the petitioner did not raise any such objection for several years though had participated in the negotiations for execution of charter party agreement and also themselves had issued letter of guarantee.

153. In so far as submission of Mr.Makhija, learned counsel for the petitioner now raised when this judgment of Division Bench of this court in case of Videocon 36 (2012) 4 Comp. Law Journal 178 (Delhi) Kvm ARBP76.12 Industries Limited (supra)⁴⁵ is brought to his notice that even such letter of guarantee could not have been executed at all and the same was in violation of the provisions of the said Foreign Exchange Management (Guarantees) Regulation, 2000 is concerned, in my view the petitioner had never raised such issue at any stage earlier. Be that as it may, the petitioner not having raised any such objection for last several years after executing the letter of guarantee in favour of the respondent and was fully aware of the provisions of Indian law and had acted upon

such letter of guarantee cannot be allowed to raise such issue at this stage. I am thus not inclined to accept the submission of Mr.Makhija, learned counsel that no such guarantee could have been executed by the petitioner at all under any of the provisions of the said Foreign Exchange Management (Guarantees) Regulation, 2000.

154. In case of Noy Vallesina Engineering Spa (supra)³⁷ while dealing with the provisions of Foreign Exchange Regulations Act this court has considered a similar situation and has held that the award cannot be set aside because at the time of entering into the contract, permission of the Reserve Bank of India was not obtained. It is held that if such a permission was necessary, it could be obtained by the party concerned before he receives actual payment. In my view, said judgment also supports the case of the respondent.

155. This court in case of Vitol S.A. (supra)³⁵ has also after adverting to the judgment of Supreme Court in case of Shri Lal Mahal Limited (supra) ³³ has negated similar contention of the petitioner opposing the enforcement of the foreign award.

45 2014 SCC Online Bom.1276 37 (2006) 5 Bom.C.R.155 33 (2014) 2 SCC 433 Kvm ARBP76.12

156. Supreme Court in case of Shri Lal Mahal Limited (supra) has after adverting to the principles laid down by the Supreme Court in case of Renusagar Power Co. Ltd. (supra)²² has held that the principles laid down in the judgment of Renusagar Power Co. Ltd. (supra) must apply for the purpose of section 48(2) (b) of the Arbitration and Conciliation Act, 1996. It is held that although the same expression 'public policy of India' is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the Sections but, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award. Supreme Court has held that section 48 of the Arbitration and Conciliation Act, 1996 does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. It is held that under section under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. In my view the principles laid down by the Supreme Court in case of Shri Lal Mahal Limited (supra)³³ squarely applies to the facts of this case. I am respectfully bound by the principles laid down in the said judgment.

157. In case of Penn Racquet Sports (supra)³⁴ Delhi High Court has held that the recognition and enforcement of a foreign award cannot be denied merely because the award was in contravention of the law of India. The award should be contrary to the fundamental policy of Indian law, for the Courts in India to deny recognition and enforcement of a foreign award. It is held that merely because a monetary 22 AIR 1985 SC 1156(1) 33 (2014) 2 SCC 433 34 ILR (2011) Delhi 181 Kvm ARBP76.12 award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality. In my view the said judgment in case of Penn Racquet Sports (supra) squarely applies to the facts of this case. I am in agreement with the views expressed by the Delhi High Court.

158. Supreme Court in case of Renusagar Power Co. Ltd. (supra)²² has held that since the Foreign Awards Act was concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. This principle of the Supreme Court in case of Renusagar Power Co. Ltd. (supra)²² has been reiterated by the Supreme Court in case of Shri Lal Mahal Limited (supra)³³. It is also held by the Supreme Court that since the expression 'public policy' covers the field not covered by the words 'and the law of India' which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required. In my view even if such letter of guarantee could not have been issued at all in favour of the respondent under any of the provisions of the said Foreign Exchange Management (Guarantees) Regulation, 2000 which was acted upon by the parties simpliciter violation of the provisions of the said regulation, in my view would not be contrary 22 AIR 1985 SC 1156(1) 22 AIR 1985 SC 1156(1) 33 (2014) 2 SCC 433 Kvm ARBP76.12 to the fundamental policy of Indian law as interpreted by the Supreme Court in case of Renusagar Power Co. Ltd. (supra).

159. Delhi High court in case of SRM Exploration Pvt.Ltd. (supra)³⁶ has dealt with the provisions of FEMA, 1999 including section 3 and has held that there was no provision voiding the transaction in contravention thereof. Delhi High Court has also referred to Section 47 of FERA 1973 which prohibited from entering into contract agreement directing or indirectly for operation of the said Act or any provisions thereof. It is held by Delhi High Court that the legislature while re- enacting the law on the subject has chosen to do away with such a provision which shows a legislative intent to not void the transaction even if in violation of the said Act. I am in respectful agreement with the view expressed by Delhi High Court in case of SRM Exploration Pvt.Ltd. (supra). Delhi High Court in the said judgment has held that the world is a shrinking place today and commercial transactions spanning across borders abound. The court was of the opinion that if the court is dissuaded for the reason of the transaction for which the parties had stood surety/guarantee being between foreign companies, the court would be sending a wrong signal and dissuading foreign commercial entities from relying on the assurances/guarantees given by Indian companies and which would ultimately restrict the role of India in such international commercial transactions. I am in respectful agreement with the views expressed by the Delhi High Court. In my view the petitioner not having raised any objection about the validity and enforcement of such guarantee at any point of time before filing objection before the learned arbitrator and had acted upon such guarantee, if such objection is allowed to be raised at such belated stage, it will be contrary to the principles laid down by the Supreme Court and by Delhi High Court. I am thus not inclined to 36 (2012) 4 Company Law Journal 178 (Delhi) Kvm ARBP76.12 accept this submission of the learned counsel for the petitioner.

160. In so far as judgment of Supreme Court in case of Mannalal Khetan & Others (supra)¹⁷ relied upon by the learned counsel for the petitioner is concerned, it is held by the Supreme Court that a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. It is held that in every case where the

statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act. In my view since Foreign Exchange Management (Guarantees) Regulation, 2000 does not require any prior permission of the Reserve Bank of India in issuance of such letter of guarantee as is held by Division Bench of this court in case of Videocon Industries Ltd. (supra)⁴⁵, in my view judgment of Supreme Court in case of Mannalal Khetan & Others (supra)¹⁷ relied upon by the learned counsel for the petitioner does not assist the petitioner.

161. In so far as judgment of Supreme Court in case of Mrs.Shoba Viswanathan (supra)¹⁸ relied upon by the learned counsel for the petitioner is concerned, Supreme Court has held that when the enforcement of the contract is against any provision of law, that will amount to enforcement of an illegal contract. The contract per se may not be illegal. But its enforcement requires compliance of statutory conditions, failure of which will amount to statutory violation. In my view this judgment of the Supreme Court does not assist the petitioner since no prior consent of the Reserve Bank or any other authority is required for issuance of the nature of the guarantee executed by the petitioner. 17 (1977) 2 SCC 424 45 2014 SCC Online Bom.1276 17 (1977) 2 SCC 424 18 1996 Madras Law Journal Reports 96 Kvm ARBP76.12

162. Delhi High Court in case of Penn Racquet Sports (supra)³⁴, after adverting to the judgment of Supreme Court in case of Fuerst Day Lawson Ltd.(supra) ²⁶ held that narrow meaning must be given under Section 48 in proceedings for enforcement of a foreign award and affirmed the principle that only when the nation's "most basic notions of morality and justice" are violated, would the public policy doctrine be applied to refuse enforcement. Delhi High Court has followed the said judgment of the Supreme Court in case of Fuerst Day Lawson Ltd. (supra) and has held that the award should be contrary to the fundamental policy of Indian law, for the courts in India to deny recognition and enforcement of a foreign award.

163. In my view since no prior permission of the Reserve Bank or any other authority was required under the provisions of Foreign Exchange Management (Guarantees) Regulation, 2000 or there was no prohibition from issuing such letter of guarantee under the said regulation and the petitioner not having raised any such issue prior to the date of filing their objections before the arbitral tribunal from the date of execution of such letter of guarantee, the recognition and enforcement of foreign award in question cannot be denied. In my view even if prior permission of the Reserve Bank would have been required which was admittedly not obtained by the petitioner before execution of such guarantee, the recognition and enforcement of such foreign award based on such guarantee would not be contrary to fundamental policy of Indian law and would also not be contrary to the interest of India or justice of morality.

164. I am therefore of the view that Arbitration Petition No.76 of 2012 is not maintainable under section 34 of the Arbitration and Conciliation Act, 1996 and thus deserves to be dismissed as not maintainable. In so far as Arbitration Petition 34 ILR (2011) Delhi 181 26 (2001) 6 SCC 356 Kvm ARBP76.12 No.12 of 2012 is concerned, in my view the petitioner M/s.POL India Projects Limited who are respondents to the said petition have not furnished any proof before this court as to why enforcement of the foreign award may be refused.

165. In my view the said foreign award is enforceable under Part II and is binding for all purposes on the parties under section 46 of the Arbitration and Conciliation Act, 1996. I am therefore of the view that the foreign award is already stamped as decree and the claimant holding such foreign award has become entitled for enforcement of the award having taken effective steps for execution of the award. In my view, the petition for enforcement of the foreign award is in accordance with and in compliance with section 47 of the Arbitration and Conciliation Act, 1996. As this court has taken a view that the said foreign award is enforceable, the respondents herein i.e. Aurelia Reederei Eugen Friederich GmbH Schiffahrtsgesellschaft & Company KG can proceed to take further effective steps for execution of the same. In the circumstances the claimant is directed to put the award in execution in accordance with the rules of this court. I therefore, pass the following order :-

(a) Arbitration Petition No.76 of 2012 is dismissed as not maintainable under section 34 of the Arbitration and Conciliation Act, 1996.

(b) Arbitration Petition No.12 of 2012 is made absolute in terms of prayer (a).

(c) No order as to costs.

(R.D. DHANUKA, J.)