

Bombay High Court

Sideralba S.P.A vs Shree Precoated Steels Ltd on 13 October, 2015

Bench: R.D. Dhanuka

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

ARBITRATION PETITION NO.84 OF 2013

SIDERALBA S.P.A. )  
a Corporation organised under the laws )  
of Italy and having its registered offices at )

Zona ASI, Localita Pantano, Acerra/Napoli )  
Italy. ) .. Petitioner

Versus

SHREE PRECOATED STEELS LTD. )  
a company incorporated under the provisions )  
of the Companies Act, 1956 and )  
having its registered office at )  
nd )  
Rehman Building, 2 floor Mezzanine, )  
24 Veer Nariman Road, Fort, )  
Mumbai - 400 001. ) .. Respondent

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Mr.Nikhil Sakhardande a/w Ms.Sonali Mathur a/w Ms.Priyanka Shetty

i/by M/s.AZB & Partners for the petitioner.  
Ms.Rajani Iyer, Senior Advocate a/w Mr.Jayesh Ashar a/w Mr.Dhaval

Patil i/by M/s.K. Ashar & Co. for the respondent.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 4th September 2015.

PRONOUNCED ON : 13th October 2015.

Judgment :-

. By this petition filed under Sections 46 and 47 of the

Arbitration and Conciliation Act, 1996 (for short "the said Arbitration Act), the petitioner seeks a declaration that the arbitral award dated 8 th June 2011 is enforceable as a decree of this Court and seeks payment of cost. Some of the relevant facts for the purpose of deciding this petition are as under :

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2. The petitioner is a company incorporated under the laws of Italy and has its registered office at Italy. The respondent is a public limited company incorporated under the provisions of Indian Companies Act, 1956 and has its registered office at Mumbai.

3. Some time in the year 2005, according to the petitioner, the petitioner and the respondent were introduced to one another by Mr.Enzo Fiorentino who was the agent of the respondent in Italy. It is the case of the petitioner that in the month of December 2005, a meeting took place between the representatives of the petitioner and the respondent in Naples, Italy at which it was agreed by and between the parties that the petitioner would purchase 4,250 MT of Prime Hot Dip Galvanised Steel Coils from the respondent at the price of EUR 480 per MT, totaling to EUR 2,040,000. On 20th January 2006, the respondent sent to the petitioner a document titled as 'Sales Contract-170104' dated 17th January 2006 which reflected the terms of the agreement finalised between the parties at the meeting held in the month of December 2005. The respondent issued four proforma subcontracts dated 17th January 2006 for partial shipments.

4. It is the case of the petitioner that the said documents were signed and returned by the petitioner to the respondent on 28 th January 2006. It is the case of the petitioner that the petitioner

instructed its banks to issue the required Letters of Credit to the respondent which were issued by the banks of the petitioner during the period between 10th February 2006 and 14th February 2006. The respondent, however, refused to supply the goods to the petitioner on receipt of the said Letters of Credit on the ground that there was a delay in issuance of the Letters ppn 3 arbp-84.13(j).doc of Credit and, therefore, the goods could no longer be sold by the respondent to the petitioner at the price of EUR 480 per MT and could only be sold at the current market price which was substantially higher than the price stipulated in the initial contract.

5. It is the case of the petitioner that there were further meeting held between the parties on 17 th February 2006 and 18th February 2006. It was agreed that the respondent would sell 4,250 MT of the goods at the price of EUR 525 per MT, amounting to a total of EUR 2,231,250 to the petitioner prior to the shipment of goods. The petitioner also agreed to purchase an additional quantity of 4,250 MT of the goods at the price of EUR 535 per MT from the respondent.

6. It is the case of the petitioner that on the request of the respondent, it was agreed that the additional 4,250 MT quantity of steel coils would be supplied through a sister concern of the respondent, one Nagit Trading LLC, a company incorporated and organised under the laws of United Arab Emirates and for whose performance, the respondent undertook full responsibility.

7. On 24th February 2006, the respondent issued a contract reference no. 'No.1701404 R1' dated 17th January 2006 and finalised it on 24th February 2006. On 26th February 2006, the agent of the respondent Mr.Fiorentino sent to the petitioner a contract reference 'No.NTLLC/240205/05-06/12' dated 24th February 2006 for the sale of 4,250 MT of the goods to the petitioner by said Nagit Trading LLC at the price of EUR 535 per MT, duly signed by Nagit Trading LLC. The agent of the respondent addressed an email dated 26 th February ppn 4 arbp-84.13(j).doc 2006 to the petitioner assuring that an official letter declaring that the respondent would be responsible for all effects, including commercial and quality of the supply, would soon be sent to the petitioner and also assured that the request of the petitioner for a 'certificate of quality' would also be issued by the respondent.

8. By an email dated 28th February 2006 addressed by the petitioner to the agent of the respondent, the petitioner sought a further clarification regarding the payment of revised contract price modifying the Letters of Credit and payment of the difference in the price prior to the shipment. The petitioner sought a fresh proforma from the respondent with the appropriate revised contract price.

9. The agent of the respondent, by his email dated 1 st March 2006, replied to the email of the petitioner dated 28th February 2006 inter alia asking for the Letters of Credit to be extended in accordance with the new deadlines. On 1st March 2006, the petitioner requested its banks to amend the Letters of Credit that they had issued and to extend their validity which was extended until 21st May 2006 and last date of shipment was changed to 30th April 2006.

10. On 2nd March 2006, the respondent executed an undertaking and agreed to take responsibility for the quality and delivery terms of the Nagit Contract by its sister concern and also agreed to give their certificate for inspection and testing of the said goods being supplied by Nagit Trading LLC.

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11. By an email dated 27th March 2006, the agent of the respondent notified that the shipment under the said contract was expected to be shipped between 10th April 2006 and 15th April 2006 and that he would communicate the ship's name as soon as possible. He requested the petitioner to remit the amount of the price difference between the old rate and the contract rate in favour of the respondent.

12. On 29th March 2006, the petitioner transferred the said amount of EUR 191,250 as advance payment to the respondent with a value date of 31st March 2006. It is the case of the petitioner that though the petitioner had performed all its obligations under the said contract, the respondent failed to dispatch the goods on time in accordance with the said contract. The agent of the respondent by his communication dated 26th April 2006, informed the petitioner that the respondent could not dispatch the goods as anticipated due to some problems that were faced by the respondent and requested the petitioner to extend the validity of Letters of Credit by one month and for authority to make partial shipments. It is the case of the petitioner that the petitioner had no other available option and was constrained to accept the said request of the respondent. Accordingly, on 27th April 2006, the petitioner requested its banks to amend Letters of Credit by changing the latest date of shipment to 31 st May 2006 and the expiry date to 21st June 2006 and to allow partial shipment of the goods.

13. It is the case of the petitioner that the respondent thereafter assured the petitioner that the shipment of goods would take place between 15th May 2006 and 20th May 2006 but the shipment did not take place as assured by the respondent. On 24 th May 2006, the ppn 6 arbp-84.13(j).doc respondent informed the petitioner that the goods would not be shipped before 5th June 2006 and requested to extend the validity of the Letters of Credit until 6th July 2006 and the last date of shipment to be postponed until 15th June 2006.

14. The petitioner by its communication dated 26 th May 2006, agreed to the request of the respondent for extension and amendment of the Letters of Credit. The respondent by its letter dated 12 th June 2006 informed the petitioner about further delay in the shipments and the respondent once again requested the petitioner to amend the Letters of Credit to reflect 30th June 2006 as the last shipment date and 21 st July 2006 as the latest date for shipment. The petitioner according to the said request of the respondent amended the Letters of Credit accordingly.

15. By communication dated 21st June 2006, the agent of the respondent informed the petitioner that the goods were ready to be loaded on board MV Gulf Pride during the following days. The petitioner by its email dated 28th June, 2006 to the agent of the respondent expressed his disappointment that no goods under the contract or the Nagit contract had been shipped even though they had been purchased in February 2006. In the said email, the petitioner included the text of an email the petitioner intended to send to the respondent for the views of the agent of the respondent on its contents.

16. The petitioner further requested that either the goods be dispatched prior to 30th June 2006 or the advance payment made under both the contracts i.e. EUR 191,250 and EUR 454,750 in lieu of the said contract be reimbursed within the same deadline together with ppn 7 arbp-84.13(j).doc related expenses or else the petitioner would provide through its legal department and the Italian Embassies in India and in the United Arab Emirates to sue the respondent for the breach of the agreement and for refund of the damages suffered.

17. It is the case of the petitioner that on the same day, the agent of the respondent by an email dated 28 th June 2006, forwarded the said email received from the Managing Director of the petitioner to the Vice President of the respondent, Marketing Department and requested that some action be taken in that regard.

18. On 29th June 2006, three bills of lading were issued and sent to the petitioner confirming that 2,634,195 MT of goods were to be loaded on board MV Gulf Pride at the Mumbai port which was to sail to Salerno. The total value of the goods to be loaded amounted to EUR 1,387,6777.38. The said goods were insured by the respondent with the New India Assurance Company Ltd. On 8 th July 2006, the said vessel MV Gulf Pride sailed from the Mumbai port. On 13 th July 2006, the respondent presented the documents for payment under the Letters of Credit, however, as the Letters of Credit provided for deferred payment terms of 90 days from the date of the bill of lading, no payment was to be made prior to 27th September 2006.

19. On 19th July 2006, MV Gulf Pride was damaged on its way to Djibouti and consequently, it docked in Djibouti a couple of weeks later. By an email dated 21st July 2006, the respondent indicated that its management had given guidelines for renegotiating the said orders for the remaining quantity of goods and that the petitioner would ppn 8 arbp-84.13(j).doc be informed of the final figures of the increase in rate, by that evening.

The petitioner refused to renegotiate the said contract price but the respondent insisted on an increase on the ground that the steel prices were steadily increasing day by day.

20. On 28th July 2006, the agent of the respondent informed the petitioner that he had not managed to settle the matter with the respondent and further provided the petitioner with a draft email to be addressed by the petitioner to the respondent. On 28 th July 2006, the Managing Director of the petitioner replied to the agent of the respondent agreeing with his suggestion but stated that he wanted to emphasize that he was the respondent who was to send him an official communication for cancellation of the order and that it was obvious that they would have to reimburse the balance amount to the petitioner.

21. During the period between 1st August 2006 and 23rd August 2006, various emails were exchanged between the agent of the respondent and the respondent regarding the reimbursement of EUR 191,250 advance payment that had been made by the petitioner to the respondent. On 8th August 2006, MV Gulf Pride was arrested in Djibouti upon the application of third parties holding monetary claims against the owners. On 18 th August 2006, the respondent transferred EUR 26,100 to the petitioner corresponding with 20% advance payment of fourth proforma subcontract. On

22nd August 2006 and 1st September 2006, the respondent agreed to the petitioner's request for a 30 day and a 45 day extension of the deferred payment terms under the Letters of Credit. The respondent by their letter dated 12th September 2006, informed the petitioner that the extension would no longer be granted.

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22. On 18th September 2006, the petitioner applied to the Court of Nola, Italy to issue an ex parte order injunction the banks that had issued the Letters of Credit from making payments to the respondent.

The Court of Nola passed an ex parte order on 21 st September 2006 and confirmed on 14th December 2006.

23. The respondent impugned the said order dated 14 th December 2006 which order came to be vacated on 6 th March 2007. The respondent accordingly collected EUR 1,225,004.48 by partially encashing the Letters of Credit. The petitioner had accordingly paid to the respondent a total of EUR 1,290,154.48 for the goods shipped at the end of June 2006.

24. On 19th July 2007, the petitioner and other Italian companies that had also purchased steel from the respondent that had been loaded on board the MV Gulf Pride agreed to pay USD 310,000 for the release of the vessel. The share of the petitioner of this payment was USD 95,617.10. On 5th August 2007, the said vessel MV Gulf Pride was released and it reached the Salerno port on 23rd August 2007.

25. It is the case of the petitioner that upon arrival of the said vessel, the goods were inspected and a survey report was issued on 8 th September 2007. It was concluded that the entire shipment was affected by salt water damages and oxidation. It is the case of the petitioner that as the goods no longer be used or sold to its customers, the petitioner sold them to Bilal and Basher Najjar Company on 11th January 2008 for an amount of EUR 694,853.96.

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26. It is the case of the petitioner that New India Assurance Company Ltd. refused to compensate the petitioner for the loss suffered in relation to the damaged goods. The petitioner, therefore, initiated the Court proceedings against the Insurance Company on 1st August 2008 in Salerno and made a claim for EUR 845,764.10 compensation comprising of EUR 689,749.65 and difference between the price paid to the respondent EUR 1,387,687.38 less the amount received from the sale to Bilal and Basher Najjar Company EUR 697,927.83 for loss suffered because of the goods being damaged as also EUR 156,014.50 for insurance, underwater inspection, technical assessments and legal costs. Since the respondent refused to reimburse the petitioner for the loss alleged to have been suffered by the petitioner, the petitioner issued a notice of arbitration dated 5th October 2007 and invoked the arbitration under Article 14 of the said contract dated 17 th January 2006, finalised in February 2006 and claimed from the respondent for reimbursement of the damage suffered by them

due to non-performance of the Negit contract.

27. The petitioner appointed Prof.Francois Perret and the respondent appointed a former Chief Justice of Jammu and Kashmir High Court as their nominee arbitrators respectively. The arbitrators nominated by the parties appointed the Chairman of the Tribunal.

28. Ms.Iyer, learned senior counsel appearing for the respondent invited my attention to various objections raised by the respondent in the affidavit-in-reply filed by the respondent to the enforcement of the award dated 8th June 2011. It is submitted by the learned senior counsel that the petitioner deliberately did not apply for enforcement of the ppn 11 arbp-84.13(j).doc award against the said M/s.Nagit Trading LLC. It is submitted that no relief thus could be claimed by the petitioner for enforcement of the award against the respondent herein. She submits that the petitioner has sought an enforcement of the foreign award against the respondent under the main contract between the petitioner and the respondent in respect of the Nagit contract. She submits that even if the respondent has not challenged the said award under Swiss law, the respondent is entitled to raise an objection about enforceability of the said award under Sections 47 and 48 of the Arbitration Act.

29. Learned senior counsel submits that admittedly, the respondent was not a party to the agreement between the petitioner and the said M/s.Nagit Trading LLC and thus the respondent was not a party to any alleged arbitration agreement and the arbitral proceedings separately initiated by the petitioner against the said M/s.Nagit Trading LLC. It is submitted that in the said so called letter of guarantee executed by the agent of the respondent, there was no arbitration agreement recorded between the parties. She submits that the part of the award before the arbitral tribunal in so far as the claim of the petitioner arising out of the said Nagit contract against the respondent herein was thus without jurisdiction and nullity. In support of this submission, learned senior counsel invited my attention to the dissenting award rendered by one of the arbitrators holding that the dispute in respect of the Nagit contract did not arise out of the subject contract under which the arbitral tribunal had been constituted.

30. It is submitted that the dispute has arisen out of a separate and independent contract between the petitioner and the said M/s.Nagit ppn 12 arbp-84.13(j).doc Trading LLC, Dubai to which the respondent was not a party. In the said dissenting award, it is held that the claim thus made by the petitioner arising out of the said Nagit contract fell outside the scope of the present arbitration and thus the arbitral tribunal had no jurisdiction to consider the same. Learned arbitrator, in the said dissenting award, held that he did not agree with the view of majority arbitrators that it was permissible under the Swiss law to adjudicate upon the dispute even arising out of the Nagit contract.

31. It is submitted that the learned arbitrator, in the said dissenting award, has interpreted the said writing executed by the agent of the respondent and held that the said document was not an agreement.

The same was not addressed to the petitioner or any person or entity. The said document was an unilateral declaration and could never be considered as an 'agreement.' It is held that the said writing also did not contain any arbitration clause. It is held that only remedy available to a person who wanted to enforce his rights under the said agreement was to approach appropriate Court of law.

32. Learned senior counsel also placed reliance on the finding rendered by the learned arbitrator in the said dissenting award and submits that the respondent had raised an issue of jurisdiction and maintainability of the claim in the arbitration proceedings right from the beginning. It was contended by the respondent all throughout that the said claim was outside the scope of arbitration and that the arbitral tribunal had no jurisdiction to decide the said claim arising out of Nagit contract. It is held in the said dissenting award that the advocate for the ppn 13 arbp-84.13(j).doc respondent had withdrawn his objection for a preliminary hearing on jurisdiction of the arbitral tribunal to decide the claim in respect of the Nagit contract and has not withdrawn his objection to the jurisdiction of arbitral tribunal to decide the same.

33. It is submitted by the learned senior counsel that unilateral undertaking relied upon by the petitioner was not even remotely connected with the subject matter of the contract between the petitioner and the respondent under which the said arbitral tribunal was constituted but the said claim was arising out a separate and independent contract between the petitioner and the said M/s.Nagit Trading LLC. She placed reliance on the finding rendered by the arbitral tribunal in the said dissenting award that since there was no arbitration clause recorded in the said undertaking between the petitioner and the respondent, the claim made by the petitioner against the respondent under the said Nagit contract was without jurisdiction.

34. It is submitted by the learned senior counsel that subsidiary claim was dehors the main contract entered into between the petitioner and the respondent. The jurisdiction of the arbitral tribunal is restricted to any controversy or claim arising out of or relating to the said contract or any alleged breach thereof and not arising out of the said Nagit contract. Learned senior counsel adopted the reasonings given by the learned arbitrator in the said dissenting award in so far as the claim arising out of the said undertaking (Exhibit C-120) is concerned, as a part of her submission herein. In the said dissenting award, the learned arbitrator, however, concurred with the majority award in respect of the balance part of the award.

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35. In so far as the unanimous award on the other issues is concerned, it is submitted by the learned senior counsel that the respondent admittedly was a seller in the main contract whereas the petitioner was a buyer. The said contract was mutually determined by the parties. My attention is invited to Articles 45, 74 and 75 of 'United Nations Convention of Contracts for the International Sale of Goods (1980) (CISG).' It is submitted by the learned senior counsel that it was an admitted position that the goods under the first three sub-contracts were shipped by the respondent in July 2006. The fourth sub-contract was not mutually cancelled by the parties and thus was required to be performed some time in August and September 2006 or later on. She submits that under Article 75

of the said CISG, avoidance of the contract, if any, by the respondent could have been taken place only in August/September 2006 or later on whereas the replacement of goods not supplied by the respondent could have been purchased by the petitioner only after avoidance of the said contract by the respondent after August/September 2006.

36. It is submitted that the petitioner, however, did not produce any evidence on record to demonstrate that the petitioner had purchased any goods in replacement either in August/September 2006 or any time thereafter. She submits that the petitioner, on the contrary, had alleged to have purchased those goods in replacement from Ilva S.p.A. between May and September 2006 i.e. much prior to the cancellation of the contract with the respondent. She submits that the arbitral tribunal thus could not have considered the alleged breach based on the goods purchased by the petitioner in anticipation of avoidance of the said contract by the respondent.

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37. It is submitted that the claim for damage could not have been allowed by the arbitral tribunal by way of punishment but at the most could have been considered only by way of compensation. The petitioner had failed to prove the loss alleged to have been suffered by the petitioner due to avoidance of the said contract by the respondent. She submits that the award rendered by the arbitral tribunal allowing the claim for damages is thus contrary to the public policy of India and on the face of it, the same is patently in violation of the statutory provision and cannot be said to be in public interest. She submits that the impugned award is also contrary to fundamental policy of Indian law.

38. It is submitted by the learned senior counsel that the said arbitral award is contrary to the terms of the contract. The arbitral tribunal could not have passed their award based on equity. She submits that the said award is also contrary to the facts pleaded by the petitioner itself. Till July 2006, there was no avoidance of the contract admittedly.

She submits that though the respondent had shipped the goods in the month of July 2006, the petitioner however did not receive the goods because of some other reasons not attributable to the respondent. It is submitted that burden or onus to prove that the breaches were on the part of the respondent and that the petitioner had suffered loss was on the petitioner which the petitioner had failed to discharge. She submits that the award is based on no evidence. She submits that the claim for damages awarded by the arbitral tribunal was without any proof and/or evidence and thus in violation of (1) fundamental policy of Indian law or (2) the interests of India; or (3) justice or morality.

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39. Learned senior counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of Oil and Natural Gas Corporation Limited Vs. Western Geco International Limited, reported in (2014) 9 SCC 263 and in particular paragraphs 35, 38 to 43 thereof and would submit that if determination of claim by the arbitral tribunal affects or leads to any civil

consequences, the arbitral tribunal has to adopt judicial approach and has to apply the principles of natural justice. She submits that Wednesbury principle applies even while the Court deals with the petition for enforcement of the foreign award under Section 48 of the Arbitration Act. She submits that if the award is not in conformity with the fundamental policy of Indian law, this Court can refuse to enforce the foreign award on that ground. She submits that the public policy as interpreted by the Supreme Court in the said judgment would not be different in case a petition filed under Section 48 of the Arbitration Act for enforcement of the foreign award.

40. Learned senior counsel submits that since the petitioner has chosen to apply for enforcement of the said foreign award, the fundamental policy of Indian law has to be applied and it will be applicable to the enforcement petition having been filed in India. She submits that in contravention of the public policy, it seems to be enforced. Even the principle laid down by the Supreme Court on the expression 'judicial approach' also stands attracted to the enforcement petition under Section 48 of the Arbitration Act. She submits that since the petitioner was not a party to the Nagit contract, no reliefs could be granted by the arbitral tribunal against the respondent arising out of the said contract between the petitioner and the said M/s.Nagit Trading LLC.

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41. Learned senior counsel also placed reliance on the judgment of the Supreme Court in the case of Associate Builders Vs.Delhi Development Authority, reported in (2015) 3 SCC 49 in which the Supreme Court reiterated the principles laid down by it in the case of Oil and Natural Gas Corporation Limited (supra). Learned senior counsel placed reliance on paragraphs 27 to 34 of the said judgment and would submit that the expression 'fundamental policy of Indian law' interpreted by the Supreme Court in the said judgment in the cases of Associate Builders (supra) and Oil and Natural Gas Corporation Limited (supra) apply to the petition filed under Section 48 of the Arbitration Act. She submits that no different principle is applicable to the foreign award. That is applicable to a domestic award.

42. Mr.Sakhardande, learned counsel for the petitioner submits that the agent of the respondent Mr.Enzo Fiorentino in Italy introduced the petitioner with the respondent during the year 2005 and had organised a meeting in Naples, Italy in the month of December 2005. It was agreed that the petitioner would purchase 4,250 MT of Prime Hot Dip Galvanised Steel Coils from the respondent at the price of EUR 480 per MT, totaling to EUR 2,040,000. He submits that at the request of the respondent, it was agreed that additional 4,250 MT quantity of steel coils would be supplied through a sister concern of the respondent, one Nagit Trading LLC, a company incorporated and organised under the laws of United Arab Emirates. The said agent of the respondent thereafter, under a contract, sent an email dated 26 th February 2006 to the petitioner for the sale of 4,250 MT of Prime Hot Dip Galvanised Steel Coils by said Nagit Trading LLC at the price of EUR 535 per MT, duly signed by Nagit Trading LLC. The ppn 18 arbp-84.13(j).doc said agent had accordingly by his email dated 26 th February 2006 advised the petitioner that he would send an official letter declaring that the respondent would be responsible for all effects including commercial and quality of the supply.

43. Learned counsel invited my attention to further correspondence exchanged between the said agent of the respondent and the petitioner on 21st July 2006 and 28th July 2006. My attention is invited to the writing dated 2nd March 2006 on the letter head of the respondent thereby undertaking all the risks and responsibilities on the quality and delivery terms for the letter of credit opening in favour of Nagit Trading LLC, Dubai by customers ask for "Shree Mill Test Certificate" and also ask for inspection certificate by S.G.S. or another independent supervision company.

44. Learned counsel for the petitioner invited my attention to paragraphs 80 and 81 of the statement of defence filed by the respondent before the arbitral tribunal. The respondent had averred in the said paragraphs that the said M/s.Nagit Trading LLC was a part of M/s.Nasser Ahli Group and was a trader and amongst its other trading businesses acts as an agent of the respondent. The respondent was informed that M/s.Nagit Trading LLC was separately responding to the parallel arbitration proceedings pending between the said respondent and M/s.Nagit Trading LLC which to the extent applicable to the present arbitration and in support of the defence of the respondent, the respondent craves leave to and refer to and rely upon the same. He submits that the respondent had wrongly denied that the said M/s. Nagit Trading LLC did not act as an official agent of the respondent.

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45. My attention is invited to paragraph 85 of the statement of defence in which it was averred by the respondent that since the said M/s.Nagit Trading LLC was amongst its other trading businesses dealing in the goods of the respondent, at the request of M/s.Nagit Trading LLC, the respondent had in general terms issued a letter dated 2 nd March 2006 for the benefit of all customers of M/s.Nagit Trading LLC for purchasing the goods manufactured by the respondent including the petitioner thereby undertaking risks and responsibilities on quality and delivery terms for the Letter of Credit opened in favour of M/s.Nagit Trading LLC. He submits that it is thus an admitted position that the respondent had given an undertaking vide its letter dated 2 nd March 2006 on behalf of the said M/s.Nagit Trading LLC including the petitioner.

46. It is submitted that in the said statement of defence, the respondent did not raise any issue of jurisdiction about the transactions of the petitioner with the said M/s.Nagit Trading LLC. He submits that the respondent had annexed a copy of the reply of the said M/s.Nagit Trading LLC filed before other arbitral forum as annexure to the statement of defence filed by the respondent in the present proceedings. He submits that the respondent thus could not have denied the liability of the respondent arising out of the said undertaking rendered by the respondent on behalf of the said M/s.Nagit Trading LLC in favour of the petitioner.

47. Learned counsel for the petitioner invited my attention to paragraph 135 of the arbitral award in which it was recorded that the ppn 20 arbp-84.13(j).doc two arbitrations i.e. between the petitioner and the respondent herein and another between the petitioner and the said M/s.Nagit Trading LLC, were heard simultaneously. The parties acknowledged that it was not possible to segregate the two cases, although they would try to specify which case will be addressed, whenever it is possible. It was recorded that consequently, some of the testimonies were heard relating to both cases. He also placed reliance on paragraphs 137, 138, 140 and 144 of the said award and would submit that the

objection regarding jurisdiction was raised by the respondent on evidentiary hearing on 14 th May 2009.

48. It is submitted that the arbitral tribunal has rightly recorded the said statement made by the respondent in paragraph 138 of the award. He submits that the respondent thus cannot dispute the said statement recorded by the arbitral tribunal in the said award about withdrawal of their plea of jurisdiction regarding the claim arising out of the Nagit contract. Learned counsel for the petitioner invited my attention to paragraphs 271 to 274 and 279 to 286 and would submit that the arbitral tribunal has recorded a finding that the jurisdiction of the arbitral tribunal was not disputed by the respondent. The respondent had tacitly accepted the jurisdiction of the arbitral tribunal for the first 19 months of the arbitration during which it addressed the merits of the petitioner's claim based on C-120 and in support of its defence. The respondent had also re-affirmed its consent to the jurisdiction of the arbitral tribunal when it withdrew the tardy plea of lack of jurisdiction and raised it for the first time on 14th May 2009 at the evidentiary hearing.

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49. It was held that by that time, the parties had already produced two rounds of submissions on the merits in which the respondent did not raise the issue of jurisdiction at all. The arbitral tribunal has recorded that the respondent acknowledged the mandatory nature of Article 186(2) of the PIL Act when it withdrew its tardy jurisdictional opposition on 14th May 2009. It was held that the parties were governed under the Swiss Arbitration Law which exclusively governs this question. It was provided that in such a case, "the arbitral tribunal must accept jurisdiction pursuant to Article 186(2) of the PIL Act and cannot decline it ex officio." He submits that the arbitral tribunal has also rendered a finding that the respondent did not raise any jurisdictional objection relating to the claim of the petitioner for reimbursement of the damages suffered due to failure of M/s.Nagit Trading LLC to perform the Nagit contract during the preliminary hearing or during the following months. He submits that the finding of the arbitral tribunal that the respondent appropriately accepted the jurisdiction of the arbitral tribunal over the claim raised pursuant to the undertaking of 2nd March 2006 issued by the respondent cannot be interfered with and the execution of the said award cannot be refused on this ground.

50. Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of State of Maharashtra Vs.Ramdas Shrinivas Nayak & Anr., reported in 1982 (2) SCC 463 and in particular paragraphs 9 and 10 thereof and would submit that the statements made in the judgment and the concession recorded are conclusive and cannot be disputed by the party. In support of this submission, learned counsel placed reliance also on the judgment of the ppn 22 arbp-84.13(j).doc Supreme Court in the case of D.P. Chadha Vs. Triyugi Narain Mishra and Ors., reported in (2001) 2 SCC 221 and in particular paragraph 18 thereof. He submits that the respondent did not apply for clarification of the award even if, according to the respondent, there was no such concession made by the respondent before the arbitral tribunal. He submits that the respondent, on the other hand, participated in the arbitral proceedings on merits even in respect of the said claim arising out of the Nagit contract.

51. Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and Ors., reported in (2013) 1 SCC 641 and in particular paragraphs 70 to 76 thereof and would submit that the arbitral tribunal had jurisdiction to decide the dispute even arising out of the agreement entered into between the petitioner and the said M/s. Nagit Trading LLC since the respondent was their sister concern and had issued an undertaking on behalf of the said M/s. Nagit Trading LLC in favour of the petitioner.

52. In so far as various objections raised by the respondent to the enforcement of the said award on merits is concerned, the learned counsel for the petitioner placed reliance of the judgment of the Supreme Court in the case of Shri Lal Mahal Limited Vs. Progetto Grano Spa, reported in (2014) 2 SCC 433 and in particular paragraphs 19, 23 to 25, 27 to 30 and 45 to 48 thereof and would submit that the powers of the Court for refusing enforcement of the foreign award under Sections 47 and 48 are very limited. This Court ppn 23 arbp-84.13(j).doc cannot have a second look at the foreign award in the award enforcement stage. There cannot be a review of the foreign award on merits.

53. Learned counsel for the petitioner submits that the judgments of the Supreme Court in the cases of Associate Builders (supra) and Oil and Natural Gas Corporation Limited (supra) would not apply to the present proceedings. He submits that both these judgments of the Supreme Court were dealing with the powers of the Court under Section 34 of the Arbitration and Conciliation Act, 1996 in the case of domestic award. He submits that the powers of the Court under Section 34 of the Arbitration Act while dealing with the domestic award are wider than the powers of the Court while dealing with enforcement of the foreign award under Sections 47 and 48 of the Arbitration Act. He submits that the nature of jurisdiction of the Court under Section 48 is totally different than the nature of jurisdiction of the Court under Section 34. He submits that the powers of the Court under Sections 47 and 48 are very narrow.

54. Learned counsel for the petitioner submits that the principles laid down by the Supreme Court in the cases of Associate Builders (supra) and Oil and Natural Gas Corporation Limited (supra) would thus not apply to the present proceedings which are under Sections 47 and 48 of the Arbitration Act. He submits that the powers of the Court at the enforcement stage and at the stage of considering the challenge to the domestic award are totally different and independent. Learned counsel distinguished the judgments of the Supreme Court in the cases of Associate Builders (supra) and Oil and Natural Gas Corporation Limited (supra). It is submitted by the learned counsel for ppn 24 arbp-84.13(j).doc the petitioner that under Swiss Law applicable to the parties, the respondent ought to have challenged the said award and Article 190 of the Public International Law is applicable to the parties. Since the respondent did not challenge the said award under the said Public International Law, the said award has attained finality.

55. Learned counsel appearing for the petitioner invited my attention to various paragraphs of the award and would submit that the arbitral tribunal has rendered various findings of facts which cannot be re-opened by this Court at the enforcement stage of the said award.

Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of Transocean Shipping Agency (P) Ltd. Vs. Black Sea Shipping and Ors., reported in (1998) 2 SCC 281 and in particular paragraph 18 thereof and would submit that since the award has not been challenged by the respondent, the same has attained finality.

56. Ms.Iyer, learned senior counsel for the respondent in rejoinder submits that even in the statement of defence filed by the respondent, the respondent had disputed the liability of the respondent arising out of the Nagit transactions. She submits that the respondent had only withdrawn the preliminary objection for the time being and had not withdrawn the final objection. She placed reliance on various observations made by the learned arbitrator in the minority award. She submits that the enforcement of the award is in the teeth of the fundamental policy of Indian law and thus cannot be enforced in India. She submits that the arbitral tribunal had permitted the respondent to raise issue of jurisdiction later. Learned senior counsel distinguished ppn 25 arbp-84.13(j).doc the judgment of the Supreme Court in the case of Chloro Controls India Private Limited (supra) and also the other judgments relied upon by the learned counsel for the petitioner on the ground that the facts in those matters are totally different. She submits that this Court has to consider the dissenting award also on the issue of jurisdiction and the same cannot be ignored.

#### REASONS AND CONCLUSIONS :-

Whether the respondent had withdrawn the plea of jurisdiction raised before the arbitral tribunal regarding the claim arising out of Nagit Contract ?

57. It was urged by learned senior counsel for the respondent that the respondent was not a party to the agreement between the petitioner and M/s.Nagit Trading LLC and was not a party to the arbitration agreement. It is also urged that the claim made by the petitioner arising out of the M/s.Nagit Contract was outside the scope of the present arbitration petition and thus the arbitral tribunal had no jurisdiction to consider the said claim. It is the case of the respondent that the respondent had not withdrawn the said plea of jurisdiction before the arbitral tribunal and in support of this submission, she placed reliance on the dissenting award.

58. Per contra, it was urged by learned counsel for the petitioner that the arbitral tribunal has rightly recorded the statement made by the respondent in paragraph 138 of the arbitral award which statement cannot be disputed by the respondent. A perusal of the record clearly ppn 26 arbp-84.13(j).doc indicates that the arbitral tribunal has recorded a statement made by the respondent in paragraph 138 of the arbitral award. In paragraph 271 to 274 and 279 to 286 of the arbitral award, the arbitral tribunal has also recorded a finding that the jurisdiction of the arbitral tribunal was not disputed by the respondent. It is also recorded that the respondent had tacitly accepted the jurisdiction of the arbitral tribunal for the first 19 months of the arbitration during which it addressed the merits of the claim of the petitioner based on C-120 and in support of its defence. The respondent also reaffirmed its consent to the jurisdiction of the arbitral tribunal when it withdrew the tardy plea of lack of jurisdiction and raised it for the first time on 14 th May, 2009 at the Evidentiary Hearing. It is also recorded by the arbitral tribunal that the respondent had acknowledged the mandatory nature of Article 186(2) of the PIL Act when it withdrew its tardy

jurisdictional opposition on 14th May, 2009.

59. It is held that the seat of the arbitral tribunal is in Geneva, Switzerland, Article 186(2) of PIL Act is mandatory law and cannot be derogated from. The arbitral tribunal must accept jurisdiction pursuant to Article 186(2) of PIL Act and cannot decline it ex-officio. The arbitral tribunal has also rendered a finding that the respondent did not raise any jurisdictional objection relating to the claim of the petitioner for reimbursement of the damages suffered due to failure of M/s.Nagit Trading LLC to perform the Nagit Contract in RI, during the preliminary hearing or during the following months.

60. The Supreme Court in case of D.P Chadha vs. Triyugi Narain Mishra & Ors.(2001) 2 SCC 221 has held that the record of the ppn 27 arbp-84.13(j).doc proceedings made by the Court is sacrosanct and correctness thereof cannot be doubted merely for asking. The Supreme Court has adverted to its earlier judgment in case of State of Maharashtra vs. Ramdas Shrinivas Nayak & Anr. Air 1982 SC 1249, in which it was held that the Judge's record was conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else. The Court could not launch into inquiry as to what transpired in the High Court. It it held that the Court is bound to accept the submission of the Judges recorded in their judgments, as to what transpired in Court. It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence.

61. It is held that if the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. It is held that if a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error and that is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. In my view the principles laid down by the Supreme Court would apply to the facts of this case. The two arbitrators have in their majority award recorded the statements made by the respondent several times in the arbitral award which was never contradicted or controverted by the respondent at any point of time. Admittedly the respondent did not apply for clarification of the arbitral award insofar as the alleged wrong recording of such ppn 28 arbp-84.13(j).doc statement of the respondent as canvassed by the respondent before this Court for the first time is concerned. In my view, principles laid down by the Supreme Court would also apply to the arbitral tribunal. A party who has not applied for correction of any alleged wrong recording of the statement of such party before the arbitral tribunal at the earlier opportunity available cannot be allowed to raise such plea later.

62. A perusal of the record indicates that the respondent has not only withdrawn the plea of jurisdiction insofar as the claim arising of Nagit Contract is concerned, but it participated in the arbitral proceedings on that claim on merits. The respondent had also placed reliance on the written statement filed by the said M/s.Nagit Trading LLC in the arbitral proceedings filed by the petitioner separately against M/s.Nagit Trading LLC.

63. A perusal of the arbitral award clearly indicates that the arbitral tribunal had framed various issues to be determined as summarized in paragraph 157 of the arbitral award. Issue No.(f) provided "Is the claimant entitled to claim, in this arbitration, for damages from the respondent for the non-performance of the Nagit Contract by Nagit based on C-120 and, if so, in which amount ?" The arbitral tribunal has dealt with the said issue after hearing the arguments of both the parties on merit. In my view, there is thus no substance in the submission of learned senior counsel for the respondent that the respondent had not withdrawn the plea of jurisdiction insofar as the said claim for damages under Nagit Contract under C-120 in this arbitration was based.

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64. The arbitral tribunal has also considered Article 186(2) of PIL Act which provides that the plea of lack of jurisdiction must be raised prior to any defence on merits. The arbitral tribunal therefore, recorded that since the respondent had withdrawn the objection, the arbitral tribunal had jurisdiction to entertain the said claim of the petitioner. In support of this finding, the arbitral tribunal also placed reliance on Swiss Arbitration Law which exclusively governed that question. In my view, the respondent thus cannot be allowed to raise the plea that there was any wrong recording of plea raised by the respondent by the arbitral tribunal. Insofar as reliance placed by learned senior counsel for the respondent on the minority award is concerned, in my view, since two of the arbitrators have recorded the statement made by the respondent, withdrawing their plea of jurisdiction, reliance placed on the minority award taking a different view is misplaced.

Whether the petitioner was bound to apply for enforcement of the award against Nagit Trading LLC before filing the present petition ?

65. It is not in dispute that the petitioner had filed a separate arbitral proceedings against M/s.Nagit Trading LLC which proceedings were proceeded with simultaneously with the present arbitral proceedings. A perusal of the arbitral award indicates that the petitioner had accepted substitution of the respondent by Nagit regarding purchase and delivery of additional 4250 MT quantity of steel coils on the condition that the respondent would guarantee the quality and delivery of those additional goods which guarantee was embodied in C-120. It is held that the purpose of Article 111 CO guarantee was to protect the ppn 30 arbp-84.13(j).doc beneficiary against a particular risk which was entirely independent from the third party's obligation towards the beneficiary of the guarantee, which may be non-existent, void or invalid. It is held that the guarantor cannot raise any defence or exception against the beneficiary of the guarantee which the third party may be entitled to raise against it. It is held that the petitioner was entitled to be compensated by the respondent of the damages arising from failure of Nagit to perform. The respondent has been in breach of its obligation under the guarantee contained in C-

120 from the date on which the petitioner demanded payment.

66. In the operative part of the award, the arbitral tribunal held that the respondent shall pay to the petitioner an amount of EUR 1,038,747 together with 5% interest subject to the condition that enforceability of the said decision was made conditional on the petitioner being unable to fully

collect the amount of the award rendered in its favour by the same arbitral tribunal in the parallel proceedings filed by the petitioner against the said M/s.Nagit Trading LLC or because the petitioner did not obtain exequatur of the said award in Dubai or because Nagit Trading LLC had in the mean time become insolvent or is being liquidated prior to enforcement of the said award. It was also made clear that in case partial calculation of the award by the petitioner, the enforceability of the decision shall be limited to that portion of the respondent remaining debt corresponding to the uncollected portion of the latter award.

67. A perusal of paragraph 67 of the arbitration petition filed by the petitioner indicates that the petitioner had intended to file the proceedings ppn 31 arbp-84.13(j).doc in the United Arab Emirates (UAE) seeking recognition and enforcement of the award dated 8th June, 2011 against Nagit Trading LLC passed by the said arbitral tribunal under the arbitration proceedings between the petitioner and Nagit. It is stated in the said paragraph that if any monies are received by the petitioner pursuant to the enforcement proceedings commenced in UAE, the petitioner undertakes to provide credit to the respondent to the extent of such amounts.

68. A perusal of the award thus indicates that the petitioner is entitled to apply for enforcement of the said award against the respondent as well as against the said M/s.Nagit Trading LLC and if the petitioner recovers any amount from M/s.Nagit Trading LLC to that extent the liability of the respondent arising out of the said contract C-120 would be reduced. The petitioner thus has rendered an undertaking to this Court that if any amount is recovered from the said M/s.Nagit Trading LLC, the petitioner would give appropriate credit to the respondent. In my view, there is thus no merits in the submission made by learned senior counsel for the respondent.

69. Be that as it may, the respondent has admittedly not challenged the arbitral award. According to Swiss Law applicable to the parties, the said award has achieved finality. In any event, this Court cannot adjudicate upon the merits of the arbitral award under section 48 of the Arbitration Act, 1996. Insofar as the submission of the learned senior counsel for the respondent that no order could be passed by the arbitral tribunal against the respondent based on such unilateral undertaking relied upon by the petitioner against the respondent, which was not connected with the subject contract between the parties is ppn 32 arbp-84.13(j).doc concerned, a perusal of record indicates that the respondent also has placed reliance on the written statement filed by M/s.Nagit Trading LLC in connected arbitral proceedings. The respondent did not dispute the execution and contents of such writing (C-120). The arbitral tribunal has interpreted the correspondence exchanged between the parties and also the agent of the respondent and the petitioner and has also interpreted the terms of the undertaking / guarantee. This Court cannot refuse to enforce the execution of the foreign award by dis-regarding the interpretation of the arbitral tribunal of the terms of the contract by supplying another interpretation. In my view there is thus no merit in the submission of learned senior counsel for the respondent.

70. Insofar as the submission of learned senior counsel that the petitioner could not have made any claim arising out of purchase of goods by the petitioner from third party, during the period between May and September, 2006 in view of the respondent having avoided contract only after August and September, 2006 is concerned, the Supreme Court in case of Shri Lal Mahal Ltd. (supra) has held

that section 48 of the Arbitration Act does not give an opportunity to have a second look on the foreign award in the award enforcement stage. The scope of enquiry under section 48 does not permit review of the foreign award on merits. Under section 48(2)(b), enforcement of the foreign award can be refused only if such enforcement is found to be contrary to (i) fundamental policy of Indian Law; (ii) the interests of India and; (iii) justice or morality. In my view, the grounds raised by the respondent for refusing to enforce of the foreign award does not fall under any of these categories set out by the Supreme Court in case of *Shri Lal Mahal* (supra).

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71. Be that as it may, a perusal of the award indicates that the arbitral tribunal has rendered a finding of fact that no evidence was adduced before the arbitral tribunal showing that the parties had jointly agreed in July or August, 2006 to waive supply of remaining 1606.805 MT to be supplied under the contract as alleged by the respondent. It is held that the respondent had committed breach of its obligation by failing to deliver 1606.805 MT, it was still to deliver to the petitioner under the contract which breach gave rise to a claim for damages pursuant to Article 45(1)(b), 74 and 75 of the CISG. It is held that the petitioner was thus entitled to recover the difference between the contract price and the price of substitute transactions it carried out with IIva on the condition that it successfully discharge its burden of proving that the respondent was in default or failed to perform and that substituted purchases from IIva were effected in compliance with the requirements of Article 75 of CISG.

72. The arbitral tribunal has rendered a finding that the petitioner was entitled to claim for the price difference between the price paid to IIva and the contract price only for un-supplied 1606.805 MT of goods and not for total 4245 MT contract quantity as claimed. It is held that the arbitral tribunal was satisfied having thoroughly reviewed the quantity of goods, the petitioner had bought from IIva and that the purchase price were reasonable under the circumstances. The arbitral tribunal also rendered a finding that the petitioner was entitled to use the goods which it had bought from IIva prior to avoidance of the contract in order to fulfill all its obligations towards the clients and to charge the respondent the costs of acquiring such goods.

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73. In my view this Court cannot have second look on the foreign award under section 48 of the Arbitration Act in the award enforcement stage. This Court cannot review the foreign award on merits.

There is thus no merit in the submission of learned senior counsel for the respondent that the enforcement of a foreign award can be refused on the ground that the petitioner could not have purchased any goods prior to avoidance of contract by the respondent. In my view, this objection does not fall under any of the grounds permissible under section 48 of the Arbitration Act and even otherwise would not fall under any grounds enumerated by the Supreme Court in case of *Shri Lal Mahal* (supra).

74. Insofar as the the submission of learned senior counsel for the respondent that the petitioner had not proved actual loss suffered by the petitioner and the arbitral award thus is in conflict with the fundamental policy of Indian Law is concerned, a perusal of the award indicates that the arbitral tribunal has considered this issue at length.

The arbitral tribunal also held that the contents of C-82 as supported by other documents and the average difference between the price per MT paid to Iiva for substitute goods and the contract price assessed by the petitioner on that basis appears to be reasonable under 2006 market conditions. The arbitral tribunal also held that the petitioner was entitled to use the goods bought prior to avoidance of the contract in order to fulfill its contractual obligation towards its own clients.

75. The arbitral tribunal found that the correct figure that was set out by the petitioner was EUR 256.51 per MT and thus the petitioner was entitled to claim for damages for the amount of EUR 412161.55 ppn 35 arbp-84.13(j).doc from the respondent for undelivered goods i.e. 1606.805 MT which figure was closed to EUR 411,392 calculated by the respondent based on the average purchase price from Iiva rather than on the average difference per MT used by the arbitral tribunal. In my view, the findings of fact rendered by the arbitral tribunal cannot be interfered with in these proceedings and this Court cannot refuse to enforce the foreign award under section 48 of the Arbitration Act by adjudicating upon the disputes between the parties on merits. The Supreme Court in case of Shri Lal Mahal (supra) has held that the procedural defects like taking into consideration any in admissible evidence or ignoring / rejecting 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. Section 48 of the Arbitration Act does not permit review of the foreign award on merits. In my view there is thus no substance in the submission made by learned senior counsel for the respondent that such foreign award cannot be enforced on the ground that the petitioner had not proved actual loss suffered by the petitioner or the said part of the award would be in conflict with the fundamental policy of the Indian Law for the purpose of refusing such foreign award under section 48 of the Arbitration Act.

76. By that as it may, a perusal of the award clearly indicates that the arbitral tribunal has rendered a pure finding of fact and enforcement of the foreign award cannot be refused by this Court by adjudicating upon such findings of fact recorded by the arbitral tribunal. I am also not inclined to accept the submission of learned senior counsel that the award is contrary to the terms of the contract or is based on evidence.

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77. Insofar as the judgment of the Supreme Court in the case of Associate Builders (supra) relied upon by Ms.Iyer, learned senior counsel for the respondent in support of her submission that the expression "fundamental policy of the Indian Law" as considered by the Supreme Court in the said judgment of Associate Builders (supra) and the ground of perversity in the impugned award shall stand attracted also when an approach to the enforcement of a foreign award is concerned, a perusal of the judgment of the Supreme Court in case of Associate Builders (supra) clearly indicates that the said judgment was delivered by the Supreme Court while considering a domestic award and the

powers of the Court under section 34 of the Arbitration Act to interfere with such domestic arbitral award under various heads of the public policy. While dealing with the provisions of section 34 of the Arbitration Act, the Supreme Court in the said judgment adopted the principles laid down by it in the case of ONGC Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705, which also had dealt with the powers of the Court under section 34 to deal with a domestic arbitral award.

78. The Supreme Court in the case of Associate Builders (supra) also considered the principles laid down by it in the case O.N.G.C. Ltd. vs. Western Geco International Ltd. (2014) 9 SCC 263 which also has dealt with a domestic arbitral award and the provisions of Part-I of the Arbitration Act and has held that the arbitrator must have judicial approach and he must not act perversely which two principles form part of the fundamental policy of the Indian Law.

79. The Supreme Court in the said judgment in the case of Associate Builders (supra) has after considering the provisions of section 37 of the Arbitration Act held that the contravention of the Arbitration Act thus would be regarded as patent illegality. The Supreme Court in case of O.N.G.C. Ltd. vs. Western Geco International Ltd. has held that the perversity or irrationality of decisions is tested on the touch stone of wednesbury principles of reasonableness. It is held that the decisions that fall short of standard of reasonableness are open to challenge in a Court of law after in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

80. The Supreme Court in the case of Shri Lal Mahal Limited (supra) considered the expression "public policy of India" in section 48(2)(b) and whether it must receive narrow meaning than section 34. A perusal of the said judgment clearly indicates that the Supreme Court had examined as to what would be the scope of enquiry before the Court in which foreign award as defined in section 44 was sought to be enforced in view of two decisions of the Supreme Court i.e. in the case of ONGC Ltd. vs. Saw Pipes Ltd. (supra) and Phulchand Exports Limited vs. O.O.O. Patriot (2011) 10 SCC 300, in which it was held that whether the Court can refuse to enforce the foreign award if it was contrary to the contract between the parties and/or was patently illegal.

81. It was urged by the petitioner before the Supreme Court that expansive construction given by the Supreme Court to the term "public policy of India" in the case of ONGC Ltd. vs. Saw Pipes Ltd. (supra) must also apply to the use of the same term "public policy of India" in section 48(2)(b) of the Arbitration Act. On the other hand, it was canvassed by the respondent before the Supreme Court that the principles laid down by the Supreme Court in the case of Renuagar Power Co.

Ltd. vs. General Electric Co. 1994 Supp. (1) SCC 644 while interpreting section 7(1)(b)(ii) of the Foreign Awards Act was equally applicable to section 48(2)(b) of the Arbitration & Conciliation Act, 1996 and the expression "public policy of India" in section 48(2)(b) must receive narrow meaning than section 34 of the Arbitration Act. It was urged that the judgment of the Supreme Court in the case of O.N.G.C. Ltd. vs. Saw Pipes Ltd. (supra) never meant to give wider meaning to expression "public policy of India" insofar as section 48 of the Arbitration Act was concerned.

82. The Supreme Court in the case of Shri Lal Mahal Ltd.

(supra) has adverted to its judgment in the case of Renusagar Power Co. Ltd. (supra) in which it was held that the words "public policy" used in section 7(1)(b)(ii) of the Foreign Awards Act meant public policy of India. The Supreme Court has negated the argument that the recognition and enforcement of the award of the arbitral tribunal, GAFTA could be questioned on the ground that it was contrary to the public policy of the State of New York. The Supreme Court drew a clear and fine distinction while applying the rule of public policy between a matter governed by domestic laws and the matter involving the conflict of laws. It has been held that the application of the doctrine of "public policy" in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in case involving a foreign element than when purely municipal legal issues are involved.

83. The Supreme Court in the said judgment of Renusagar ppn 39 arbp-84.13(j).doc Power Co. Ltd. (supra) held that the defence of "public policy" which was permissible under section 7(1)(b)(ii) should be construed narrowly. It is held that the provision in section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which required that the enforcement of the foreign award must not be contrary to the public policy or the law of India. It is held 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. It is held that the expression "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.

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

85. The Supreme Court in the case of Shri Lal Mahal Ltd. (supra) has also interpreted its judgment in the case of O.N.G.C. Ltd. vs. ppn 40 arbp-84.13(j).doc Saw Pipes Ltd. (supra) which had considered the ambit and scope of jurisdiction of Court under section 34 of the Arbitration & Conciliation Act, 1996 and has held in the said judgment with regard to section 34 of the Arbitration Act that the expression "public policy of India" was required to be given a wider meaning and for that purpose had added a new category "patent illegality" for setting aside the domestic award.

After interpreting its judgment in the case of O.N.G.C. Ltd. vs. Saw Pipes Ltd. (supra), it is held that it could be safely observed that while accepting the narrow meaning given to the expression "public policy" in the case of Renusagar Power Co. Ltd.

ig (supra) in the matters of enforcement of the foreign award, there was departure from the said meaning for the purpose of jurisdiction of the Court in setting aside award under section 34 of the Arbitration Act.

86. The Supreme Court accordingly held that what was stated by it in the case of Renusagar Power Co. Ltd. (supra) with reference to section 7(1)(b)(ii) of the Foreign Awards Act must equally apply to the ambit and scope of section 48(2)(b) of Arbitration Act. It is held that a distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws had been noticed by the Supreme Court in the case of Renusagar Power Co. Ltd. (supra) and accordingly held that the principles laid down by the Supreme Court in the case of Renusagar Power Co. Ltd. (supra) should apply as regards the scope of enquiry under section 48(2)(b) and thus for the purpose of section 48(2)(b) the expression "public policy of India" must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is ppn 41 arbp-84.13(j).doc covered by one of the three categories enumerated in Renusagar Power Co. Ltd. (supra). It is held that although same expression "public policy of India" is used in both in section 34(2)(b)(ii) and section 48(2)(b) and the concept of "public policy of India" is same in nature in both the sections but its application differs in degree insofar as these two sections are concerned. It is held that 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.

87. The Supreme Court clarified that the principles in the case of Renusagar Power Co. Ltd. (supra) must apply for the purpose of section 48(2)(b) of the Arbitration & Conciliation Act, 1996 and insofar as the proceedings for setting aside the award under section 34 of the Arbitration Act are concerned, the principles laid down in the case of O.N.G.C. Ltd. vs. Saw Pipes Ltd. (supra) governed the said proceedings.

It is accordingly held that the enforcement of the award would be refused under section 48(2)(b) in which if such enforcement would be contrary to

(i) fundamental policy of Indian law or (ii) the interest of India ; or (iii) justice or morality. The Supreme Court clarified that the wider meaning given to the expression "public policy of India" occurring in section 2(b)

(ii) in the case of O.N.G.C. Ltd. vs. Saw Pipes Ltd. (supra) is not applicable where the objection is raised to the enforcement of foreign award under section 48(2)(b).

88. In the case of Phulchand Exports Ltd. (supra), a two Judge bench of the Supreme Court had accepted the submission that the ppn 42 arbp-84.13(j).doc meaning given to the expression "public policy of India" in section 34 of the Arbitration Act decided in the case of O.N.G.C. Ltd. vs. Saw Pipes Ltd. (supra) must be applied to the same expression occurring in section 48(2)(b) of the Arbitration & Conciliation Act, 1996. However, in the case of Shri Lal Mahal Ltd. (supra), it has been held that the view of the Supreme Court in the case of Phulchand Exports Ltd. (supra) that the

expression "public policy of India" used in section 48(2)(b) had to be given a wider meaning and the award could be set aside, if it is patently illegal does not lay down the correct law and accordingly overruled the said judgment. In my view though a domestic award can be set aside if it is in violation of fundamental policy of Indian Law and enforcement of a foreign award can be refused on the ground that such foreign award is contrary to fundamental policy of Indian Law, the powers of Court exercising powers under sections 34 and 48 differs in degree and are not identical.

89. The Supreme Court in the said judgment in the case of Shri Lal Mahal Ltd. (supra) held that while considering the enforceability of the foreign awards, the Court does not exercise the appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, the some error has been committed . In my view none of the objections raised by the respondent fall under any of the categories i.e. (i) the award is contrary to the fundamental policy of Indian law or

(ii) the interest of India ; or (iii) justice or morality.

90. The Supreme Court has in the case of Associate Builders (supra) and in case of O.N.G.C. Ltd. vs. Western Geco International Ltd.

ppn 43 arbp-84.13(j).doc (supra) has held that the domestic award can be set aside if it is contrary to and in violation of the fundamental policy of the Indian Law. Though the Supreme Court in the case of Shri Lal Mahal Ltd. (supra) has used the same expression i.e. contrary to fundamental policy of Indian Law while dealing with the enforcement of the foreign award under section 48(2)(b), in my view, the power of a Court while applying the said expression in the case of enforcement of the foreign award is very narrow and limited and is not wider than while dealing with a domestic award.

In my view, the Court while dealing with a foreign award is governed by the principles of private international law and thus the expression "fundamental policy of Indian law" must be necessarily construed in the sense of doctrine of public policy as applied in the field of private international law.

91. In my view, the principles laid down by the Supreme Court in the case of Shri Lal Mahal Ltd. (supra) differentiating the powers of the court being very narrow in case the enforcement of the foreign award than that while dealing with a challenge to the domestic award squarely applies to the facts of this case. In my view, the submission made by learned senior counsel for the respondent that the expression "fundamental policy of Indian law" as interpreted by the Supreme Court in the case of Associate Builders (supra) and in the case of O.N.G.C. vs. Western Geco International Ltd. (supra) shall apply to the foreign award with same force is contrary to the principles laid down by the Supreme Court in the case of Shri Lal Mahal Ltd. (supra) and is also contrary to sections 47 and 48 of the Arbitration & Conciliation Act, 1996 and is thus rejected.

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92. In my view the Supreme Court in the case of Associate Builders (supra) and in the case of O.N.G.C. vs. Western Geco International Ltd. (supra) has affirmed the views of the Supreme Court in the case of O.N.G.C. Ltd. vs. Saw Pipes Ltd. (supra) which was decided admittedly dealing with a

domestic award under section 34 of the Arbitration Act which principles, in my view, cannot be extended to the foreign award under section 48(2)(b) of the Arbitration Act. The principles laid down by the Supreme Court in the case of Phulchand Exports Ltd. (supra) thereby applying the expression "public policy" as interpreted by the Supreme Court in the case of O.N.G.C. Ltd. vs. Saw Pipes Ltd. to the foreign award under section 48(2)(b) has been overruled out by the Supreme Court in the case of Shri Lal Mahal Ltd. (supra). In my view, the reliance thus placed by learned senior counsel on the judgment of the Supreme Court in the case of Associate Builders (supra) in support of her submission that the expression "fundamental policy of the Indian law" as interpreted by the Supreme court in the case of Associate Builders (supra) shall apply to enforcement of the foreign award under section 48(2)(b) of the Arbitration Act being the similar expression is totally misplaced.

93. This Court in the case of POL India Projects Limited vs. Aurelia Reederei Eugen Friederich GmbH & Anr. decided on 8th April, 2015 in Arbitration Petition No.76 of 2012 has after adverting to various judgments of the Supreme Court, including the judgment in the case of Shri Lal Mahal Ltd. (supra) and also the judgment of the Delhi High Court in the case of Penn Racquet Sports vs. Mayor International Limited, ILR (2011) Delhi, 181 has held as under :-

ppn 45 arbp-84.13(j).doc "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) 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) 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) 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 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) has held that since the Foreign Awards Act was concerned ppn 46 arbp-84.13(j).doc 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) has been reiterated by the Supreme Court in case of Shri Lal Mahal Limited (supra). 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 simplicitor violation of the provisions of the said regulation, in my view would not be contrary to the fundamental policy of Indian law as interpreted by the Supreme Court in case of Renusagar Power Co. Ltd. (supra)."

94. I am respectfully bound by the judgment of this Court in the case of POL India Projects Limited (supra). In my view, the respondent has not furnished any proof before this Court as to why enforcement of the foreign award may be refused. The said foreign award dated 8 th June, 2011 is enforceable under Part-II and is binding on all the parties under section 46 of the Arbitration Act. I am therefore, of the view that the foreign award already stands as a decree and the petitioner holding the said foreign award has become entitled for enforcement of the said foreign award having taken effective steps for execution of the said award. In my view, the petition for enforcement of the foreign award is in ppn 47 arbp-84.13(j).doc accordance with law and in compliance with section 47 of the Arbitration Act. As this Court has taken a view that the said foreign award is enforceable, the petitioner can proceed to take further effective steps for execution of the same. In the circumstances, the petitioner is directed to put the award in execution in accordance with the rules of this Court.

95. I therefore pass the following order :-

(a) Arbitration Petition No.84 of 2013 is made absolute in terms of prayer clauses (a) and (b).

(b) There shall be no order as to costs.

(R.D. DHANUKA, J.)

