Gujarat High Court
Oci Corporation vs Kandla Export Corporation & 2 on 8 August, 2017
O/IAAP/2/2017 ORDER

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN. UNDER ARBITRATION ACT NO. 2 of 2017
TO
PETN. UNDER ARBITRATION ACT NO. 10 of 2017

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OCI CORPORATION....Petitioner(s) Versus KANDLA EXPORT CORPORATION & 2....Respondent(s)

========== Appearance:

MR. MIHIR J. THAKORE, SENIOR ADVOCATE ASSISTED BY ADVOCATES MS. SHRUTI SABHARWAL, MS. GRISHMA AHUJA, MR. TEJAS KARIA, MS. ILA KAPOOR AND MR. NIRAG PATHAK for SHARDUL AMARCHAND MANGALDAS AND CO, ADVOCATE for the Petitioner(s) No. 1 MR. SAURABH SOPARKAR, SENIOR ADVOCATE, MR. RASHESH SANJANWALA, SENIOR ADVOCATE AND MR. MEHUL S. SHAH, SENIOR ADVOCATE ASSISTED by ADVOCATES MR. KEYUR VYAS, MR. ARCHIT JANI, MR. SAHIL M SHAH, MR. JENIL SHAH, MS. NIDHI T. VYAS for the Respondents in the respective matters NOTICE SERVED BY DS for the Respondent(s) No. 2

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CORAM: HONOURABLE MR.JUSTICE R.M.CHHAYA Date : 08/08/2017 ORAL ORDER

1. This group of petitions filed under the Arbitration Act raise common questions of facts and law and hence, were heard together and are dealt with by this common order. The facts as stated in petition under Arbitration Act No.2/17 are made the basis of this order.

2. The parties to these petitions entered into different contracts for supply of Indian Rapeseed Meal and more particularly the petitioners and respondent no.1 in each of the application. At HC-NIC Page 1 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER the outset, it deserves to be noted that the other respondents in each of the petitions are either partners of the firm or are directors of the Company.

3. As the dispute arose between the parties, the dispute was referred to Arbitration before GAFTA Tribunal in London. The disputes so referred culminated into 9 original GAFTA awards dated 28.04.2014. The respondents preferred appeals challenging the original awards before the Board of Appeal, GAFTA, London and the appellate board of GAFTA after hearing the parties was pleased to uphold all the original awards with some minor modification to the amount of damages awarded to

the petitioner on the basis of the calculation of damages from the exact date of default. The record further indicates that the respondents approached GAFTA Appeal Board seeking clarification of the awards which came to be rejected by GAFTA Appellate Board vide order/communication dated 26.05.2015. The respondents carried the same further by filling appeals as provided under Sections 68 and 69 of the English Arbitration & Conciliation Act, 1996 before the High Court of Justice Queen's Division Commercial Court and the Hon'ble Queen's Bench Division of London High Court by an order dated 14.07.2015 refused leave to appeal the awards to the respondents. The respondents thereafter approached the Court of appeal in London against HC-NIC Page 2 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER the order passed by the Hon'ble Queen's Bench division of London High Court and by a final order dated 04.02.2016, the Court of appeal in London refused leave to appeal against the order dated 14.07.2015 and also disallowed the plea of the respondents to prefer an appeal before the Supreme Court of United Kingdom. According to the petitioners, the proceedings attained finality as per the provisions of UK Arbitration Act and hence, the petitioner filed individual applications for execution of the awards as foreign awards before the District Court at Gandhidham which came to be registered as Special Execution Petitions No.167/15 to 175/15. The record indicates that the learned District Court at Gandhidham issued notice to the respondents.

4. At this stage, it would be appropriate to note that the petitioner herein preferred petition under Section 15(5) of the Commercial Court, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 for seeking clarification and appropriate direction to transfer Special Execution Petition No.167/2015 and allied execution petitions pending before the District Court at Gandhidham□Kachchh either to the High Court or to appropriate commercial courts, commercial divisions. The Hon'ble Division Bench of this Court in the case reported in 2017(1) GLH 383 was pleased to observe thus □HC-NIC Page 3 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER "11.00. The sum and substance of the above discussion would be, (1) Where the subject matter of an arbitration is a commercial dispute of a specified value and if such arbitration is international commercial arbitration, all the applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 shall be heard, decided and disposed of by the Commercial Division where such commercial Division has been constituted in the High Court i.e. in the present case High Court of Gujarat.

(2) Where the subject matter of an arbitration is a commercial dispute but not of a specified value and if such arbitration is international commercial arbitration, considering the provisions of Arbitration and Conciliation (Amendment) Act, 2015 the same shall be heard, decided and disposed of by the concerned High Court.

(3) Where the subject matter of an arbitration is a commercial dispute of a specified value and if such arbitration is other than international arbitration, all the applications

or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 shall be filed in and heard, decided and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such commercial court has been constituted.

Considering section 15 of the Commercial Courts Act, all the applications / appeals in question under the Arbitration and Conciliation Act, 1996, therefore are required to be transferred to the concerned Commercial Division of the High Court of Gujarat or before the Gujarat High Court or HC-NIC Page 4 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER before the concerned commercial court and as observed hereinabove and as the case may be.

12.0. In view of the above and for the reasons stated above, all these applications stand disposed of and it is held that the concerned Executing Court before whom the respective Execution Petitions are pending shall not have any jurisdiction to execute foreign awards for which the Execution Petitions are filed. Consequently, the concerned Commercial court to return the respective Execution Petitions to the concerned original applicant to present it before appropriate Court considering the observations made in para 11 of the present judgement and order."

5. Pursuant to the aforesaid judgment, the Special Execution Petitions No.167/15 to 175/15 came to be transferred to this Court.

6. The learned advocates appearing for the parties were also asked to submit brief written submissions and the learned advocates were heard at length and extensively on the issue of applicability of Sections 47, 48 and 49 of the Arbitration and Conciliation, 1996 (hereinafter referred to as "the Act").

7. Heard Mr. Mihir J. Thakore, learned Senior Advocate assisted by learned advocates Ms. Shruti Sabharwal, Ms. Grishma Ahuja, Mr. Tejas Karia, Ms. Ila Kapoor and Mr. Nirag Pathak for the applicants for M/s. Shardul Amarchand Mangaldas & Co. in all the matters, Mr. Saurabh Soparkar, learned Senior Advocate, Mr. Rashesh Sanjanwala, HC-NIC Page 5 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER learned Senior Advocate and Mr. Mehul S. Shah, learned Senior Advocate assisted by learned advocates Mr. Keyur Vyas, Mr. Archit Jani, Mr. Sahil M Shah, Mr. Jenil Shah, Ms. Nidhi T. Vyas for the respondents in the respective matters.

8. The learned counsels appearing for the parties have candidly submitted that these applications are filed for execution of foreign awards under the provisions of the Act and therefore, this Court may first decide whether the awards in question are to be termed as decree of this Court as provided under Section 49 of the Act.

9. Mr.Thakore, learned counsel appearing for the petitioner relying upon the relevant provisions of the Act and more particularly Sections 44, 46, 47, 48 and 49 of the Act, has taken this Court through the basic facts arising in these petitions and has submitted as under □

10. That Contract No. KEC/OCI/5/11□12 dated 11.01.2012 was entered into between respondent no.1 herein and the petitioner for supply of Indian Rapeseed Meal with the specification prescribed thereunder and with other conditions. Mr. Thakore also referred to the noteworthy terms of the said contract which are as under :

> "COMMODITY INDIAN RAPESEED MEAL SPECIFICATION CRUDE PROTEIN 36% MIN.

MOISTURE 12.5% MAX HC-NIC Page 6 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER SAND/SILICA 2.5% MAX FAT(OIL) 2.5% MAX ASH 9.0% MAX FIBRE 12.0% MAX AFLATOXIN (B1, B2, G1, G2) 50 ppb Max.

QUANTITY 5000MT(FIVE THOUSAND METRIC TONS) 5% MORE OR LESS AT BUYER'S OPTION PRICE:

US$167 PMT(US DOLLARS ONE HUNDRED SIXTY SEVEN ONLY PMT) FOB KANDLA□INDIA LOAD PORT:

KANDLA□INDIA SHIPMENT 1st MAY, 2012 TO 20TH MAY, 2012 FREIGHT:

TO BUYER'S ACCOUNT CERTIFICATION SHIPPED WEIGHT AND SHIPPED QUALITY AS PER SAMPLE SEALED AT LOADING PORT AND ANALYSED AS PER GAFTA CONTRACT NOS. 107 & 125 TO BE FINAL.

PAYMENT TERMS:

BY IRREVOCABLE LETTER OF CREDIT (L/C) AT SIGHT TO BE OPENED ON SELLER AT WRITTEN REQUEST FOR 100% INVOICE VALUE THROUGH SELLER'S BANK, STATE BANK OF INDIA, COMMERCIAL BRANCH, AHMEDABAD QUANTITY/QUALITY:

TO BE FINAL AT LOADING PORT ARBITRATION:

ANY DISPUTE ARISING OUT OF OR UNDER THIS CONTRACT SHALL BE REFERRED TO ARBITRATION IN LONDON IN ACCORDANCE WITH GAFTA 125 ARBITRATION RULES. THIS CONTRACT SHALL BE GOVERNED BY ENGLISH LAW.

OTHER CONDITION[sic]:

ALL OTHER TERMS AND CONDITIONS AS PER THE GAFTA CONTRACT 107/125 CURRENTLY IN FORCE. BOTH THE BUYER AND SELLER HEREBY ACKNOWLEDGES FAMILARITY WITH THE NEXT(sic) OF THE SAID GAFTA CONTRACTS AND AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS"

11. The record of the petitions indicate that as the goods were not supplied as per the terms of the contract, the arbitration clause was invoked and as per the arbitration clause, the dispute so arising was referred to the Arbitration in London in accordance with GAFTA 125 Rules. The same came to be registered as Arbitration No.14□711, which culminated into award dated 28.04.2014.

12. Mr. Thakore, learned counsel submitted that as per the award dated 28.04.2014, the learned arbitrators have directed the sellers, i.e., respondent no.1 to pay forthwith to the buyers a sum of USD 846,750.00 and also passed further awards to the effect that all the fees and expenses of the arbitration be paid by the sellers and if any sum already paid by the buyers in this respect to be reimbursed by the sellers on the same conditions as a principal awards as above.

13. Mr. Thakore further submitted that the said awards dated 28.04.2014 were challenged before the appellate forum being Appeal Award No.4383, which came to be rejected vide order dated HC-NIC Page 8 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER 16.04.2015, against which the review was preferred by the respondents which was also rejected on 26.05.2015.

14. Mr. Thakore further submitted that the orders passed by the appellate forum was further challenged before the High Court of Justice, Queen's Bench Division Commercial Court of England, which culminated into the order dated 14.07.2015, which was also confirmed in further appeal vide order dated 04.02.2016.

15. Mr. Thakore submitted that in light of the aforesaid facts and considering the provisions of the Act, burden is upon the respondents to satisfy this Court and to show that the awards in question are not enforceable as provided under Section 48(1) and/or 48(2) of the Act and relied

upon the judgment of the Apex Court in the case of Shri Lal Mahal Ltd. vs. Progetto Grano SPA reported in (2014) 2 SCC 433.

16. Mr. Thakore submitted that the present petitions are execution petitions and this Court will have to determine in two parts. Referring to the provisions of the Act and more particularly Sections 46, 47, 48, it was contended that this Court will have to determine whether the awards which are foreign awards are enforceable and declare it as decree of this Court.

17. Mr. Thakore submitted that the second stage can HC-NIC Page 9 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER be kept pending and only after this Court comes to the conclusion that the awards become enforceable, then it would become decree of this Court and then execute it as provided under Order 21 of the Civil Procedure Code and subsequent stage can be decided later and therefore, the present hearing may be limited to the application of Section 48 of the Act. At this stage, Mr. Thakore also relied upon the judgment of the Apex Court in the case of M/S. Fuerst Day Lawson Ltd vs Jindal Exports Ltd. reported in 2001(6) SCC

356.

18. Mr. Soparkar, learned counsel appearing for the respective respondents raised the following contentions □

19. That this Court may decide the issue of Section 47 of the Act first and then decide whether the awards are enforceable or not.

20. It was contended that as provided under Section 46 of the Act, the Arbitration has to be by a party or in relation to contract executed between whom it is made. It is not in dispute that only the firms were party to the contracts. It was contended that Section 47 read with Section 49 of the Act will have bearing on the proceedings inasmuch as, individuals are not party to the proceedings and therefore foreign awards would not be binding on them.

21. It was contended that the provisions of section 49 of the Act provides that the award is to be made decree by this Court which is the first stage and therefore, the individuals are wrongly joined and have no locus and even the petitions do not contain any averment to justify the presence of individuals other than the companies.

22. Referring to the provisions of section 48(2) of the Act, it was contended by the learned counsel appearing for the respondent that the damages would mean the damages immediate and not for profiteering.

23. Referring to the provisions of section 51(3) of the U.K. Sale of Goods Act as well as section 51(2) of the said Act, Mr. Soparkar learned counsel appearing for the respondent contended that it has to be exact damages. Referring to the awards in origin as well as the awards passed by the appellate board of GAFTA, Mr. Soparkar, contended that the amount awarded is more than its true loss and it is an unusual case which would shock the conscience of this Court. It was further contended that even according to the petitioner, the actual loss is much less than what is awarded. It was contended that approximately, the amount of 13 million USD is awarded for 9 contracts only.

24. It was also further contended that the High Court of England has not confirmed the orders of the HC-NIC Page 11 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER Arbitration awards passed by the arbitrators as well as the appellate arbitration board, but has refused to entertain the objections of the respondents by holding that the view taken by the Arbitration Tribunal/Board is not obviously wrong. By referring to Section 69 of the U.K. Sale of Goods Act and even referring to the order passed by Court of appeal, it was contended that the Court of Appeal refused permission to appeal without hearing and the decision has become final as per the English law.

25. Relying upon the judgment of the Apex Court in the case of Shri Lal Mahal Ltd(supra), Mr. Soparkar, learned counsel appearing for the respondent contended that the awards in question have become final only as per English Law and the provisions of section 48 of the Act and more particularly section 48(2)(b) of the Act would apply and the respondents have a right to dispute the same as it is against the public policy. Relying upon the judgment of the Apex Court in the case of Renusagar Power Co. Ltd. vs. General Electric Co. reported in AIR 1994 SC 860 as well as the judgment in the case of Associate Builders vs. Delhi Development Authority reported in (2015) 3 SCC 49 and judgment of the Calcutta High Court in the case of Gopalchandra Mukherjee v. Food Corporation of India reported in (2017) SCC Online Calcutta 67, it was contended that the awards would be contrary to HC-NIC Page 12 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER the public policy in India and the same are against fundamental principles of Indian law and violative of morality and justice and the same would shock the conscience of this Court.

26. It was contended that mere violation of Indian law may not satisfy the test that it is against public policy, but when it is against fundamental rules of legal system of the country, such foreign awards are not enforceable.

27. Further relying upon the judgment in the case of Renu Sagar (supra) more particularly paragraphs No.68 to 76, the judgment of the Apex Court reported in 1994 (suppl.) SCC 465 as well as the judgment rendered in the case of Laxman Prasad v. Prodigy Ele. Ltd. & Anr. reported in (2005) 5 SCC 465 (at page 477), it was contended that test is provided to the effect that whether the awards in question are violative of Indian law or whether it is against the basic principles of morality and justice and whether there is flagrant/gross breach of the same.

28. Explaining and elucidating the impugned orders further, Mr.Soparkar contended that the awards of the Arbitration Tribunal whereby as against the direct loss of around 3 million USD, a total loss including consequential loss of 5 million USD for 14 contracts is being compensated by damages in sum exceeding 13 million USD for 9 contracts, which is fundamentally in violation of Indian HC-NIC Page 13 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER jurisprudence wherein compensation is always to make good damages suffered and not profiteering.

29. Referring to Section 57 of the Indian Sale of Goods Act and Section 73 of the Indian Contract Act, it was contended by Mr. Soparkar that the provision is to pay direct loss and not indirect loss and not for profiteering and the parties cannot be made richer. Mr. Soparkar also further contended that the parties had entered into back to back contracts and have adopted the cause and minimise the loss and the petitioners have adopted such a cause whereby they have minimised the loss and therefore the petitioners cannot ask for more.

30. Referring to Section 73 of the Indian Contract Act as well as the judgment of the Apex Court in the case of Messrs. Torjan & Company Vs. RM.N.N. Nagappa Chettiar reported in AIR 1953 SC 235, it was contended by Mr. Soparkar, learned counsel appearing for the respondents that a party cannot be awarded astronomical profits that he would have made. Mr. Soparkar contended that if the petitioner would have purchased it from the open market, to satisfy the back to back contracts entered into by the petitioner with its proposed buyer, only in such circumstances, it can claim for profit which otherwise is not entitled to. It was submitted that the petitioner cannot claim greater amount than penalty which is permissible.

31. Relying upon the judgments of the Apex Court rendered in the cases of DCM Decometal Gmbh v. Rohit Ferro Tech Ltd., reported in AIR 1962 SC 366 and Union of India & Ors. v. Sugauli Sugar Works Pvt. Ltd. reported in 1976 (3) SCC 32, it was contended by Mr. Soparkar, learned counsel for the respondent that only the loss due to breach of contract and steps taken to mitigate such loss can be awarded as damages and nothing beyond loss. It was contended that it being back to back contract which was known to the petitioner and not having gone in the market cannot be permitted to profiteer as if they have suffered damage of the profit as well and this fundamental basis can be considered only if the contract is performed. It was therefore contended that these facts would shock the conscience of the Court and it is against equity and fairness.

32. Relying upon the judgment of the Hon'ble Bombay High Court reported in 2015 Bombay CR 204, it was contended that in the fact situation, it would be a case of unjust enrichment which is against fundamental policy of Indian law and the petitioner cannot be permitted to make profit out of the breach of contract.

33. Relying upon the judgment of the Calcutta High Court in the case of Usha Beltron Ltd. v. Nand Kishore Parasramka & Anr., reported in AIR 2001 HC-NIC Page 15 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER Calcutta 137, it was contended that in these facts and circumstances this Court can go into this aspect as the same would shock the conscience of the Court.

34. Mr. Soparkar further contended that the fundamental policy of the Indian Law prescribes that no one can profiteer from breach of contract and breach of contract cannot result into profit and therefore, there is violation of fundamental policy of Indian law.

35. It was reiterated that even as per the justice and morality would it be just if a person would profit, for example Rs.65 crores, which profit he would not have made if the contract would have been executed. It was contended that it is a penalty and therefore, this Court may not entertain these petitions on the aforesaid grounds. It was contended that the awards are against the fundamental policy of Indian law and therefore it is not a fit case wherein this Court would come to the conclusion that it is a deemed decree of this Court as provided under section 49 of the Act and none of the conditions are satisfied and the impugned awards are against the fundamental policy of Indian law,

morality, justice and profiteering may not be permitted under section 49 of the Act and therefore, this Court may be pleased to reject these petitions.

36. Mr. Mehul S. Shah, learned Senior Counsel HC-NIC Page 16 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER appearing for the respective respondents has taken this Court through the judgments of the Apex Court in Renu Sagar (supra) and has contended as under □

37. That Sections 34 and 48 of the Act were similar and the judgments of the Apex Court in Shri Lal Mahal Ltd. (supra) clarified the situation and provided for test and guide as well as the parameters to be followed as to what would be against public policy of Indian law, morality and justice.

38. It was further contended that looking at the awards as it is, it cannot be said that the respondents are liable under damages and such damages could ever be awarded. It was further contended that keeping in mind both rationality and principles of damages, the impugned awards cannot be executed as the same are not accepted by the Indian law and in the instant case, the test provided by the aforesaid judgments are apparently not fulfilled and allowing the award as it is, it would be allowing unjust enrichment of the award once it is deemed to be decree of this Court and that valid and germane defence is available to the respondents before the awards are considered to be decree.

39. Referring to the emails, which in fact have been referred to by Mr. Soparkar, it was contended that the actual loss is lesser than what is HC-NIC Page 17 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER awarded. It was contended that the award of damages in such contract matter is to mitigate the loss and on facts, it has been found that only deposits have been forfeited.

40. Relying upon the judgments of the Apex Court in the cases of Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., reported in (2017) 2 SCC 228, Maula Bux v. Union of India reported in (1969) 2 SCC 554 and Fateh Chand v. Balkishan Dass reported in AIR 1963 SC 1405, Mr. Shah contended that no evidence is led for actual loss. It was further contended by Mr. Shah, learned counsel appearing for the respondent that it is not permissible for any judicial authority to award damages by just applying some measures suggested by the claimants which may be applied for in given facts of the case that there is definite pleading, evidence and finding. It was contended that if that is not so, the authority has to find out actual damages from the facts resulting from the breach of the contract. It was therefore contended that this is not a fit case for considering the impugned award as decree of this Court.

41. Mr. Rashesh S. Sanjanwala learned senior counsel assisted by Mr. Sahil M. Shah, learned counsel has adopted the arguments adopted by Mr. Soparkar and Mr. Mehul Shah, learned senior counsels appearing for the respective respondents.

42. The learned counsels appearing for the respective respondents have also further contended that it is found from the record that there were 13 contracts for which notice for arbitration has been given. It was further pointed out that pursuant to the said notice, reference was so made and the Tribunal was constituted and the Tribunal has proceeded only in reference to 9 cases and other cases are remaining. It was further contended that the claims sought to be raised by similar companies are common, but in five cases, it has come on record. It was further contended that the 14 cases could have been simultaneously decided. It was contended that there would have been all chances of award, which are likely to have contradictory findings on merits as well as in law though arising from similar contract, stipulation and same date. It was apprehended that there would be likelihood of contradiction on merits and in law. It was further pointed out that the petitioner has sought for extension of time for production of documents and therefore pursuant to the extension, if now these cases are taken up, the resultant effect in law would be that again there would be contradictory findings and therefore, the present petitions are premature.

43. Mr. Mihir J. Thakore, learned counsel appearing for the petitioner in his further reply has HC-NIC Page 19 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER contended as under □

44. That prima facie, the awards are just and proper.

45. That the issues which are raised cannot be looked into.

46. Referring to the proposal e□mail dated 12.06.2012, 16.07.2012 as well as email dated 21.07.2012, it was contended that there was no response.

47. Referring to the same from the awards in origin, it was contended that as noted by the Tribunal, the proposals were given to resolve the matter and it was contended that the Tribunal has read the same and that all such offers were without prejudice offers to resolve the issue and the same cannot be seen at the stage of enforcement of the award.

48. Mr. Thakore, referring to the provisions of section 51(2) and 51(3) of the U.K. Sale of Goods Act, contended that the same has been considered by the Tribunal as well as in the appeal award and even the aspect of actual loss in light of the provision of section 51(3) has been considered by the Arbitral appellate Tribunal and the same is overruled. Referring to para 10.15 of the award, Mr. Thakore contended that the aspect of back to back contract is concluded by the Tribunal and the Tribunal has come to the HC-NIC Page 20 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER definite conclusion that the contract in question were not "inextricably linked"and that the case is governed by section 51(3)of the U.K. Sale of Goods Act. It is further contended by Mr. Thakore, learned counsel for the petitioner that these findings given by the Arbitration Tribunal as well as the appellate Tribunal are given on interpretation of the facts under English law.

49. It was contended that as per the provisions of the Act and even as provided under sections 28 and 48 of the Act, this Court cannot entail review on merits and same is not contemplated by the Act and this Court also cannot challenge the validity. Only enforcement can be challenged. Mr. Thakore also relied upon the judgment of the Apex Court in the case of ONGC v. Saw Pipes reported in 2003(5) SCC 705.

50. Mr. Thakore further contended that the issue of damages has been considered by the Tribunal in detail as per the clauses. It was also further contended that section 69 of the English Arbitration Act, 1996 provides for an appeal on the point of law and sub-section (2) thereof provides for leave of the Court which prescribes that appeal would be with the leave of the Court when it found that the award is obviously wrong. It was contended that as held by the Hon'ble Queen's Division Bench of London High Court, the first question to be considered as per the HC-NIC Page 21 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER English law was whether requirement of sections 69(3)(a) & (b) are made out or not and the Hon'ble Bench has come to the conclusion that the decision of the Board was not obviously wrong. It was therefore contended that on such satisfaction only High Court can deal with the matter.

51. Mr. Thakore further contended that the parties have agreed for applicability of English law and the seat of arbitration would be London and once having accepted English law, challenge would be limited as provided under Sections 68 and 69 of the English Arbitration Act, 1996. It was contended that the Tribunal has come to the conclusion the there are no special circumstances as to why section 51(3) of the UK Sale of Goods Act should not be applied and the petitioner has lost market value of the goods. Referring to the judgment of the review before the High Court as well as to the Court of appeal, it was contended by Mr. Thakore that the proceedings ended in England.

52. Mr. Thakore contended that the judgment of the Apex Court in Saw Pipe (supra) clarifies the distinct jurisdiction between sections 34 and

section 48 of the Act and the same is in context with the provisions of section 34 of the Act and the Hon'ble Court was quite conscious of the fact that the judgment of three judges cannot be overruled.

53. Referring to the judgment in the case of Renu Sagar (supra), Mr. Thakore contended that the contention that the award is contrary to the English law is not available. Mr. Thakore also further contended that whether section 51(2) of the English law or 51(3) of the English law should be applied cannot be looked into by this Court nor it would enable any party to argue the same. Referring further to the observations made in the case of Renu Sagar (supra), it was contended that the argument that it is a case of unjust enrichment is also not permissible. Mr. Thakore also contended that the parties have agreed to English law and it is analysed accordingly.

54. Mr. Thakore contended that section 21 of the Arbitration Act is in part I of the Act and applies only to domestic arbitration and international arbitration in India and no exceptions are carved out in respect of foreign awards. Mr. Thakore further submitted that section 48 is to be interpreted narrowly and by virtue of amendment in section 48 of the Act, now issues are kept beyond doubt. It was further contended that this Court cannot go into the correctness of the award and the case of the respondent that it was back to back contract/order, and that it could have been sold in open market cannot be examined by this Court.

55. Mr. Thakore further contended that the other contentions raised as regards profiteering that the Tribunal has given more than six times than what is suffered by the petitioner and that the award is against the fundamental policy of Indian law, morality and justice, is to be given a narrow meaning once the Tribunal has

correctly examined as per the English law and found that no further enquiry would be necessary. It was therefore submitted that this Court may be pleased to hold that the awards in question are enforceable and are not against the provisions of section 48(2) of the Act and declare it to be decree of this Court.

56. Mr. Mihir Thakore, learned counsel appearing for the petitioner has also relied upon the provisions of section 51(3) of the UK Sale of Goods Act and the relevant observations made by the GAFTA Appellate Board and more particularly paragraphs 10.3 to 10.5, 10.12 to 10.17 and has contended that the findings given in the awards cannot be reviewed on the ground of fundamental policy of Indian law particularly in view of the explanation 2 of section 48(2) of the Act and has further referred to and relied upon the order passed by the GAFTA appellate board on the plea of clarification by the respondents dated 26.05.2015 as well as the order passed by the Queen's Bench, division of London on 14.07.2015.

57. It was further contended that even the reliance HC-NIC Page 24 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER placed upon the judgment of Bunge vs. Nidera of the Queen's Bench was found by the Bench that the said case would not apply to the arbitration proceedings before GAFTA. Referring to section 48(1)(a), 48(1)(b)(c)(d)(e) as well as section 48(2)(a), section 48(2)(b) of the Act, it was submitted that the scope of inquiry by this Court would not permit or allow a review on merits of the dispute and the scope of inquiry on the ground of public policy under section 48 of the Act in relation to foreign award is much narrower than public policy as contained under section 34 of the Act, which deals with domestic awards and not foreign awards.

58. It was also submitted that the judgment in the case of Saw Pipes (supra) would not apply to the present case as the Hon'ble Apex Court has considered the domestic award and the provisions of section 34 of the Act for enforcement of such domestic award.

59. Relying upon the amendment, whereby explanations 1 and 2 have been inserted w.e.f. 23.10.2015, it was contended that in view of such amendment, the scope of inquiry by this Court on the ground of public policy has further become limited and the awards which are found to be in conflict with the public policy of India where the making of the awards was induced by fraud or corruption or is violative of sections 75 or 81 of the Act, or the HC-NIC Page 25 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER award is in contravention of the fundamental policy of Indian law, or is in contravention with the most basic notions of morality and justice can be reviewed by this Court. It was further submitted that on the contrary, it has been provided that whether there is contravention in the public policy in Indian shall not entail a review on the merits of the dispute. Thus, the scope and purview of section 48 is very limited.

60. It was further submitted that the awards are in consonance with the public policy of the India as provided under section 48(2)(b) of the Act.

61. It was contended that the parties had agreed that the English law will apply. The GAFTA Tribunal has correctly applied section 51(3) of the UK Sale of Goods Act and the awards cannot be said to be contrary to the fundamental policy of India.

62. It was further submitted that the contention raised by the respondent before this Court that only direct loss suffered by the petitioner as a result of the breach of contract as prescribed under section 51(2) of the UK Sale of Goods Act executed by it with its Korean sub-buyer and other direct losses cannot be included and the difference in the value cannot be awarded as provided under section 51(3) of the Act cannot be re-agitated before this Court as the same is a question of fact and the same would amount to HC-NIC Page 26 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER review of the merits of the dispute which is not permissible under section 48(2) of the Act. It was submitted that GAFTA Tribunal has correctly applied as provided under section 51(3) of the UK Sales of Goods Act, which has become final right upto the Queen's Bench as referred to hereinabove, which cannot be reviewed as the same would amount to review on merits of the dispute.

63. It was also contended that the contention raised by the respondents that the enforcement of the present awards would lead to a situation of unjust enrichment making the awards unenforceable by this Court as the same would be contrary to the fundamental policy of Indian law as it is in violation of sections 73 and 74 of the Indian Contract Act would not amount to violation of fundamental policy of India.

64. The learned counsel for the petitioner has relied upon the judgment of the Delhi High Court in the case of Cruz City Mauritius Holdings v. Unitech Ltd. reported in (2017) SCC Online Del. 7810 and other decisions of various High Court to buttress his argument that mere violation of provision of Indian law would not amount to violation of fundamental policy of India. It has been contended that the respondents have failed to demonstrate that the awards amount to violation fundamental policy of India and merely because the Tribunal has held that section 51(3) of the HC-NIC Page 27 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER UK Sale of Goods Act applies, which is a different measure of determination of loss, it cannot be said that the awards are contrary to the fundamental policy of Indian law and the most basic principles of justice and morality.

65. Relying upon the provisions of section 28(1)(b) clause (1) of the Act, it was submitted that the Act itself mandates that an arbitral tribunal of an international commercial arbitration in India is required to apply the law governing the

disputes as that is chosen by the parties and therefore, it was contended that the enforcement of the award would not be against the most basic principles of justice and morality. The learned counsel for the petitioner has further relied upon the judgments of the Bombay High Court as well as Delhi High Court in the case of Etizen Bulk & Ashapura Minechem Ltd (2016(2) ArbLR 113(Bom), M/s. Lois Dreyfus Commodities v. Sakuma Exports Ltd (2015 6 Bom CR 258), Sideralba S.P. A v. Shree Precoated Steels Ltd (Arbitration Petition No.84 of 2013, High Court of Bombay) and Xstrata Coal Marketing v. Dalmia Bharat (Cement) Ltd (236 (2017) DLT 524) to buttress his argument that the issue of damages or unjust enrichment amounts to a review of the merits of the disputes and is beyond the scope of purview permitted under section 48 of the Act.

66. On the aforesaid grounds, it was therefore HC-NIC Page 28 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER submitted by the learned counsel for the petitioner that 9 Arbitration Awards are appropriate, just and proper and enforceable under the Indian law.

67. Mr. Soparkar, learned counsel for the respondents has reiterated the arguments which were already canvassed. Mr. Soparkar further contended that the present awards are not merely violative of Section 73 of the Indian Contract Act but it is also such that it would shock the conscience of the Court and has given further example, which is enumerated as below □ If A agrees to sell the goods to B at Rs.95 and B would be selling it further to C, to make a profit of Rs.3 on it, and deposits Rs.2 with C as security; then in the event of default by A, B ought to be awarded a maximum compensation of Rs.5 (i.e. Rs. 3 towards loss of profit and Rs.2 towards forfeiture of deposit by C). However, if B is awarded a compensation of Rs.105, by calculating the difference between the market price (say Rs. 200 on the date of default) and the contract price (i.e. Rs.95), the B would be making a colossal profit out of the breach of contract by A, which cannot be permitted. Even if the contract would have been performed by A, then B would have earned profit of Rs.3 and not Rs.105. Grant of Rs.105 to B, would be something which would shock the conscience of this Hon'ble Court and would be against the public policy of India.

68. To buttress the aforesaid argument, Mr. Soparkar has relied upon the judgment of the Apex Court in the case of Gherulal Parekh v. Mahadeodas Maiya HC-NIC Page 29 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER reported in AIR 1959 SC 781 and in the case of Murlidhar Agarwal vs. State of UP (1974 2 SCC 472 and Central Inlald Water vs. Brojo Nath Ganguly reported in 1986 (2) SCC 156.

69. It was also further contended that the respondents are not seeking review of the award passed by the arbitral tribunal and by explanations 1 and 2 of section 48(2), the only limitation imposed by the legislature is not to enter into merits of the award. However, this Court has jurisdiction to determine whether the

foreign award is violative of fundamental policy of India or not and further it was contended that there is no limitation imposed upon by the legislature for entering into the merits of the award by this Court and that this Court has jurisdiction to test the award on the ground of morality and justice and this Court has to decide as to what would be just and moral.

70. It was submitted that the argument of the petitioner that if the respondent would have supplied goods then they would have breached the contracts with the Korean buyers and would have sold the said goods at the market price, thereby making a profit out of it, is nothing but a speculative argument and cannot be considered by this Court and it was therefore submitted that execution of the awards deserves to be refused by this Court in view of the objections raised by HC-NIC Page 30 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER the respondents in the objections filed under sections 47 and 48 of the Act as well as the submissions made.

71. No other or further submissions have been made and as noted hereinabove, the aforesaid discussion also includes written submissions which are submitted by both the sides.

72. Before reverting to the submissions made by the learned counsel appearing for the parties, it would be appropriate to refer to the relevant provisions of the Act □ The Arbitration & Conciliation Act, 1996 Section 2(1)(f) 'international commercial arbitration' means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in Indian and where at least one of the parties is□

(i)an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India;

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or HC-NIC Page 31 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER

(iv) the Government of a foreign country;

Section 47. Evidence.--

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court--

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.--In this section and in the sections following, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court].

Section 48. Conditions for enforcement of foreign awards.--

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that--

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that--

(a) the subject□matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.--For the avoidance of any doubt, it is clarified that an 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.

Explanation 2.□ For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub□section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

Sale of Goods Act, 1979 Section 51. (1) Where the seller wrongfully neglects or refuses to deliver HC-NIC Page 34 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER the goods to the buyer, the buyer may maintain an action against the seller for damages for non□delivery.

(2)The measure of damages is estimated loss directly and naturally resulting, in the ordinary course of events, from the seller'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 of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver."

73. In order to understand the controversy with which this Court is concerned at this stage is that, admittedly there were contracts between the petitioner and the respondent No.1 in particular, which is described in detail hereinabove. It is also an admitted position that as per the said contract, the parties have agreed that "seat of arbitration would be London". Thus, the parties as per the arbitration clause provided in the contract, were relegated to arbitration as per the GAFTA Rules, which culminated into awards in origin by three arbitrators dated 28.04.2014. It is also an admitted position that the respondents preferred appeals challenging the original awards before the Board of Appeal, GAFTA, London and the appellate board of GAFTA after hearing the parties was pleased to uphold all the original awards on 16.04.2015. Thereafter, the respondents approached GAFTA Appeal Board seeking HC-NIC Page 35 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER clarification of the awards which came to be rejected by GAFTA Appellate Board vide order/communication dated 26.05.2015. The respondents carried the same further by filing appeals as provided under sections 68 and 69 of the English Arbitration & Conciliation Act, 1996 before the High Court of Justice Queen's Division Commercial Court and the Hon'ble Queen's Bench Division of London High Court by an order dated 14.07.2015 refused leave to appeal the awards to the respondents. The respondents thereafter approached the Court of appeal in London against the order passed by the Hon'ble Queen's Bench division of London High Court and by a final order dated 04.02.2016, the Court of appeal in London refused the appeal against the order dated 14.07.2015 and also disallowed the plea of the respondents to prefer an appeal before the Supreme Court of United Kingdom.

74. At the outset, it deserves to be noted that the learned counsel for the respondents did raise objection that the applications did not satisfy the requirement of section 47. At this stage, it deserves to be noted that the petitioner had approached the Hon'ble Division Bench of this Court under section 15(1) of the Commercial Court Act and the Hon'ble Division of the this Court held that the execution petitions which were pending before the District Court at Gandhidham should be transferred to this Court under HC-NIC Page 36 of 96 Created On

Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER Commercial Court, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015.

75. It further deserves to be noted that the respondent herein contended that the applications are not maintainable as the conditions of Section 47 of the Act are not satisfied, more particularly as the petitioner did not produce the certified copy of the award or notarized copy of the award. The applicants preferred Civil Application (O.J) NO.400/2017 and allied applications and have produced notarized copies of the awards and this Hon'ble Court has passed the following order:

> "Heard learned counsels appearing for the parties.
>
> By this application, the applicant has prayed for brining on record the true copy of the award passed by the Arbitral Tribunal.
>
> Having heard learned counsels for the parties, the applications are allowed. The true copy of award in each application is taken on record. Applications disposed of accordingly."

76. It may be noted that section 47 lays down the procedural requirement, which the party has applied for enforcement of a foreign award and such provision is based upon Article IV of Newyork Convention. It also deserves to be noted that before effective stage of execution, the duly notarised copy has been brought on record.

77. In light of the aforesaid therefore, it cannot be said that the conditions of the said sections are not satisfied.

78. Upon considering the submissions made by the learned counsel appearing for the parties and on perusal of the record and proceedings as well as the judgments which are relied upon by the learned counsel appearing for the respective parties, it is an admitted position that the parties entered into a contract for supply of Indian Rapeseed Meal and in the arbitration clause, it is clearly provided that the seat of arbitration would be at London and it would be according to the GAFTA 125 Arbitration Rules and the same would be governed by English law.

79. Both the sides have taken this Court to the relevant observations made by the learned Arbitrators as well as Arbitral Board. The contention raised by the respondent that actual loss is far less than what is granted is to be seen and appreciated in light of the provisions of section 51 of the UK Sale Goods Act as the parties had agreed that the English law will apply. It is a matter of record that the findings arrived at by the Arbitration Tribunal and the conclusion arrived at by the appellate board entirely touches the merits of the case. As far as merits are concerned, the same cannot be re□ appreciated by this Court while dealing with the HC-NIC Page 38 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER execution petitions with the Indian law and the findings given are on interpretation of facts of the case and as per the English law and this Court cannot review the same on merits and its validity cannot be examined by this Court in these proceedings and thus, as per the agreement between the parties, for applicability of English law, the same is analysed by the Courts in England.

80. Therefore, in opinion of this Court, the awards in question which are foreign awards can be examined in light of the provisions of section 48 of the Act only. The aforesaid view is also found from the explanation 2 of section 48(2) of the Act that while examining whether there is contravention with the fundamental policy of Indian law, the same shall not entail review on merits.

81. The learned counsel for the respondents has also contended that the High Court of Justice Queen's Division Commercial Court has not confirmed the findings of the Tribunal as well as the arbitration appellate board, but has refused leave as it was found that the Tribunal was not obviously wrong. At this juncture, reference be made to the provisions of section 69 of the UK Arbitration Act, which provides for leave to appeal. From bare reading of the order of the Queen's Bench Division Court of appeal, it is observed that the awards were not obviously HC-NIC Page 39 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER wrong. Therefore, it cannot be said that the awards have not become final and thus, the appeal preferred by the respondent was disallowed and as per the English law the awards have become final. The facts clearly establish that the respondent Company exhausted all remedies that were available for challenging the awards/order□in□origin, available under English law.

82. The objections raised by the learned counsel for the respondents are on the following grounds in light of the provisions of section 48 of the Act□

1. That the impugned awards are against the fundamental public policy of Indian law.

2. The awards are in contravention to the public policy of Indian law.

3. That the awards are against the basic principles of morality and justice and are in flagrant and gross breach of the same.

4. That it is such that it would shock the conscience of this Court.

5. That the awards are exhaustive in nature and no one can profit from breach of the contract and is against the provisions of section 73 of the Indian Contract Act and violative of fundamental policy of Indian law.

6. That the damages which are awarded are more HC-NIC Page 40 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER than the actual loss.

7. That by the impugned awards, damages which are awarded are irrational and against the principles of damages as are accepted by Indian law.

83. In light of the aforesaid facts which arise in this group of petitions and as contended by the learned counsel appearing for the respondents in particular, this Court is therefore called upon to examine on the aspect that the enforcement of the awards in question would be contrary to public policy of India. It is also further contended by the learned counsel for the respondents based upon the provisions of section 48(2) Explanation 1 clause (2) that the impugned awards are in contravention with the fundamental policy of India and clause (3), that it is in conflict with basic notion of morality and justice. Section 48 came to be amended and Explanations 1 and 2 as it stands today, have been substituted by Act 3 of 2016 w.e.f. 23.10.2015 and explanation 2 further provides that the test as to whether there is contravention with the fundamental policy of Indian law shall not entail a review on merits of the dispute.

84. The first limb of argument which is put forward by the learned counsel for the respondents is to the effect that the impugned awards are contrary to the public policy of India. The basis for HC-NIC Page 41 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER that contention is that the awards prescribe for more than actual loss. It is also further contended that the High Court of Justice Queen's Division Commercial Court has only refused to entertain the appeal only by holding that the view taken by the arbitral board is not obviously wrong. It is also contended that the impugned awards are violative of Indian law inasmuch as that against direct loss of 3 million dollars and total consequential loss of 5 million dollars for 14 contracts, the petitioner is being compensated by damages in sum of 13 million dollars for 9 contracts and the same is fundamentally in violation of Indian jurisprudence wherein compensation is always to make good damages suffered and not profiteering.

85. In furtherance of the said contention it is also contended by the respondents that if the impugned awards are permitted to be implemented then the same would amount to unjust enrichment.

It was also further contended that though the petitioner has not gone to market, cannot be permitted to profiteer and as it was back to back contract, only loss of profit can be awarded and therefore, it is against the fundamental policy of Indian law and also against morality and justice. The respondents have also contended that it is also in breach of section 73 of the Indian Contract Act and therefore it is in violation of fundamental policy of Indian law and the awards HC-NIC Page 42 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER are exhaustive in nature which would shock the conscience of this Court. Relying upon the judgments which are dealt with in this judgment separately, it is contended that it is not permissible for any judicial authority to award damages by just applying the same measure suggested by the claimant which may be applied in given facts of case and in fact the actual damages found on such appreciation of evidence only be granted.

86. Over and above, it is evident from the contentions which are raised by the respondents that they have on basis of the findings arrived at by the Arbitration Tribunal as well as appellate board, it is contended that the impugned awards are against the fundamental policy of Indian law and therefore, are not enforceable and cannot be deemed to be a decree of this Court and the petitions are therefore required to be dismissed.

87. The aforesaid contentions are denied by the learned counsel for the petitioner and it is contended that the scope of inquiry under section 48 of the Act is limited and the same does not allow a review of the merits of the dispute. It is also contended that mere violation of sections 73 and 74 of the Indian Contract Act would not amount to violation of fundamental policy of Indian law. It is also contended that the HC-NIC Page 43 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER contentions raised by the respondents that the awards would allow unjust enrichment and would allow review of the merits is wholly misplaced and therefore, it is contended that 9 arbitration awards are appropriate, just and proper and enforceable under Indian law. Thus, this Court cannot review the awards on merits.

88. Learned counsel for the petitioner has relied upon the judgment of the Apex Court rendered in the case of Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., reported in [(2001) 6 SCC 356], wherein the Apex Court in paragraphs 31 and 32 has observed thus:□ "31. Prior to the enforcement of the Act, the Law of Arbitration in this country was substantially contained in three enactments namely (1) The Arbitration Act, 1940, (2) The Arbitration (Protocol and Convention) Act, 1937 and (3) The Foreign Awards (Recognition and Enforcement) Act, 1961. A party holding a foreign award was required to take recourse to these enactments. Preamble of the Act makes it abundantly clear that it aims at to consolidate and amend Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The object of the Act is to minimize supervisory role of court and to give speedy justice. In this view, the stage

of approaching court for making award a rule of court as required in Arbitration Act, 1940 is dispensed with in the present Act. If the argument of the respondent is accepted, one of the objects of the Act will be frustratedand defeated. Under the old Act, after making award and prior to HC-NIC Page 44 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER execution, there was a procedure for filing and making an award a rule of court i.e. a decree. Since the object of the act is to provide speedy and alternative solution of the dispute, the same procedure cannot be insisted under the new Act when it is advisedly eliminated. If separate proceedings are to be taken, one for deciding the enforceability of a foreign award and the other thereafter for execution, it would only contribute to protracting the litigation and adding to the sufferings of a litigant in terms of money, time and energy. Avoiding such difficulties is one of the objects of the Act as can be gathered from the scheme of the Act and particularly looking to the provisions contained in Sections 46 to 49 in relation to enforcement of foreign award. In para 40 of the Thyssen judgment already extracted above, it is stated that as a matter of fact, there is not much difference between the provisions of the 1961 Act and the Act in the matter of enforcement of foreign award. The only difference as found is that while under the Foreign Award Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus, in our view, a party holding foreign award can apply for enforcement of it but the court before taking further effective steps for the execution of the award has to proceed in accordance with Sections 47 to 49. In one proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting HC-NIC Page 45 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER in multiplicity of litigation. It is also clear from objectives contained in para 4 of the St atement of Objects and Reasons, Sections 47 to 49 and Scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the court. The submission that the execution petition could not be permitted to convert as an application under Section 47 is technical and is of no consequence in the view we have taken. In our opinion, for enforcement of foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make rule of the court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the court enforcing a foreign award can deal with the entire matter. Even otherwise, this procedure does not prejudice a party in the light of what is stated in para 40 of the Thyssen judgment.

32. Part II of the Act relates to enforcement of certain foreign awards. Chapter 1 of this Part deals with New York Convention Awards. Section 46 of the Act speaks as to when a foreign award is binding. Section 47 states as to what evidence the party applying for the enforcement of a foreign award should

produce before the court. Section 48 states as to the conditions for enforcement of foreign awards. As per Section 49, if the Court is satisfied that a foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court and that court has to proceed further to execute the foreign award as a decree of that court. If the argument advanced on behalf of the respondent is accepted, the very purpose of the Act in regard to speedy and effective execution of foreign award will be defeated. Thus none of the contentions urged on behalf of the respondent merit acceptance so as to uphold the impugned judgment and order. We have no HC-NIC Page 46 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER hesitation or impediment in concluding that the impugned judgment and order cannot be sustained."

89. The Apex Court in the case of Renusagar Power Co. Ltd. (Supra), has observed thus:□

40. We are, therefore, of the opinion that the enforcement of the Arbitral award is not barred by S. 7(1)(a)(ii) of the Foreign Awards Act on the ground that Renusagar was unable to present its case before the Arbitral Tribunal.

III. Objection to the Enforceability of the Award on the Ground that it is Contrary to the Public Policy of the State of New York.

41. Shri Venugopal has urged that although under sub□clause (b) of clause (2) of Art. V of the New York Convention the recognition and enforcement of an arbitral award can be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country, i.e., the country where the award is sought to be enforced, a departure has been made in S. 7(i)(b)(ii) of the Foreign Awards Act which prescribes that the foreign award may not be enforced under the said Act if the Court dealing with the case is satisfied that the enforcement of the award would be contrary to public policy. The submission of Shri Venugopal is that in S. 7(1)(b)(ii) of the Act. the Parliament has deliberately refrained from using the words "public policy of India" which implies that the words "public policy" are not restricted to the public policy of India but would cover the public policy of the country whose law governs the contract or of the country of the place of arbitration and the enforcement of an award would be refused if it is HC-NIC Page 47 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER contrary to such public policy. In this context Shri Venugopal has invited our attention to the provisions of S. 7(1) of the Arbitration (Protocol and Convention) Act, 1937 wherein the words used are "and enforcement thereof must not be contrary to the public policy or law of india". According to Shri Venugopal while under the 1937 Act, objections to enforcement are limited to the public policy of India or law of India, there is no such limitation in S. 7(l)(b)(ii) of the Foreign Awards Act. Shri Venugopal has also placed reliance on the decision of this Court in V/o Tractoroexport. Moscow v. Tarapore and Co., (1970) 3 SCR 53 : (AIR 1971 SC 1) wherein this Court has held that there was clear deviation from the rigid and

strict rule that the courts must stay a suit whenever an international commercial arbitration as contemplated by the Protocol and the Conventions, was to take place and that it was open to the legislature to deviate from the terms of the Protocol and the Convention and that it appears to have given only a limited effect to the provisions of the 1958 Convention. We find it difficult to accept this contention. It cannot be held that by not using the words "Public policy of India" and only using the words "public policy" in S. 7(l)(b)(ii) of the Foreign Awards Act, Parliament intended to 'deviate from the provisions of the New York Convention contained in Art. V(2)(b) which uses the words "public policy of that country" implying public policy of the country where recognition and enforcement is sought. That Parliament did not intend to deviate from the terms of the New York Convention is borne out by the amendment which was introduced in the Act by Act 47 of 1973 after the decision of this Court in Tractoroexport case (supra) whereby S. 3 was substituted to bring it in accord with the provisions of the New York Convention. The Foreign Awards Act has been enacted to give HC-NIC Page 48 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER effect to the New York Convention which seeks to remedy the defects in the Geneva Convention of 1927 that hampered the speedy settlement of disputes rough arbitration. The Foreign Awards Act therefore, intended to reduce the time taken in recognition and enforcement of foreign arbitral awards. The New York Contention seeks to achieve this objective by dispensing with the requirement of the leave enforce the award by the Courts where the ward is made and thereby avoid the problem of "double exequatur". It also restricts the cope of enquiry before the Court enforcing he award by eliminating the requirement that he award should not be contrary to the principals of the law of the country in which it sought to be relied upon. Enlarging the field of enquiry to include public policy of the Courts whose law governs the contract or oil he country of place of arbitration, would run counter to the expressed intent of the legislation.

42. With regard to the provisions of the Arbitration (Protocol and Convention) Act, 937, it may be stated that S. 7(1) of the said Act, as originally enacted. read as under :

"7. Conditions For Enforcement of Foreign Awards. □(1) In order that a foreign ward may be enforceable under this Act it must have □

(a) been made in pursuance of an agreement for arbitration which was valid under he law by which it was governed,

(b) been made by the tribunal provided for n the agreement or constituted in manner greed upon by the parties,

(c) been made in conformity with the law covering with the arbitration procedure.,

(d) become final the country in which it was made, HC-NIC Page 49 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER

(e) been in respect of a matter which may lawfully be referred to arbitration under the law of British India, and the enforcement thereof must not be contrary to the public policy or the law of British India.

(2) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that□

(a) the award has been annulled in the country in which it was made, or

(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented or,

(c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration :

Provided that, if the award does not deal with all questions referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non□existence of the conditions specified in clauses (a), (b) and (c) of sub□sec. (1), or the existence of the conditions specified in clauses (b) and (c) of sub□sec. (2), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable HC-NIC Page 50 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER that party to take the necessary steps to have the award annulled by the competent tribunal."

43. By Indian Independence (Adaptation of Central Acts and Ordinances) Order 1948, the words "British India" were substituted by the words "the Provinces", which words were substituted by the words "the States" by the Adaptation of Laws Order, 1950. By Part B States (Laws) Act, 1951, the words "the States" were substituted by the word "India". The aforesaid amendments introduced from time to time indicate that the words "public policy" and "the law of India" are independent of each other and the words "public policy" are not qualified by the words "of India" which follow the word "law" because there was no separate public policy for each Province or State in India. This means that even in the Protocol and Convention Act of 1937 the legislature had used the words "Public Policy" only and by the said words it was intended to mean "the public policy of India". The New York Convention has further curtailed the scope of enquiry by excluding contravention of law of the Court in which the award is sought to be enforced as a ground for refusing recognition and enforcement of a foreign award. The words "law of India" have, therefore, been omitted in S. 7(1)(b)(ii) of the Foreign Awards

Act. It cannot, therefore, be said that by using the words "Public Policy" only S. 7(1)(b)(ii) of the. Foreign Awards Act seeks to make a departure from the provisions contained in the Protocol and Convention Act of 1937 and, by using the words "Public Policy". without any qualification, Parliament intended to broaden the scope of enquiry so as to cover public policy of other countries, i.e., the country whose law governs the contract or the country of the place of arbitration. In the U.K., the Arbitration Act, 1975 has been enacted to give effect to the provisions of HC-NIC Page 51 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER the New York Convention. Section 5(3) of the said Act provides as under :

"Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award."

45. We are, therefore, of the view that the words "public policy" used in S. 7(l)(b)(ii) of the Foreign Awards Act refer to the public policy of India and the recognition and enforcement of the award of the Arbitral Tribunal cannot be questioned on the ground that it is contrary to the public policy of the State of New York.

47. The need for applying the touchstone of public policy has been thus explained by Sir William Holdsworth □ "In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them". (History of English Law, Vol. III p. 55).

48. Since the doctrine of public policy is somewhat open□textured and flexible, judges in England have shown certain degree of reluctance to invoke it in domestic law. There are two conflicting positions which are referred as the 'narrow view' and the 'broad view'. According to the narrow view Courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this areas. (See Chitty on Contracts, 26th Ed. Vol. I, para 1133, pp. 685□686). Similar is the trend of the decision in India. In Gherulal Parakh v. Mahadeodas Maiya, 1959 Suppl (2) SCR 392: (AIR 1959 SC 781) this Court favoured the HC-NIC Page 52 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER narrow view when it said :

" .....though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days" (p.

440) (of SCR) : (at p. 795 of AIR).

49. In later decisions this Court has, however, leaned towards the broad view. (See Murlidhar Agarwal v. State of U.P. (1975) 1 SCR 575 at p. 584 : (AIR 1974 SC 1924 at p. 1930) : Central Inland Water Transport Corporation v. Brojo Nath Ganguly (supra) (1986 (2) SCR 278 at p. 373 : (AIR 1986 SC 1571 at p. 1612); Rattanchand Hira Chand v. Askar Nawaz Jung (1991)3 SCC 67 at pp. 76□77 : (1991 AIR SCW 496 at pp. 502□03).

50. In the field of private international law, Courts refuse to apply a rule of foreign law or recognise a foreign judgment or a foreign arbitral award if it is found that the same is contrary to the public policy of the country in which it is sought to be invoked or enforced. The English Courts follow the following principles: "Exceptionally, the English court will not enforce or recognise a right conferred or a duty imposed by a foreign law where, on the facts of the particular case, enforcement or, as the case may be, recognition, would be contrary to a fundamental policy of English law. The Court has, therefore, refused in certain cases to apply foreign law where to do so would in the particular circumstances be contrary to the interests of the united Kingdom or contrary to justice or morality". (see Halsbury's Laws of England, IV Ed., vol. 8, para 418).

57. In Deutsche Schachtbau□und Tiefbohrgesellschaft m.b.H. v. R.As al□Khaimah National Oil Co. (1987) 2 All ER HC-NIC Page 53 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER 769, decided by the Court of Appeal. Sir John Donaldson M.R. has said :

"Consideration of public policy can never be exhaustively defined, hut they should be approached with extreme caution. As Burrough J. remarked in Richardson v. Mellish, (1824) 2 Bing 229 at 252, (1824□34) All ER Rep 258 at 266. It is never argued at all but when other points fail. It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.

63.In view of the absence of a workable definition of "international public policy" we find it difficult to construe the expression "public policy" in Article V(2)

(b) of the New York Convention to mean international public policy. In our opinion the said expression must be construed to mean the doctrine of public policy as applied by the Courts in which the foreign award is sought to be enforced.

Consequently, the expression 'public policy' in Section 7(l)(b)(ii) of the Foreign Awards Act means the doctrine of public policy as applied by the Courts in India. This raises the question whether the narrower concept of public policy as applicable in the field of public international law should be applied or the wider concept of public policy as applicable in the field of municipal law.

65. This would imply that the defence of 'public policy which is permissible under S. 7(l)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground HC-NIC Page 54 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in S. 7(1) of the Protocol and Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7 (l)(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 contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article 1(c) of the Geneva Convention of 1927 and Section 7(l) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(l)(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(l)(b)(ii) of the Foreign Awards Act must necessarily be HC-NIC Page 55 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER 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.

99. In Indian law the principle of unjust enrichment finds recognition in the Indian Contract Act, 1872 (Ss. 70 and 72).

100. We do not consider it necessary to go into the question whether the principle of unjust enrichment is a part of the public policy of India since we are of the opinion that even if it be assumed that unjust enrichment is contrary to public policy of India, Renusagar cannot succeed because the unjust enrichment must relate to the enforcement of the award and not to its merits in view of the limited scope of enquiry in proceedings for the enforcement of a foreign award under the Foreign Awards Act.

The objections raised by Renusagar based on unjust enrichment do not relate to the enforcement of the award because it is not the case of Renusagar that General Electric has already received the amount awarded under the arbitration award and is seeking to obtain enforcement of the award to obtain further payment and would thus be unjustly enriching itself. The objections about unjust enrichment raised by Renusagar go to the merits of the award, that is, with regard to the quantum awarded by the Arbitral Tribunal under item Nos. 2, 3, 4 and 7, which is beyond the scope of the objections that can be raised u/S. 7(l)(b)

(ii) of the Foreign Awards Act. To hold otherwise would mean that in every case where the arbitrators award an amount which is higher than the amount that should have been awarded, the award would be open to HC-NIC Page 56 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER challenge on the ground of unjust enrichment. Such a course is not permissible under the New York Convention and the Foreign Awards Act. We have, however, examined the objections raised by Renusagar relating to unjust enrichment even on merits and we are not satisfied that the amounts awarded under items Nos. 2, 3, 4 and 7 are so excessive as to result in unjust enrichment of General Electric."

90. Similarly, the Apex Court in the case of Shri Lal Mahal Ltd. (supra), has considered the provisions of Section 48 of the Act in relation to foreign award and has observed thus:□ "19. Having regard to clause (b) of sub□section (2) of Section 48 of the 1996 Act, we shall immediately examine what is the scope of enquiry before the court in which foreign award, as defined in Section 44, is sought to be enforced. This has become necessary as on behalf of the appellant it was vehemently contended that in light of the two decisions of this Court in Saw Pipes1 and Phulchand Exports2, the Court can refuse to enforce a foreign award if it is contrary to the contract between the parties and/or is patently illegal. It was argued by Mr. Rohinton F. Nariman, learned senior counsel for the appellant, that the expression "public policy of India" in Section 48(2)(b) is an expression of wider import than the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961. The expansive construction given by this Court to the term "public policy of India" in Saw Pipes1 must also apply to the use of the same term "public policy of India" in Section 48(2)(b).

20. Mr. Jayant K. Mehta, learned counsel HC-NIC Page 57 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER for the respondent, on the other hand, placed heavy reliance upon the decision of this Court in Renusagar3 and submitted that what has been stated by this Court while interpreting Section 7(1)(b)(ii) of the Foreign Awards Act in that case is equally applicable to Section 48(2)(b) of the 1996 Act and the expression 1 Oil and Natural Gas Corporation "public policy of India" in Section 48(2)(b) must receive narrow meaning than Section 34. Saw Pipes1 never meant to give wider meaning to the expression, "public policy of India" insofar as Section 48 was concerned. According to Mr. Jayant K. Mehta, Phulchand Exports2 does not hold that all that is found

in paragraph 74 in Saw Pipes1 is applicable to Section 48(2)

(b). He argued that in any case both Saw Pipes1 and Phulchand Exports2 are decisions by a two□Judge Bench of this Court whereas Renusagar3 is a decision of three□Judge Bench and if there is any inconsistency in the decisions of this Court in Saw Pipes1 and Phulchand Exports2 on the one hand and Renusagar3 on the other, Renusagar3 must prevail as this is a decision by the larger Bench.

21. The three decisions of this Court in Renusagar3, Saw Pipes and Phulchand Exports need a careful and close examination by us. We shall first deal with Renusagar.

22. It is not necessary to narrate in detail the facts in Renusagar3 . Suffice it to say that Arbitral Tribunal, GAFTA in Paris passed an award in favour of General Electric Company (GEC) against Renusagar. GEC sought to enforce the award passed in its favour by filing an arbitration petition under Section 5 of the Foreign Awards Act in the Bombay High Court. Renusagar contested the proceedings for enforcement of the award filed by GEC in the Bombay High Court on diverse grounds. Inter alia, one of the objections raised by Renusagar was that the HC-NIC Page 58 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER enforcement of the award was contrary to the public policy of India. The Single Judge of the Bombay High Court overruled the objections of Renusagar. It was held that the award was enforceable and on that basis a decree in terms of the award was drawn. Renusagar filed an intra□court appeal but that was dismissed as not maintainable. It was from these orders that the matter reached this Court. On behalf of the parties, multifold arguments were made. A three□Judge Bench of this Court noticed diverse provisions, including Section 7(1)

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

23. Of the many questions framed for determination, the two questions under consideration were; one, "Does Section 7(1)

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

(ii) of the Foreign Awards Act?". This Court held that the words "public policy" used in Section 7(1)(b)(ii) of the Foreign Awards Act meant public policy of India. The argument that the recognition and enforcement of the award of the Arbitral Tribunal, GAFTA can be questioned on the ground that it is contrary to the public policy of the State of New York was negated. A clear and fine distinction was drawn by this Court while applying the rule of public policy between a matter governed by domestic laws and a matter involving conflict of laws. It has been held in unambiguous terms that the

application of the doctrine of "public policy"in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to HC-NIC Page 59 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER invoke public policy in cases involving a foreign element than when purely municipal legal issues are involved.

24. Explaining the concept of "public policy" vis□a□vis the enforcement of foreign awards in Renusagar , this Court in paras 65 and 66 (pgs. 681□682) of the Report stated:

65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. . . . . This would mean that "public policy" in Section 7(1)(b)(i i) 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 HC-NIC Page 60 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER 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) fundamenta lpolicy of Indian law; or (i i) the interests of India; or (ii i) justice or morality.

25. In Saw Pipes1, the ambit and scope of the court's jurisdiction under Section 34 of the 1996 Act was under consideration. The issue was whether the court would have jurisdiction under Section 34 to set aside an award passed by the Arbitral Tribunal, GAFTA which was patently illegal or in contravention of the provisions of the 1996 Act or any other substantive law governing the parties or was against the terms of the contract. This Court considered the meaning that could be assigned to the phrase "public policy of India" occurring in Section 34(2)

(b)(ii). Alive to the subtle distinction in the concept of 'enforcement of the award' and 'jurisdiction of the court in setting aside the award' and the decision of this Court in Renusagar3, this Court held in Saw Pipes1 that the term "public policy of India" in Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it becomes final. Having that distinction in view, with regard to Section 34 this Court said that the expression "public policy of India" was required to be given a wider meaning. Accordingly, for the purposes of Section 34, this Court added a new category - patent illegality - for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter HC-NIC Page 61 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER and if the illegality is of trivial nature it cannot be held that award is against public policy. Award could also be set aside if it was so unfair and unreasonable that it shocks the conscience of the court.

26. From the discussion made by this Court in Saw Pipes in paragraph 18 of the Report, it can be safely observed that while accepting the narrow meaning given to the expression "public policy" in Renusagar3 in the matters of enforcement of foreign award, there was departure from the said meaning for the purposes of the jurisdiction of the Court in setting aside the award under Section 34.

27. In our view, what has been stated by this Court in Renusagar3 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 the 1996 Act. In Renusagar3 it has been expressly exposited that the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression "public policy" used in Section 7(1)(b)(ii) was held to mean "public policy of India". A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in Renusagar. For all this there is no reason why Renusagar should not apply as regards the scope of inquiry under Section 48(2)(b). Following Renusagar, we think that for the purposes of Section 48(2)

(b), the expression "public policy of India" must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the three categories enumerated in Renusagar3. Although the same expression 'public policy of India' is used both in Section 34(2(b)(ii) and Section 48(2)(b) and HC-NIC Page 62 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER the concept of 'public policy in India' is same in nature in both the Sections but, in our view, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)

(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

28. We are not persuaded to accept the submission of Mr. Rohinton F. Nariman that the expression "public policy of India" in Section 48(2)(b) is an expression of wider import than the "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act. We have no hesitation in holding that Renusagar3 must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in Saw Pipes1 would govern the scope of such proceedings.

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 (I) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in Saw Pipes1 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 Pipes1 must be 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 HC-NIC Page 63 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER the statement in paragraph 16 of the Report that the expression "public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law and is overruled.

34. Mr. Rohinton F. Nariman vehemently contended that once parties had agreed that certification by an inspecting agency would be final, it was not open to the Arbitral Tribunal, GAFTA as well as Board of Appeal, to go behind that certificate and disregard it even if the certificate was inaccurate (which was not the case). In this regard, reliance was placed on two judgments of the English courts, namely, Agroexport and Alfred C. Toepfer. He submitted that House of Lords in Gill & Duffus has affirmed the decision in Alfred C. Toepfer. It was, thus, submitted that the Arbitral Tribunal, GAFTA and the Board of Appeal having disregarded the finality of the certificate issued by S.G.S. India, the awards were plainly contrary to contract and, therefore, not enforceable in India. It was submitted on behalf of the appellant that it was not an issue in dispute and not the buyers' case before the Arbitral Tribunal, GAFTA and/or the Board of Appeal that the procedure adopted by SGS India was not in conformity with the contract. It was, therefore, not open to the Board of Appeal to render a finding which went beyond the scope of the buyers' very case.Accordingly, it was argued that the Board of Appeal dealt with the

questions not referred to it and which were never in dispute and, therefore, award cannot be enforced because it is contrary to Section 48(1)(c) of the 1996 Act as well.

42. The challenge to the enforceability of the foreign awards passed by the Board of Appeal is mainly laid by the sellers on the ground that the Board of Appeal has gone beyond the terms of the contract by ignoring the certificate of quality obtained at the HC-NIC Page 64 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER load port from the buyers' nominated certifying agency, i.e., SGS India which was final under the contract. The Board of Appeal, while dealing with the question whether the SGS India certificate was issued by the contractual party and in contractual form, noticed the clause in the contract in respect of quality and condition and it held that SGS India was an acceptable certifying party under the contract. As regards the other part of that clause that provided, "certificate and quality showed in the certificate will be the result of an average samples taken jointly at port of loading by the representatives of the sellers and the buyers", the Board of Appeal recorded its finding as follows:

"The SGS India certificate shows that an inspection took place at the suppliers godowns inland, and representative samples taken. Sealed samples were inspected lotwise and the cargo meeting the contractual specifications was allowed to be bagged for dispatch to Kandla. Continuous supervision of loading into the vessel was also carried out at the port. The samples drawn periodically were reduced and composite samples were sealed; one sealed sample of each lot was handed over to the supplier, one sealed sample of each lot was analysed by SGS and the remaining samples were retained by SGS for a period of three months unless and until instructions to the contrary were given.

The analysis section of the certificate states that "The above samples have been analysed and the weighted average Pre□shipment and Shipment results are as under: We find that this procedure was not in conformity with the requirements of the Contract, which required the result to be of an average sample taken at port of loading, not the weighted average of pre□shipment and shipment samples. Accordingly the HC-NIC Page 65 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER certificate is uncontractual and its results are not final. In consequence the Board is obliged to evaluate all the evidence presented, including the evidence of the uncontractual SGS India certificate to decide whether or not the goods were of the contractual description, i.e. Durum wheat Indian origin."

43. Thus, having held that SGS India was the contractual agency, the Board of Appeal further held that the sellers failed to establish that the SGS India certificate was in contractual form. Two fundamental flaws in the certification by SGS India were noted by the Board of Appeal, one, SGS India's certification did not follow the contractual specified mode of sampling and the other, the analysis done by SGS India was doubtful. The Board of Appeal then sifted the documentary evidence let in by the parties and finally concluded

that wheat loaded on the vessel Haci Resit Kalkavan was soft wheat and the sellers were in breach of the description condition of the contract.

44. It is pertinent to state that the sellers had challenged the award (no. 3782) passed by the Board of Appeal in the High Court of Justice at London. The three decisions; (i) Agroexport5 by Queen's Bench Division, (ii) Toepfer6 by Court of Appeal, and (iii) Gill & Duffus7 by House of Lords, were holding the field at the time of consideration of sellers' appeal by the High Court of Justice at London. In Agroexport , it has been held that an award founded on evidence of analysis made other than in accordance with contract terms cannot stand and deserves to be set aside as evidence relied upon was inadmissible. The Court of Appeal in Toepfer has laid down that where seller and buyer have agreed that a certificate at loading as to the quality of goods shall be final and binding on them, the buyer will be precluded from recovering HC-NIC Page 66 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER damages from the seller, even if, the person giving the certificate has been negligent in making it. Toepfer has been approved by the House of Lords in Gill & Duffus7. The High Court of Justice at London can be assumed to have full knowledge of the legal position exposited in Agroexport5 , Toepfer6 and Gill & Duffus7 yet it found no ground or justification for setting aside the award (no. 3782) passed by the Board of Appeal. If a ground supported by the decisions of that country was not good enough for setting aside the award by the court competent to do so, a fortiori, such ground can hardly be a good ground for refusing enforcement of the award. Accordingly, we are not persuaded to accept the submission of Mr. Rohinton F. Nariman that Delhi High Court ought to have refused to enforce the foreign awards as the Board of Appeal has wrongly rejected the certificate of quality obtained from the buyers' nominated certifying agency and taken into consideration inadmissible evidence in the nature of certificates obtained by the buyers' for the purposes of forwarding contract.

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.

47. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error HC-NIC Page 67 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated

under Section 48(2)(b).

48. The contention of the learned senior counsel for the appellant that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore, these awards cannot be enforced being contrary to Section 48(1)(c) is devoid of any substance and is noted to be rejected."

91. On the aforesaid aspects, learned counsel for the petitioner has also relied upon the following judgments of the Bombay High Court and Calcutta High Court :☐

(i) Jaldhi Overseas Pvt. FZC V. Vinergy International Private Ltd. [2016 SCC Online Cal 2299].

(ii) Noble Resources Ltd. V. Twenty First Century Wire Roads Ltd. [2015 SCC Online Bom 4677]

(iii)Integrated Sales Services Ltd. V. Arun Dev [2017 (1) MHLJ 681].

(iv) Canadian Commercial Corporation V. Coal India Ltd. [2016 SCC Online Cal 5031].

(v) GEA EGI Contracting/Engineering Co. Ltd. V. Bharat Heavy Electricals Ltd. [233 (2016) DLT 661].

(vi) Rio Glass Solar SA V. Shriram EPC Ltd. & Ors. [MANU/TN/0458/2017] HC-NIC Page 68 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER

92. Learned counsel for the respondents has also relied upon the judgment passed in the case of Hadley Vs. Baxendale [156 Eng. Rep. 145], and contended that as there was back to back contract which was known to the parties, loss of profits cannot be awarded as awarded by learned Tribunal. Firstly, the said aspect touches the merits of the awards directly and therefore, it is beyond the scope of inquiry that this Court is entitled to make under Section 48 of the Act and secondly, even if the awards in question are considered, there is finding of the fact that there was no back to back contract and therefore, with respect to the said judgments, the same will have no application to the facts of the case on hand. Learned counsel for the respondents has relied upon the judgment of the Apex Court in the case of Union of India & Ors. Vs. Sugauli Sugar Works (P) Ltd. [(1976) 93 SCC 32], and contended that, in case of breach of contract, as far as possible the injured party should be placed in as good situation as if the contract had been performed and while awarding damages by breach of contract, the rule as to market price is intended to secure only an indemnity to the purchaser. Even this aspect would touch the merits of the awards in question and the facts of that case were different and distinct, whereas in the case on hand, the awards being governed by the provisions of UK Sale of Goods Act with respect the HC-NIC Page 69 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER aforesaid judgment would not be applicable to the present case.

93. Similarly, learned counsel for the respondents has also relied upon the judgment rendered in the case of Messrs. Trojan & Company Vs. RM. N.N.Nagappa Chettiar [AIR 1953 SC 235] and has contended that in case of breach of contract, measure of damages cannot be the amount of loss ultimately sustained by the represented. In the case on hand, as stated hereinabove, the parties had agreed for applicability of English law and the issues of quantum of damages that were awarded by learned Arbitral Tribunal would not only touch the merits of the awards, but the awards are passed as per the law applicable in England and therefore, the aforesaid judgment also would not render any assistance to the case of the respondents.

94. Learned counsel for the respondents has also relied upon the judgment of Apex Court in the case of Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas & Anr. [AIR 1962 SC 366] and has contended that there is breach of Sections 73 and 74 of the Indian Contract Act, as already held above, the case on hand is for enforcement of foreign award and even if, there is any alleged breach of Indian Law, the same would not amount to contravention of fundamental policy of Indian Law and hence, the said judgment would also not HC-NIC Page 70 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER apply to the facts of the present case.

95. The respondents have also relied upon the judgment of the Apex Court in the case of Associate Builders (supra), wherein the Apex Court while considering the aspect of fundamental policy of Indian Law, interest of India, justice and morality and patently illegal i.e contravention of substantial law of India and contravention of arbitration and Conciliation Act, 1996 and contravention of terms of the contract, has observed thus:☐

27. Coming to each of the heads contained in the Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held☐ "35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as HC-NIC Page 71 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law",

we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also HC-NIC Page 72 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER a quasijudicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law.

Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223: (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is HC-NIC Page 73 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

Interest of India

35. The next ground on which an award may be set aside is that it is contrary to the interest of India. Obviously, this concerns itself with India as a member of the world community in its relations with foreign powers. As at present advised, we need not dilate on this aspect as this ground may need to evolve on a case by case basis.

Justice

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and HC-NIC Page 74 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

Morality

37. The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Indian Contract Act, so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality".

"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (XLV of 1860)."

39. This Court has confined morality to sexual morality so far as section 23 of the Contract Act is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience."

96. At the outset, it deserves to be noted that in the case of Associates Builders (supra), the case before the Apex Court was of domestic award and the Apex Court has examined the aspect of award, which was contrary to the fundamental policy of HC-NIC Page 75 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER Indian Law or contrary to the Interest of India, contrary to Justice or Morality or was Patently Illegal as provided under Section 34 of the Act, wherein the scope is wider than Section 48 of the Act. It is not the case of the respondents that, the impugned awards are passed disregarding the order of Superior Court in India. As per the facts revealed in the instant case, the parties had agreed to the applicability of English law. All the parties were heard before the Arbitral Tribunal as well as the appellate Board and in fact, the respondents carried the order further before the Superior Courts in England and have failed. It is also not the case of the respondents that principle of audi alteram partem has been breached. As held hereinabove, in inquiry under Section 48 of the Act read with Explanations 1 and 2 to Section 48 of the Act, the respondents have failed to establish that the awards are in contravention with the fundamental policy of the Indian Law or that the same is in conflict with basic notion of morality or justice. Explanation 2 of Section 48 plays a vital role and is an important aspect which has to be borne in mind by this Court while examining the foreign awards at the stage of enforcement. Thus, all the parties were heard at every stage, more particularly the respondents cannot make any grievance that any ex parte award is passed at any stage and therefore, considering Explanation 2 to Section 48(2) of the Act, this Court cannot HC-NIC Page 76 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER entail any inquiry into the review on the merits of the dispute and as stated earlier, the Apex Court in the case of Associates Builders (supra) has examined the domestic awards.

97. In light of the aforesaid provisions of law applicable i.e. UK Sale of Goods Act, even if the principle as held by the Apex Court in the case of Associates Builder (supra), are applied, the grounds raised by the respondents do not constitute even remotely that there is any contravention to the fundamental policy of India or there is basic notion of morality or justice.

98. Hypothetical example which was relied upon by learned counsel for the respondents may be good when Indian Law is to be applied and therefore, in the instant case, it cannot be said that the impugned awards are against public policy of India or that they are against the principles of morality and justice.

99. In the facts of this case, it cannot be said that the awards are such that it would shock the conscience of the Court and the parties are bound by the agreement and the aspect whether it shocks conscience of the Court depends on the facts of each case and when the parties had agreed for applicability of English Law and Arbitration under the GAFTA Rules at London, the contention that the award is punitive award cannot now be considered under Section 48 of the Act. The HC-NIC Page 77 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER parties were aware about the provisions of Section 51(1) and 51(3) of UK sale of Goods act which has been considered by learned Arbitral Tribunal.

100. Learned counsel for the respondent has also relied upon the judgment of the Apex Court in the case of Oil & natural Gas Corporation Ltd., [(2003) 5 SCC 705], wherein the Apex Court has observed thus:□ "12. Hence, the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is dehors the said provisions, it would be, on the face of it, illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act.

13. The question, therefore, which requires consideration is whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under S. 24, 28 or 31(3), which affects the rights of the parties? Under sub□section (1)

(a) of S. 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be □whether such award could be set aside? Similarly, under sub□ section (3), Arbitral Tribunal is directed HC-NIC Page 78 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? Similarly, if the award is non□speaking one and is in violation of S. 31(3), can such award be set aside? In our view, reading S. 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would

be contrary to basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under S. 34.

15. Result is □if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under S.

34. However, such failure of procedure should be patent affecting the rights of the parties.

16. The next clause which requires interpretation is Cl. (ii) of sub□section (2)(b) of S. 34 which inter alia provides that the Court may set aside arbitral award if it is in conflict with the 'Public Policy of India.' The phrase 'Public Policy of India' is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise HC-NIC Page 79 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and constitutional provisions.

18. Further, in Renusagar Power Co. Ltd. v. General Electric Co. (1994 Supp (1) SCC

644), this Court considered S. 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which inter alia provided that a foreign award may not be enforced under the said Act, if the Court dealing with the case is satisfied that the enforcement of the award will be contrary to the public policy. After elaborate discussion, the Court arrived at the conclusion that public policy comprehended in S. 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is the 'Public Policy of India' and does not cover the public policy of any other country. For giving meaning to the term 'Public Policy,' the Court observed thus :□"66. Article 5(2)(b) of the New York Convention of 1958 and S. 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 contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Art. 5(2)(b) of the New York Convention and S. 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Art. 1(c) of the Geneva Convention of 1927 and S. 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in S.

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. 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 S. 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."

18. The Court finally held that :□"76. Keeping in view the aforesaid objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries, we are of the view that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in S. 7(1)(b)(ii) of the Act."

20. Mr. Desai submitted that the narrow meaning given to the term 'public policy' in Renusagar's case is in context of the fact that the question involved in the said matter was with regard to the execution of the award which had attained finality. It was not a case where validity of the award is challenged before a forum prescribed under the Act. He submitted that the scheme of S. 34 which deals with setting aside the domestic arbitral award and S. 48 which deals with enforcement of foreign award are HC-NIC Page 81 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER not identical. A foreign award by definition is subject to double exequatur. This is recognised inter alia by S. 48(1) and there is no parallel provision to this clause in S. 34. For this, he referred to Lord Mustill and Stewart C. Boyd QC's "Commercial Arbitration" 2001 wherein (at page 90) it is stated as under :□"Mutual recognition of awards is the glue which holds the international arbitrating community together, and this will only be strong if the enforcing Court is willing to trust, as the convention assumes that they will trust, the supervising authorities of the chosen venue. It follows that if, and to the extent that the award has been struck down in the local Court it should be a matter of theory and practice be treated when enforcement is sought as if to the extent it did not exist."

21. He further submitted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in the domestic arbitration the only recourse is to S. 34. The aforesaid submission of the learned senior counsel requires to be accepted. From the judgments discussed above, it can be held that the term 'public policy of India' is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or HC-NIC Page 82 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER nullity. But in a case where the judgment and decree is challenged before the appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India.' On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned senior counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of S. 28(3) of the Act which specifically provides that "Arbitral Tribunal shall decide in accordance with the terms of the contract." Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub□sections (2) and (3) of S. 28. Section 28(2) specifically provides that arbitrator shall decide ex aequo et bono (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under S. 24 or HC-NIC Page 83 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality."

101. In the above cited judgment, the Apex Court has considered the aspect relating to enforcement of domestic award as provided under Section 34 of the Act and hence, the same would not be applicable to the case on hand.

102. Learned counsel for the respondents has also placed reliance on the following judgments :□

(i) Central Inland Water Transport Corporation Limited & Anr. Vs. Brojo Nath Ganguly & Anr. [(1986) 3 SCC 156].

(iii) Gherulal Parakh Vs. Mahadeodas Maliya & Ors. [AIR 1959 SC 781].

(iii) Thyssen Krupp Materials AG Vs. The Steel Authority of India [2017 SCC Online Del 7997]

(iv) Usha Beltron Ltd. Vs. Nand Kishore Parasramka & Anr. [2001 SC Online Cal 255]

103. Thus, having agreed to the applicability of English law and the learned Tribunal having applied the provisions of UK Sale of Goods Act as well as GAFTA Rules, the same would not mean that there is any contravention of fundamental policy of India and as the facts unfold from the record of the petitions, admittedly the awards have been upheld by the Appellate Board as well as the Courts in England.

104. This group of petitions are considered at this stage to determine whether the awards in question are enforceable and whether the awards are deemed to be decree by this Court as provided under Section 49 of the Act. As far as this aspect is concerned, learned counsel for the parties have contended that the aforesaid first part may be decided first by this Court and accordingly, following the ratio laid down by the Apex Court in the case of Fuerst Day Lawson Ltd.(supra), keeping the petitions pending, by this order only 1st part, viz., whether the awards in question are deemed to be decree of this Court or not as provided under the Act is hereby decided.

105. While considering the jurisdiction of the Executing Court to execute the foreign awards as provided under Section 7 (1)(b)(ii) of the Foreign Awards Act, the Apex Court has held that objections about unjust enrichment may relate to the merits of the award, which is beyond the scope of the objections that can be raised under Section 7(1)(b)(ii) of the Foreign Awards Act and it has been accordingly held that such course is not permissible under the New York Convention and under the Foreign Awards Act.

Provisions of Section 48 of the Act materially corresponds to Section 7 of the Foreign Awards Act. In the case on hand also, the parties agreed for applicability of English Law and Arbitration HC-NIC Page 85 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER under the GAFTA Rules at London. The awards clearly postulate that the Arbitral Tribunal and the Appellate Board have granted damages as per the provisions of UK Sale of Goods Act while interpreting Sections 51(1) and 51 (3) of the UK Sale of Goods Act and therefore, the contention raised by the respondents that the damages awarded by learned Tribunal is more than actual loss and therefore, the same would amount to unjust enrichment, which in turn would be in contravention of the fundamental policy of the Indian Law and would mean that this Court has to go into the merits of the awards with regard to quantum awarded by learned Arbitral Tribunal and following the ratio laid down by the Apex Court in the case of Renusagar Power Co. Ltd. (supra), the same would be beyond the scope.

106. In the case on hand, it is an admitted position that the petitions relate to foreign awards, which have attained finality under the English Law. Thus, as held by the Apex Court in the case of Shri Lal Mahal Limited (supra) and more particularly, even after amendment of 2015, scope of inquiry is very limited on the aspect that it is in contravention of the fundamental policy of the Indian Law or that it is in conflict with public law and this Court cannot entail review on merits into the dispute. The contention raised by the respondents in opinion of this Court, would amount to inquiry into the merits. It is not the HC-NIC Page 86 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER case of the respondents that the awards in question were induced by fraud or corruption or is violative of Sections 75 and 84 of the Act. It is an admitted position that the parties had agreed for applicability of English law and all Appellate authorities and the Courts in England have upheld the awards in origin passed by the Arbitral Tribunal as well as the Appellate Board and therefore, considering the ratio laid down by the Apex Court in the case of Shri Lal Mahal Limited (supra), read with explanation 2 of Section 48 even in limited scope of inquiry, in the facts of the case, none of the grounds raised by the respondents would establish that the awards in question are in contravention with the fundamental policy of the Indian law.

107. Following the ratio laid down by the Hon'ble Supreme Court, Bombay High Court and Calcutta High Court, scope of inquiry under Section 48 of the Act is very limited and this Court cannot adjudicate upon the merits of the case or to review the findings on merits rendered by learned Arbitral Tribunal as well as the Courts in England.

108. Considering the facts of the case on hand, learned Arbitral Tribunal as well as the Appellate Board after hearing all the parties and after considering applicable law, more particularly provisions of Section 51(1) and 51(3) of the UK Sale of Goods Act, have passed HC-NIC Page 87 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER

the awards. Following the ratio laid down by the Apex Court in the cases of Shri Lal Mahal Limited (supra), as well as the judgment of Bombay High Court and Culcutta High Court as referred above, section 48 of the Act does not give additional opportunity to have second look of the foreign award, at the stage of enforcing of the foreign award and this Court, therefore, is not empowered to look into the aspect whether the provisions of Section 51(2) or Section 51 (3) of the UK Sale of Goods Act would apply and on that count, it cannot be gainsaid that the same is in contravention with the fundamental policy of the Indian Law or that it is against the morality and also that the same would shock the conscience of this Court.

109. Considering the contention of learned counsel for the respondents that the impugned awards are in breach of Sections 73 and 74 of the Indian Contract Act and therefore, the same would amount to contravention of fundamental policy of Indian Law, deserves to be negatived. At this stage, it would be appropriate to refer to the judgment of the Delhi High Court rendered in the case of Cruz City Mauritius Holdings Vs. Unitech Ltd., [2017 SCC Online Del 7810], wherein it has observed thus:□"96. It plainly follows from the above that a contravention of a provision of law is insufficient to invoke the defence of public HC-NIC Page 88 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER policy when it becomes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian Law. The expression fundamental policy of Indian laws refers to the principles and the legislative policy of which Indian statutes and laws are founded. The expression "fundamental policy" connotes the basic and substratal rationable, values and principles whcih form the bedrock of laws in our country.

97. It is necessary to bear in mind that a foreign award may be based on foreign law, which may be at variance with a corresponding Indian statute. And, if the expression "fundamental policy of Indian law" is considered as a reference to a provision of the Indian statue, as is sought to be contended on behalf of Unitech, the basic purpose of the New York Convention to enforce foreign awards would stand frustrated. One of the principal objective of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member state's national policy and which it cannot be expected to compromise. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.

99. The explanations to section 48(2) of the Act as amended introduced by the Arbitration adn Conciliation (Amendment) Act, 2015 have brought about a material change and further narrowed the scope of the public policy defence: first, explanation 1 has sought to replace the inclusive scope of the pre□amendment provision by an exhaustive HC-NIC Page 89 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER

one; second, interest of India is no longer included in the scope of public policy; and third, it has been expressly provided, although the same was authoritatively settled by the Supreme Court in Renusagar Power Co. Ltd. V. Central Electric Co. That examiantion of whether the arbitral award offends the Fundamental policy of Indian Law, does not entail a review on merits."

110. Considering the provisions of Section 28(1)(b)(1) of the Act and the facts of the case on hand, the parties had agreed that the arbitration would be as per the GAFTA rules and the seat of arbitration would be at London and the parties had also agreed that the English law would apply, now cannot be permitted to argue again on merits as is sought to be done indirectly by contending that the impugned awards are in contravention of fundamental policy of the Indian Law and morality and that the same would shock the conscience of the Court on the grounds that are contended by the respondents, more particularly the ground that there is violation of the provisions of Sections 73 and 74 of the Indian Contract Act. The parties to the contract were aware about the contracts and the date on which the contracts were entered between the parties and that they have agreed to be governed by English law and learned Tribunal having applied the provisions of UK Sale of Goods Act, which have attained finality in the learned Tribunal, the Appellate Board as well as the Courts in England, the same cannot be now re-examined on merits by contending HC-NIC Page 90 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER that it is violative of fundamental policy of Indian Law and morality.

111. Thus, in the case on hand, only because learned Arbitral Tribunal while applying Section 51(3) of the UK Sale of Goods Act has awarded a particular quantum of amount, mere violation of Sections 73 and 74 of the Indian Contract Act, therefore, would not amount to contravention of fundamental policy of the Indian Law.

112. In light of the aforesaid contention therefore, for examining whether it is in contravention with the fundamental policy of Indian law, it deserves to be noted at the outset that by Explanation 2, which is inserted/substituted by Act 3 of 2016 w.e.f. 23.10.2015 clearly postulates that such inquiry is very narrow and the same shall not entail a review on merits of the dispute and it carries a narrow meaning in comparison to the provisions of section 34(2)(b) of the Act.

113. Government of India in the publication titled Legal Glossary prepared by Ministry of Law & Company Affairs, in 1983 Edition has defined expression "Public Policy" as principles in accordance with which action of men and commodities need to be regulated to achieve the good of entire community or public. (Reference to law relating to Arbitration and Conciliation by Dr. P.C. Markanda, 9th edition).

114. Again, referring to the facts which arise in this group of petitions, the parties entered into a contract for supply of Indian Rapeseed Meal and have determined and selected appropriate law, i.e., the parties have agreed for arbitration and has also agreed for applicability of English law. The parties participated in arbitration proceedings which culminated into an award by arbitral board and confirmed in appeal under the GAFTA Rules and the leave to appeal was not granted. Having accepted the applicability of English law, the awards are based on the provisions of English law, i.e., UK Sale of Goods Act. The contention that the actual loss is less than the damages which is awarded by the arbitrator is a matter of fact and the merits which are considered by the arbitrator as per the English law and further by the English courts taking into consideration the provisions of the UK Sale of Goods Act. Therefore, the contention that the awards in question are in contravention with section 73 of the Contract Act would not take the case of the respondents any further. Considering the binding decision of the Apex Court in the case of Renu Sagar (supra) and Shri Lal Mahal Ltd. (supra), the award of damages as per the English Law and the applicability of section 51(3) of the UK Sale of Goods Act is entirely in the arena of the merits of the award and the same cannot be reopened, re-examined or re-appreciated by this Court.

115. Having agreed to the applicability of a particular law under English law and having participated in the proceedings, the same cannot be re-opened by this Court while deciding the issue under sections 47, 48 and 49 of the Act at the instance of the respondents and following the explanation 2 of section 48 therefore, even while examining the aspect whether the awards are in contravention with the fundamental policy of India, the same shall not entail a review on the merits of the dispute. It is not the case of the respondents that the contracts entered into

between the parties were against any Indian law or was in contravention of the fundamental policy of Indian Law, neither there is any other breach of Indian law for entering into such contracts. In opinion of this Court, the contracts were entered into between the respondents who are Indian suppliers and the petitioner who was a foreign buyer, which is legal and proper. Both the parties agreed that the English law would apply and though the transaction of contract cannot be examined by this Court, suffice it to say that such contracts did not contravene any other law as applicable in India or any fundamental policy of Indian law. In facts of the case, it cannot be said that enforcement of the awards would be injury to the public good or possibly, that enforcement would be wholly offensive to the ordinary/reasonable and fully HC-NIC Page 93 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER informed member of the public.

116. Therefore on the grounds which are raised to buttress the contention that the impugned awards are against the fundamental policy of Indian law, more or less touches the merits of the award and enforcement of the award cannot be denied merely on the alleged ground that it is against the provisions of section 73 of Indian Contract Act. Even the contention that inspite of actual loss occurred, a sum of Rs. 13 Million dollars is awarded for 9 contracts is based upon the applicability of the relevant provisions of the UK Sale of Goods Act, which was agreed by the parties to be made applicable and on such ground, it cannot be said that the impugned awards are in any way violative of fundamental policy of Indian law. It is not the case of the respondents that the enforcement of the awards would result into breach of any public policy of India and therefore, the contention raised by the respondents to say that the impugned awards are against the fundamental policy of Indian law deserves to be negatived. Even examining the other limb of argument that the impugned awards are against the morality and would shock the conscience of this Court, it deserves to be noted that the breach came to be initiated with the non-supply of goods agreed by the respondents themselves. Having agreed for applicability of English law and the awards having been based upon HC-NIC Page 94 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER the provisions of UK Sale of Goods Act and more particularly applicability of section 51(3) of the said Act, it cannot be said that the impugned awards are against morality or that it shocks the conscience of this Court. In a commercial transaction which was entered into between the parties as normal businessmen and both the parties having agreed to a particular course and applicability of arbitration clause with applicability of English law, it cannot be said that the impugned awards lack morality or it would shock the conscience of this Court.

117. Considering the aforesaid as well as taking into consideration the ratio laid down by the Hon'ble Apex Court as well as judgments of the other High Courts, all contentions raised by the respondents that the impugned awards are against the fundamental policy of Indian law and that the same lacks morality and that the same is in contravention with a particular provision of the Indian law and that it shocks the conscience of this Court deserve to be negatived. Even the

contention that other arbitral proceedings relating to the similar contracts are still pending wherein the petitioners have sought adjournment time and again even for production of documents in opinion of this Court would not affect the enforceability of the awards in question.

118. In facts of the aforesaid case therefore, this HC-NIC Page 95 of 96 Created On Sat Aug 12 13:46:18 IST 2017 O/IAAP/2/2017 ORDER Court finds that the awards in question have become final as per the English law and this Court is satisfied that the awards in question are enforceable and it is hereby held that the awards shall be deemed to be decree of this Court.

119. The parties shall complete the pleadings within a period of four weeks. The petitions be listed for further hearing on 11.09.2017.

(R.M.CHHAYA, J.) bjoy HC-NIC Page 96 of 96 Created On Sat Aug 12 13:46:18 IST 2017