IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.11.2016

\+ **EX.P. 334/2014**

XSTRATA COAL MARKETING AG ..... Decree Holder

Versus

DALMIA BHARAT (CEMENT) LTD ..... Judgement Debtor

Advocates who appeared in this case:

For the Decree Holder : Mr Gourab Banerji, Senior Advocate with Mr Prashant Pakiddey, Ms Shivi Sethi, Mr Sahil Tagotra and Ms Vaidehi Misra.

For the Judgment Debtor : Mr A.S. Chandhiok, Senior Advocate with Mr Ashish Dholakia, Mr Abhimanyu Mahajan, Mr Ankur Mahindroo, Mr D. Kishore Kumar, Mr Gautam Bajaj, Ms Smita Mohan and Ms Esha Mehta.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

EA(OS) No.257/2016

1. Dalmia Cement (Bharat) Limited (hereafter 'Dalmia'), the Judgment Debtor/Objector, has filed the present application under Section 48 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that enforcement of the arbitral award dated 31.01.2014 (hereafter 'first award') and the final award dated 30.04.2014 (hereafter 'final award'), be declined. Both, the first award and the final award are collectively referred to as 'the impugned awards'.

2. By the first award, the Arbitral Tribunal has awarded a sum of

US$393,500 along with interest quantified at US$ 45,980.20 till the award dated 31.01.2014, that is, till the date of passing of the first award. In addition, the Arbitral Tribunal has also awarded post-award interest at the rate of 5% per annum (compounded annually) from 28.02.2014 till the receipt of payment by the Decree Holder (hereafter 'Xstrata'). Admittedly, the first award is final amongst the parties in relation to the merits of all claims made by Xstrata, other than the claim of costs. The final award rendered by the Arbitral Tribunal on 30.04.2014 is limited to award of costs, whereby the Arbitral Tribunal has awarded costs amounting to GB £53,985.46.

3. The impugned awards were rendered in respect of the disputes that had arisen between the parties in relation to an agreement dated 09.02.2011(hereafter 'the Contract') whereby Xstrata had agreed to supply and Dalmia had agreed to purchase 1,00,000 to 1,20,000 metric tons +/- 10% of South African steam coal. The Contract included an arbitration clause and the parties had agreed that the Contract as well as the arbitration clause would be construed in all respects according the laws of England. In terms of the arbitration clause, the arbitration proceedings were held in London, United Kingdom and the arbitration was conducted under the LCIA Arbitration Rules of the London Court of International Arbitration.

4. Xstrata is a company incorporated under the laws of Switzerland; thus, the impugned awards are foreign awards within the meaning of Section 44 of the Act.

5. Dalmia claims that enforcement of the impugned awards ought to be declined under Section 48(2)(b) of the Act as according to it such enforcement would be contrary to the public policy of India. It is

contended on behalf of Dalmia that the award of damages in favour of Xstrata is without any material evidence. It is contended that although the Arbitral Tribunal had rejected the basis on which Xstrata had quantified its claim for damages but, nonetheless, awarded damages on a completely new basis, which was neither pleaded nor urged by Xstrata. It is further contended that the final award is also perverse and beyond the claims made by Xstrata inasmuch as the Arbitral Tribunal has awarded interest from the date prior to the date of breach of the Contract as claimed by Xstrata. Dalmia also contested the enforcement of the final award on the ground that the award of costs is unreasonable and perverse and contrary to the settled principles. Dalmia urges that since the Arbitral Tribunal had substantially rejected Xstrata's claim for damages, it could not have awarded costs in favour of Xstrata for pursuing such claim.

6. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

6.1 Xstrata and Dalmia entered into the Contract dated 09.02.2011, in terms of which Xstrata agreed to supply:

> "SOUTH AFRICAN STEAM COAL IN BULK:
>
> 100,000 to 120,000 metric tons +/-10% shipping tolerance to be shipped in 2 liftings of 50,000 to 60,000 MT +/-10% each. (the plus / minus 10% option is to take account of vessel configuration only and is in Vessel Owner's option and is not cumulative)"

6.2 The aforesaid coal was to be shipped in accordance with the schedule appended to the Contract. The purchase price was agreed to as US$110.50 per metric ton FOB, Richards Bay Coal Terminal, South

Africa. The shipment was to be in two tranches. The Contract was to terminate on 30.09.2011 or upon the parties having complied their obligation in terms of the Contract.

6.3 Xstrata made the first shipment of 50,567 metric tons of coal; Dalmia took delivery of this shipment on 03.06.2011 and paid the consideration for the same in terms of the Contract. There is no controversy in regard to this shipment and the disputes between the parties pertain only to the second shipment.

6.4 On 29.06.2011, Dalmia informed Xstrata that a cyclonic storm accompanied by Gale force winds had severely affected Dalmia's cement plant at Kadapa. Dalmia stated that it's shed of bulk material section and raw material handling section had been uprooted and, therefore, the said sections of the cement plant had stopped functioning. Dalmia further stated that the reconstruction of the sheds would take at least six to eight months and it would take further two to three months for normal operations to resume. Dalmia invoked clause 15.1 of the Contract (*force majeure* clause) and requested Xstrata to hold delivery of the Cargo which was to be shipped in September 2011 to a later date.

6.5 On 22.06.2012, Dalmia sent an email to Xstrata conforming that it was ready to take delivery of the second shipment in that calendar year; however, the price of cargo was required to be re-worked in view of the huge difference in the contracted price and then prevailing market rate. There is serious controversy as to whether the *force majeure* event had ended prior to 22.06.2012 since Xstrata claims that even during the period when the force majeure event is stated to have affected Dalmia's operations, its production level had increased in comparison to the previous

year. However, notwithstanding the controversy, it is admitted that the *force majeure* event had ended by 22.06.2012 - the date on which Dalmia confirmed that it was ready to take the second shipment.

6.6 Xstrata was not willing to accept any variation in the contracted price and insisted that the Contract be performed in accordance with the agreed terms with the delivery period being extended on account of the *force majeure* event. However, despite repeated requests, Dalmia did not provide 15 day "Load Port Layday Period" and Xstrata terminated the Contract on 07.03.2013 and initiated the arbitration proceedings, *inter alia*, claiming damages on account of Dalmia's breach of the Contract.

Impugned awards

7. Xstrata founded its claim for damages on the basis of the difference in the contractual price for coal and the market price of coal at the time of the breach. In addition, it also sought interest on the amount of damages as well as legal and other costs.

8. Dalmia resisted Xstrata's claim on various grounds including that it was not contractually bound to accept delivery beyond the original shipment schedule. Dalmia further asserted that Xstrata could not claim damages as it was not ready and willing to perform the Contract at all material times. The Arbitral Tribunal rejected the contention that Dalmia was absolved of its obligation to accept the delivery of goods beyond September 2011. The Arbitral Tribunal reasoned that in terms of clause 15.4 of the Contract, the duration of the Contract was extended on account of the interruption caused by the *force majeure* event. The Arbitral Tribunal further held that the parties by their conduct had also agreed to

extend the shipping schedule and it would be unconscionable for Dalmia to resile from the said position.

9. The Arbitral Tribunal rejected Dalmia's contention that the Contract had expired on 23.09.2012 and held that the Contract was subsisting till it was terminated by Xstrata on 07.03.2013.

10. The Arbitral Tribunal held that the Dalmia's refusal to accept the delivery of coal at the contractually agreed price was repudiatory and Xstrata was entitled to terminate the Contract as a result of the repudiatory breach on the part of Dalmia.

11. In view of the above, the Arbitral Tribunal held that Xstrata was entitled to damages for the breach of the Contract.

12. With respect to the issue of quantum of damages, Xstrata claimed that the price of coal was US$74.91 per metric ton as against the contractual price of US$110.50 and was, thus, entitled to a difference of US$35.59 for 66000 metric tons (60,000 metric tons + 10%). Xstrata computed its damages on the aforesaid basis at US$35.59 x 66,000 = US$2,348,940. Xstrata made the aforesaid claim on the basis of Section 50(3) of the Sale of Goods Act, 1979 which provided that where there is an available market for the goods, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or the current price.

13. Dalmia challenged the measure of damages as claimed by Xstrata. Dalmia asserted that the coal in question was to be sourced by Xstrata from its related concern, Xstrata Coal South Africa (hereafter "XSA"), and Xstrata was only entitled the margin of US$7.735. The Arbitral Tribunal

took note of the distribution agreement between Xstrata and XSA, in terms of which Xstrata was required to remit the entire consideration received for sale of coal to XSA and XSA would then refund the margin computed at 7%. The Arbitral Tribunal also noted that in respect of the first shipment of 50,567 metric tons, Xstrata was to pay XSA the full invoice value less a margin of US$7.87 per metric ton (equivalent to approximately 7.12% of the contracted value of coal) being the margin that Xstrata was entitled to retain. The Arbitral Tribunal held that Section 50(3) of the Sale of Goods Act, 1979 provided for a presumptive measure of damages and was only a *prima facie* rule. The Arbitral Tribunal rejected the measure of damages as claimed by Xstrata and held that unless Xstrata could show an existing contractual liability to the extent of damages claimed, Xstrata's true loss would have to be computed on the basis of the margin of 7.12%.

14. The Arbitral Tribunal also rejected Xstrata's claim with regard to the quantity of coal on which damages were to be computed; the Tribunal held that Dalmia was obliged to purchase a minimum 50,000 metric tons and, therefore, the damages were to be computed on the basis of a margin of US$7.87 on the 50,000 metric tons. The Arbitral Tribunal, accordingly, awarded damages in the sum of US$393,500 (being 50,000 metric tons x US$ 7.87).

15. The Arbitral Tribunal also awarded interest in terms of Section 49(3) of the Arbitration Act, 1996 from 01.10.2011 till the date of the award. The Arbitral Tribunal reasoned that had Dalmia fulfilled its contractual obligations, it would have called for delivery of coal by September 2011. The Arbitral Tribunal also took note of Dalmia's Annual Report of 2011-12, which covered the period during which Dalmia claimed that its cement

production was adversely affected by the *force majeure* event. The Annual Report reflected that there was a 44% increase in Dalmia's cement production in the Andhra Pradesh during the relevant year. Since Dalmia's Kadapa plant was the only cement production facility in Andhra Pradesh, the Arbitral Tribunal concluded that the increase in production by 44% was attributable to Dalmia's Kadapa plant and this was during the period when Dalmia had claimed that that its specified plants were inoperative due to the cyclone. In the given facts, the Arbitral Tribunal doubted Dalmia's claim that it was unable to accept delivery of coal by the end of September 2011 and, therefore, awarded interest from October 2011.

16. Insofar as the final award is concerned, the Arbitral Tribunal also awarded GB£52,168.33 to Xstrata on account of costs in relation to arbitration. The said sum was arrived at by providing a discount of 5% on the total cost of Arbitration assessed at £53,984.46.

17. In addition, the Arbitral Tribunal also awarded legal cost in favour of Xstrata in the following sums:-

(i) AUS$208,140.66 (made up of AUS$167,196.18 profit costs and AUS$40,944.48 for disbursements);

(ii) GB £2666.80;

(iii) CHF l,845.80.

18. The aforesaid amount of AUS$ 208,140.66 was also computed by providing a discount of 5% on the profit cost as claimed by Xstrata (Xstrata had claimed a sum of AUS$178,995.98 against which the Arbitral Tribunal awarded a sum of AUS$167,196.18).

19. There was no serious challenge as to the quantum of costs claimed

by Xstrata since the costs claimed to have been incurred by Dalmia were also at comparable levels. However, Dalmia contested the allocation of the costs; it contended that bulk of claims made by Xstrata were rejected and, therefore, Xstrata should also bear substantial portion of costs. The Arbitral Tribunal had considered the same and provided the discounts, it considered as appropriate.

Submissions

20. Mr Chandhiok, learned Senior Advocate appearing for Dalmia canvassed four contentions for refusing the enforcement of the impugned awards. First, he submitted that award of damages was wholly opposed to the public policy of India as according to him Xstrata had failed to produce any material to show that it had suffered actual loss. He earnestly contended that the fundamental policy of Indian Law in relation to damages was to only allow reasonable damages, which had actually been suffered by the parties claiming such damages. He contended that in absence of any actual damages, no such damages could have been awarded by the Arbitral Tribunal. In this context, he also contended that the claim made by Xstrata before the Arbitral Tribunal was for damages on the basis of the difference between the contractual price and the market price. He contended that this claim having been rejected, the Arbitral Tribunal could not have made an award in respect of damages. He submitted that it was not open for the Arbitral Tribunal to make an award in respect of an amount that had not been claimed. He strongly relied on the decision of this Court in ***Agritrade International Pte. Ltd. v. National Agricultural Co-operative Marketing Federation of India Ltd.***: **2012 (1) Arb. LR 405** (Delhi). He also relied on the decision of the House of Lords in ***Ruxley***

Electronics and Construction Ltd. v. Forsyth: **(1996) 1 Appeal Cases 344** in support of his contention that in order to succeed in a claim of damages, the plaintiff must establish that it has suffered a real loss.

21. Secondly, he contended that no goods were available with Xstrata and it had to source the goods from XSA. He contended that since no goods were available with Xstrata, it was not in a position to supply the same and perform the Contract and, therefore, no damages for alleged breach could be claimed by Xstrata.

22. Thirdly, he contended that the Contract was terminated by Xstrata on 07.03.2013 and it was common ground that the date of breach would be 07.03.2013. Nonetheless, the Arbitral Tribunal had awarded interest from 01.10.2011 which is prior to the date of breach of Contract as claimed by Xstrata. He submitted that in this manner, the Arbitral Tribunal had made an award in excess of the claim made by Xstrata. He submitted that this was beyond the jurisdiction of the Arbitral Tribunal and, therefore, the first award was contrary to the public policy of India.

23. Fourthly, he contended that the allocation of costs was contrary to the LCIA Rules and the principles of allocation as noted by the Arbitral Tribunal. He pointed out that the Arbitral Tribunal had referred to Article 28.2 of the LCIA Rules which provided for the principle that costs should "*reflect the parties' relative success and failure in the award or arbitration*". He submitted that the quantum of damages made by Xstrata had been rejected and only a small fraction of the quantum of damages was awarded. In this view, the costs incurred by Xstrata in pursuing these claims could not be awarded and the same would militate against the principle of awarding cost. He relied on the decision in the case of ***Re***

Elgindata Ltd.: **(1993) 1 All ER 232** and drew the attention of this Court to the principles for awarding cost as indicated therein. On the strength of the said decision, he contended that where the successful party raises issues or makes allegations improperly or unreasonably, the Court would not only deprive the successful party of costs, but would also order the successful party to pay cost to the other party. He submitted that since in the present case, the Xstrata had failed in its claim of damages (as claimed) and Dalmia had substantially prevailed; thus the award of costs was wholly perverse and contrary to public policy of India.

24. Mr Banerji, learned Senior Advocate countered the submissions made by Mr Chandhiok and submitted that no grounds have been made out to decline the enforcement of the impugned awards. He submitted that the grounds urged would not be available even for setting aside of an arbitral award under Section 34 of the Act. *A fortiori* the enforcement of the impugned awards could not be denied on such grounds.

25. He submitted that the question of measure of damages is clearly within the discretion of the Arbitral Tribunal and the same could not be interfered with even under Section 34 of the Act. In the circumstances, the question of refusing the enforcement of a foreign award on the said ground does not arise.

26. Insofar as the question of interest is concerned, he submitted that law as applicable to the arbitration and the agreement was the law as applicable in England. He submitted that in terms of Section 49 of the Arbitration Act, 1996, the Arbitral Tribunal was specifically empowered to award simple or compounded interest from such dates and at such rates that it considered equitable. He submitted that in view of the specific provision to law, there

could be no objection as to the award of interest from a particular date which the Arbitral Tribunal had considered to be appropriate. He relied on the decision of the Supreme Court in ***Shri Lal Mahal Limited v. Progetto Grano SPA*: (2014) 2 SCC 433** in support of his contention that enforcement of a foreign award could be refused only on the grounds that it was contrary to (i) fundamental policy of Indian Law; or (ii) the interests of India; or (iii) justice or morality. He submitted that in the present case, none of the fundamental principles of Indian Law were violated and thus, the enforcement of the impugned awards could not be declined. He also relied on the decision of a Coordinate Bench of this Court in ***National Ability S.A. v. Tinna Oil & Chemicals Ltd. & Ors.***: **2008 (105) DRJ 446** in support of his contention that the Courts would adopt a pro-arbitration approach in respect of arbitral award in order to ensure that international arbitrations have credibility.

Reasoning and conclusion

27. At the outset, it is necessary to state that the grounds on which the enforcement of a foreign award may be refused are very limited. Under Section 48(2)(b) of the Act, enforcement of a foreign award may be refused if it is found that the award would be contrary to the Public Policy of India. Explanation 1 to the aforesaid provision clarifies that "*an the award is in conflict with the public policy of India, only if, — (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.*"

28. Explanation 2 to the said provision further clarifies that the question

whether the award contravenes the fundamental policy of Indian law would not entail a review on the merits of the disputes.

29. In the context of Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, the Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co***.: **1994 Supp. (1) SCC 644** explained as under:

> "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 contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

30. In ***Shri Lal Mahal Limited*** (*supra*), the Supreme Court held that the scope of the defence of public policy as explained in *Renusagar's case* (*supra*) "would apply equally" to the defence of public policy under Section 48(2)(b) of the Act. The Court further overruled its earlier decision in ***Phulchand Exports Ltd. v. O.O.O. Patriot***: **(2011) 10 SCC 300**, wherein it was held that the expression 'Public Policy of India' as used in Section 48(2)(b) of the Act had to be given a wider meaning and the award could be set aside if it is patently illegal. The relevant extract of the

decision in ***Shri Lal Mahal Limited*** *(supra)* is reproduced below:-

> "29. We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to a (1) fundamental policy of Indian law; or (2) the interests of India; or (3)justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in Saw Pipes is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).
>
> 30. It is true that in Phulchand Exports 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 Saw Pipes must be held applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in para 16 of the Report that the expression "public policy of India used in Section48(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."

31. It is relevant to note that Explanations to Section 48(2)(b) of the Act as amended by virtue of the Arbitration and Conciliation (Amendment) Act, 2015 further restricts the scope of the defence of public policy. Explanation No.1 limits the scope of the defence of public policy only to three grounds as herein mentioned before. The ground that a foreign award is against interests of India - as indicated in *Renusagar's* case and affirmed in *Shri Lal Mahal's* case - is no longer available as a ground to refuse enforcement of an arbitral award. Further by virtue of Explanation no. 2, the examination whether an arbitral award is opposed to the fundamental

policy of Indian law would not entail an examination as to the merits of the dispute.

32. The objections raised by Dalmia must be considered in the aforesaid context. The first objection canvassed on behalf of Dalmia relates to the measure of damages. Xstrata had claimed the difference between the contracted price of the coal and the market price of coal on the date of the breach of the Contract, on the contracted quantity. The aforesaid claim was made on the basis of Section 50 of the Sale of Goods Act, 1979 which reads as under:-

> "**50 Damages for non-acceptance.**
>
> (1)Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
>
> (2)The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
>
> (3)Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."

33. Although, the Arbitral Tribunal held that Dalmia was in breach of the Contract and was liable to pay damages, it rejected Xstrata's claim as to computation of the said damages. The Arbitral Tribunal found that the Xstrata was entitled to a margin of US$7.87 per metric ton of coal. The aforesaid finding is essentially in the nature of a finding of fact. The Arbitral Tribunal's conclusion is based on the distribution agreement between Xstrata and XSA, which was produced before the Arbitral

Tribunal. The Arbitral Tribunal found that Xstrata had retained the margin of US$7.87 per metric ton (equivalent to approximately 7.12% of the contracted value of coal) in respect of the first shipment of 50,567 metric ton. The Arbitral Tribunal then assessed the damages as US$393,500; 50,000 metric tons - which the Arbitral Tribunal held Dalmia was obliged to purchase - multiplied by the margin of US$ 7.87 per metric ton.

34. The aforesaid finding of the Arbitral Tribunal cannot be made a subject matter of judicial review in these proceedings. The contention that the Arbitral Tribunal had no jurisdiction to assess the quantum of damages is without any merit. The jurisdiction of the Arbitral Tribunal is not limited to merely accepting or rejecting the measure of damages as claimed by a claimant. The Arbitral Tribunal is equally empowered to assess the quantum of damages on the basis of material and evidence produced. In the present case, the Arbitral Tribunal rejected the basis for computation of damages. The Arbitral Tribunal had held that Section 50(3) of the Sale of Goods Act, 1979 only provided a presumptive measure of damages and the Arbitral Tribunal could depart from this rule in appropriate circumstances. The Arbitral Tribunal held that Section 50(2) of the said Act sets out the governing principle for assessment of damages. In terms of Section 50(2) of the said Act, the measure of damages would be the estimated loss directly or naturally resulting from buyer's breach of the contract. Applying the aforesaid principle, the Arbitral Tribunal assessed the damages payable by Dalmia.

35. It is also relevant to note that Dalmia itself had canvassed that the true loss suffered by Xstrata was not higher than US$7.735 per metric ton. It was Dalmia's case that the true profit that would have been earned by

Xstrata would be US$7.735 per metric ton in terms of the supply agreement with XSA and therefore Xstrata could not claim anything more than that.

36. In the circumstances, the finding as to the quantum of damages cannot be stated to be perverse. The measure of damages adopted by the Arbitral Tribunal is also not alien to Indian law and in the given circumstances, a party is entitled to claim loss of profits resulting from a breach of contract on the part of the other party. There is much merit in Mr. Banerji's contention that objections as raised by Dalmia would not be sustainable even under Section 34 of the Act as the conclusion of the Arbitral Tribunal is neither perverse nor patently illegal.

37. The reliance placed by Mr Chandhiok on the decision of a Coordinate Bench of this Court in ***Agritrade International Pte. Ltd.*** (*supra*) is also misplaced. The decision in that case largely turned on the question whether an agreement existed between the parties therein. In that case, the Court had also observed that there was no material to show that Agritrade (the petitioner therein) had suffered any loss. Clearly, an award of damages which is based on no material at all would undoubtedly militate against the fundamental policy of Indian law. It is well settled that a party which has suffered from the breach of contract by the other party would be entitled to reasonable damages resulting from such breach. Any award that imposes damages which have no reasonable relationship with the context of the agreement and is based on unfounded surmises, would fall foul of the fundamental policy of Indian law. This court had merely reiterated the above principle in ***Agritrade International Pte. Ltd.*** (*supra*). However, in the present case, the damages that have been awarded are

indisputably on the basis of cogent material produced during the arbitral proceedings. This is clearly not a case where damages have been awarded on no material at all; or are founded on fanciful surmises.

38. The second contention advanced by Mr Chandhiok is related to Xstrata's entitlement to damages. The question whether Xstrata was entitled to damages in absence of having sourced the goods from XSA is plainly a matter as to the merits of the disputes between the parties. And as mentioned herein before, the scope of the present proceedings does not entail re-examination of the said disputes between the parties.

39. In ***Shri Lal Mahal Limited*** (*supra*), the Court had held as under:-

> "43. Moreover, Section 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award-enforcement stage. The scope of inquiry Under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy."

40. The facts as found by the Arbitral Tribunal clearly indicates that Xstrata was desiring to deliver the goods at the contracted price and while Dalmia was willing to purchase the same, it was not willing to pay the contracted price as the price of coal had fallen. The findings of the Arbitral Tribunal cannot be impeached in these proceedings. In the circumstances, the question whether Xstrata had the requisite quantity of coal in its possession or whether it had made arrangements for the same cannot be examined in the present proceedings. It is clear that the final award cannot be held to be contrary to the public policy on account of award of damages

in favour of Xstrata.

41. The next issue to be addressed is whether the enforcement of the final award should be declined on account of award of interest from the date prior to the date of breach.

42. The parties had agreed that the laws as in force in England would also govern the Agreement as well as the Arbitration. The Arbitration was also held in London and, therefore, the Arbitration Act, 1996 - the law of arbitration in force in United Kingdom - would be applicable.

43. Section 49 of the said Arbitration Act, 1996 is relevant and is set out below:-

> "**Interest.**
>
> (1) The parties are free to agree on the powers of the tribunal as regards the award of interest.
>
> (2) Unless otherwise agreed by the parties the following provisions apply.
>
> (3) The tribunal may award simple or compound interest fromsuch dates, at such rates and with such rests as it considers meets the justice of the case.
>
> (a) On the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;
>
> (b) On the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.
>
> (4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it

considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).

(5) Reference in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.

(6) The above provisions do not affect any other power of the tribunal to award interest."

44. In terms of Section 49(3) of the Arbitration Act 1996, the Arbitral Tribunal is duly empowered to award simple or compound interest from such dates and at such rates as meets the ends of justice. In the present case, the Arbitral Tribunal held that had Dalmia fulfilled its contractual obligations it would have taken delivery of coal in October 2011. The Arbitral Tribunal further doubted Dalmia's claim as to adverse effect of the *force majeure* event as it found that the Annual Report of Dalmia for the year 2011-12 indicated that there was increase in the cement production in Andhra Pradesh during the year 2011-12; that is, the year in which Dalmia had claimed that its production was adversely affected by the cyclonic storm. In other words, the Arbitral Tribunal was not convinced of the view that Dalmia was disabled from accepting the supplies from Xstrata as contracted for and, accordingly, it awarded interest from 01.10.2011. Although, interest has been awarded from a date which is prior to the date of the breach of Contract as claimed by Xstrata; nonetheless, it was still within the jurisdiction of the Arbitral Tribunal to award such interest in terms of Section 49(3) of the Arbitration Act, 1996 as the Arbitral Tribunal considered award of such interest as equitable. Undisputedly, the Arbitral Tribunal had the power to award interest from such dates as it considered necessary to meet the ends of justice.

45. Since the award rendered by the Arbitrator was within its jurisdiction, the enforcement of the same cannot be declined merely because no such statutory provision exists in India. The limited question to be addressed is whether award of such interest is contrary to the fundamental policy of Indian Law.

46. Plainly, the expression “fundamental Policy of Indian law" does not mean the provisions of Indian Statutes. The key words are Fundamental Policy; they connote the substratal principles on which Indian law is founded.

47. Article V (2)(b) of the New York Convention of 1958 is similarly worded as section 48(2)(b) of the Act (*sans* the explanations). In ***Renusagar Power Co Ltd v. General Electric Co.*** (*supra*), the Supreme Court had observed that:

> "Article V (2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being to the public policy of the country in which the award is set to be enforced..This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India.”

48. In ***Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd.*****: (2014) 9 SCC 263,** the Supreme Court examined the meaning of the expression "fundamental policy of Indian Law" in the context of Section 34(2)(b)(ii) of the Act and had set down three principles

that would be included in the fundamental policy of Indian law. The said principles being (i) Judicial approach; (ii) principles of natural justice; and (iii) rationality and reasonableness - on the touchstone of *Wednesbury's* principle of reasonableness.

49. The above decisions must be read in conjunction with Explanation 2 to Section 48(2)(b) of the Act, which proscribes examination as to the merits of the dispute.

50. In the present case, there is no substratal principle of Indian law that has been violated and therefore, Dalmia's challenge to the enforcement of the final award must fail.

51. The next issue to be considered is related to the award of costs. Clearly, the award of cost is a matter within the discretion of the Arbitral Tribunal. Mr Chandhiok had strongly relied on the decision in ***Re Elgindata Ltd.*** (*supra*). In that case, the Court had set down the following principles for award of costs.

> "(1) Costs are in the discretion of the court. (2) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided for by rr 2(4), 3(3) and 10 respectively. The third depends on well-established practice."

52. The first and foremost principle as set out above is that the costs are in the discretion of the Court. In the present case, the Arbitral Tribunal has exercised its discretion to allocate bulk of the costs to Dalmia. This is also in conformity with the principle that cost should follow the event. In this case, Xstrata had prevailed in its claim and Dalmia was found to be in breach of the Contract.

53. The Arbitral Tribunal had also expressly noted that Xstrata had won and that would be the event for the purpose of determining whether cost should follow the event. The contention that damages awarded in favour of Xstrata were substantially less than the amount claimed by Xstrata and, therefore, the cost should be allocated proportionately, is inconsiderable. There is no mathematical formula for splitting the costs in the ratio of the amount claimed and the amount awarded. In the present case, the discretion exercised by the Arbitral Tribunal in awarding the cost does not militate against the fundamental policy of Indian law.

54. In view of the above, the application is dismissed.

VIBHU BAKHRU, J

NOVEMBER 07, 2016
RK