IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

MCC No. 1834 of 2023

(CEREALES Y SERVICIOS AGRICOLAS DE BURGS S.L. THROUGH AUTHORISED SIGNATORY SANTOSH KOLI Vs. ***SETHI AGRITECH PRIVATE LIMITED)***

Dated : 08-07-2024

(Shri Ashwin Shanker – Advocate with Shri Kunal Naik and Shri Madhav Lahoti - Advocates for the petitioner)

(Shri Amit Agrawal – Senior Advocate with Shri Anuj Bhargava - Advocate for the respondent)

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Reserved on : 23.04.2024

Pronounced on : 08.07.2024

….....

This petition having been heard and reserved for orders, coming on for pronouncement this day, the court passed the following:

ORDER

1] Heard on the question of admission.

2] This petition has been filed by the petitioner under Sections 47 and 48 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') and Order XXI of the Code of Civil Procedure, 1908 seeking the following reliefs:-

> "a. Declare the Award dated 22 March 2022 enforceable as a decree of this Hon'ble Court;
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> b. Order a decree in favour of the Petitioner for a sum of USD 1,292,389.86 and GBP 15,977 along with interest, under the Award, till payment/ realization;
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> c. Pending the hearing and final disposal of this Petition, Order the Respondent to deposit the sum of Award sum in this Hon'ble Court;
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> d. Order that any amount that has been deposited by the Respondent with this Hon'ble Court be paid out to the Petitioner towards satisfaction of its Awarded claim;
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> e. Order of execution of the decree under Order XXI of the CPC, 1908 against the Respondent, attachment and judicial sale of all their assets and their receivables, the movable and immovable properties wherever they may be found up to the amounts mentioned in prayer clause (b) above;
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> f. Order costs of USD 20,000 incurred towards this Execution Petition; and pass such other orders as this Hon'ble Court may deem fit in the facts and circumstances of this case;
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> g. Grant such other and further reliefs as it may deem fit and proper having regard to the facts and circumstances of the case."

3] The petition is filed for execution of a foreign award passed by GAFTA Arbitration, London, wherein damages of USD $1,292,389.86 have been awarded to the petitioner against the respondent, who hails from Indore (M.P.), India.

4] In brief, the facts of the case are that the petitioner is a company incorporated under the Foreign Law and is situated in Spain. According to the petitioner, contract No.2017378 dated 11.09.2020,

was entered into between the petitioner and the respondent whereby, the respondent agreed to sell 3,600 mt +/- 5% of Organic Soybean Cake in meal, Indian origin, crop (Cargo) to the petitioner in 20 ft containers in bulk, at the price of USD $ 663/mt. The contract was concluded through a broker, Zeleny Informacion y Mercado S.L. of Pamplona, Spain, and admittedly, a dispute arose between the parties under the terms of contract, having an arbitration clause.

5] The dispute was to be referred to Arbitration in London in accordance with GAFTA Arbitration Rules No.125 (GAFTA 125), and as per the aforesaid rules, the arbitration was subjected to English Law in accordance with the Arbitration Act, 1996. The cause of dispute was that the respondent failed to ship the cargo in the agreed time, leading to breach of contract and thus, the petitioner was required to purchase the cargo from an alternate seller and incurred the damages. Thus, the petitioner invoked the arbitration clause vide its broker's e-mail dated 19.05.2021, which was also responded to by the respondent vide e-mail dated 20.05.2021. After the matter was referred to GAFTA Arbitration in London, the petitioner appointed Mr. K. Haylock as their arbitrator, however, the respondent failed to appoint their arbitrator hence, the petitioner's legal representative, Arizon Abogados S.L.P. (Arizon) applied to GAFTA for the appointment of an arbitrator on respondent's behalf in accordance with Rule 3.31 of GAFTA 125, and after the notices were served on the parties, the respondent did not appear before the arbitrator and thus, an *ex-parte* final arbitration award has been passed on 22.03.2022, and since the seat of arbitration was at England and the award was subject to English Procedural and

Substantive Law, it was to be enforced under the terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and since the respondent is a resident of Indore, the present petition has come to be filed before this Court for execution of the aforesaid award.

6] A reply to the aforesaid petition has also been filed by the respondent traversing the averments made in the petition, mainly on the ground that the award is bad in law and runs contrary to the provisions of Sections 47 and 48 of the Act of 1996, hence the application is liable to be rejected.

7] Shri Amit Agrawal, learned senior counsel with Shri Anuj Bhargava appearing for the respondent has vehemently argued before this Court that the petition is liable to be dismissed, and has raised the following grounds of challenge:-

I. Non-compliance of Section 47(1)(a) of Arbitration and Conciliation Act, 1996.
II. Non-compliance of M.P. Arbitration Rules, 1997.
III. Not a concluded contract.
IV. No Arbitration Clause in Agreement- Express or incorporated by Reference.
V. No proper notice of arbitration proceedings.
VI. Award contrary to public policy on India.

8] So far as the non-compliance of Sections 47 and 48 of the Act of 1996, is concerned, Shri Agrawal has submitted that only on the grounds that neither the original agreement has been filed on record, which according to the petitioner was entered into by and between the petitioner and the respondent, nor the original award passed by the arbitrator has been filed, the application is liable to be dismissed.

9] So far as the agreement is concerned, attention of this Court has been drawn to the fact that it has been signed by the respondent/seller only and not by the petitioner/buyer which was *sine qua non* for a valid agreement. It is submitted that it is only with the rejoinder that a countersigned copy of the agreement has been filed but the original agreement has still not been filed. It is also submitted that otherwise also, the agreement does not contain the arbitration clause. Counsel has also submitted that initially, the contract was filed as Annexure P/2 along with the petition, and when this objection was raised by the petitioner that the contract is not the original contract, along with their rejoinder, the petitioner has filed another contract, which demonstrates that they are also not sure if they filed the original contract along with the petition.

10] Regarding award, it is submitted that it is also not the original or authenticated copy of the award and vague averments have been made in the application/rejoinder. In support of his submissions, Shri Agrawal has relied upon the decision rendered by the Supreme Court in the case of ***PEC Limited Vs. Astbulk Shipping SDN BHD,*** reported as ***(2019) 11 SCC 620*** and ***Union of India Vs Vedanta Ltd,*** reported as ***(2020) 10 SCC 1***.

11] Shri Agrawal has also submitted that the petitioner has not complied with Rule 4(3), (4) and (5) of the M.P. Arbitration Rules, 1997 (hereinafter referred to as 'the Rules of 1997'), as Rule 4(3) provides that every application under Section 47 has to be verified by the applicant or by some other person, proved to the satisfaction of the Court to be acquainted with the facts of the case, and filing of an

affidavit is an additional mandatory requirement as per Rule 9(5) of the Rules of 1997. Counsel has also relied upon Rule 9(5) of the Rules of 1997 which provides that Order VI of CPC is applicable to the proceedings of the application/appeals filed under the Act of 1996, which provides for verification of the pleadings, and Sub-Rule (4) of which provides that, "*the person verifying the pleadings shall also furnish an affidavit in support of his pleadings.*"

12] Regarding non-availability of arbitration clause, it is reiterated that the agreement, Annexure-P/2 is also not a concluded contract, as it is not even signed by the applicant. It is also submitted that as per GAFTA 125 Rule 4.4, all submissions and evidence are necessarily required to be served to the other party, but the respondent was never served with the claim submissions and supporting evidence by the petitioner from a known e-mail address. It is submitted that the alleged arbitration clause in the agreement does not form an arbitration agreement and as it refers to GAFTA 125, whereas GAFTA 125 are the arbitration Rules, No.125 and hence, a reference to the arbitration rules would not be considered as the arbitration agreement between the parties. In support of this contention, Shri Agrawal has relied upon the decision rendered by the Supreme Court in the case of ***M.R. Engineers & Contractors (P) Ltd. V Som Datt Builders Ltd,*** reported as ***(2009) 7 SCC 696,*** para 22, 23 and 24; ***Inox Wind Ltd. V. Thermocables Ltd.,*** reported as ***(2018) 2 SCC 519*** and ***Giriraj Garg Vs. Coal India Ltd.***, reported as ***(2019) 5 SCC 192,*** para 5.10 and 5.11.

13] Regarding non-service of proper notice, Shri Agrawal has

emphasized on the fact that the petitioner has purposely sent e-mails to the respondent from multiple unknown e-mail addresses, which escaped the attention of the respondent and thus, they were deprived of their valuable right to contest the matter.

14] Lastly, it is also submitted that the award is contrary to the public policy of India, provided, if the respondent can prove that it is in contravention with the fundamental policy of India. Counsel has also referred to Section 74 of the Indian Contract Act, 1872 to submit that proof of actual damage or loss is *sine qua non* for payment of compensation for breach of contract, and the award passed on guess work is not enforceable. It is also submitted that it is the fundamental policy of India that where it is possible to prove the actual damage or loss, such proof is not dispensed with to prove actual damage or loss. In support of his submissions, Shri Agrawal has also relied upon the decision rendered by the Supreme Court in the case of ***National Agricultural Cooperative Marketing Federation of India Vs. Alimenta S.A.*** reported as ***(2020) 19 SCC 260; Centrotrade Minerals and Metals Inc. Vs. Hindustan Copper Limited,*** reported as ***(2020) 19 SCC 197*** and ***Kailash Nath Associates Vs. Delhi Development Authority and another,*** reported as ***(2015) 4 SCC 136.***

15] On the other hand, the reply filed and objections raised by the respondent are opposed by Shri Ashwin Shankar, learned counsel for the petitioner. A rejoinder to the aforesaid reply and objection has also been filed by the petitioner traversing the averments made therein.

16] Shri Shankar has opposed the objections raised by the sr. counsel for respondent. It is submitted that the respondent is trying to

find fault with the arbitration agreement on trivial grounds, only with a view to avoid the same. It is submitted that the petitioner has complied with all the procedural requirements of Section 47 of the Act of 1996 and the M.P. Arbitration Rules of 1997. It is submitted that the respondent has not been able to make out any case under Section 48 of the Act, so as to refuse the enforcement of the award dated 22.03.2022, by this Court.

17] It is also submitted that the respondent has raised various objections on the merits of the case which can only be raised in an appeal against the award, thus, the objections fall outside the narrow scope of Sections 47 and 48 of the Act of 1996, and this Court cannot enter into the merits of the case at this juncture. It is further submitted that after having refused to participate in the arbitration, or exercise its right to appeal against the award, the respondent cannot now raise the defences, which are deemed to be already waived. It is submitted that the petitioner has placed on record the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made, and the Rules of 1997 have also been complied with, as the petitioner's affidavit dated 05.09.2023, is also filed on record vide document No.6634/2023.

18] It is also submitted that under the GAFTA 125 Rules, an award is not required to be signed by all the arbitrators when a three member Tribunal is constituted, only the Chairman needs to sign the award. However, it is submitted that it is inadvertently mentioned in the petition that the Tribunal comprised of two members, whereas, the Tribunal comprised of three members including the Chairman, Mr. D

Lucas.

19] Shri Shankar has also relied upon Rule 9.1 of GAFTA 125, which provides that, "*All awards shall be in writing and shall be signed by the sole arbitrator or, in case of an award made by a three-man tribunal, by the chairman."* It is also submitted that the agreement has been concluded through electronic mode, which has been filed on record along with a supporting affidavit under Section 65-B of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Act of 1872'), along with the rejoinder.

20] Counsel has also submitted that the award dated 22.03.2022 has not yet been declared enforceable as a decree of this Court, hence, the said compliance with Order XXI Rule 11(2) is not possible. In the alternative, it is also submitted that since the petitioner does not have all the information regarding the respondent's assets, hence, an application, I.A. No.7975/2023 has also been filed for appropriate orders directing the respondent to disclose the information of his assets, which can be attached.

21] It is also submitted that the petitioner was not required to comply with Format 5 of the Rules of 1997, which came into force by way of an amendment dated 22.09.2023, whereas the petition itself was filed prior to that date, *i.e.*, on 17.08.2023 and the said amendment does not have retrospective application.

22] Shri Shankar has also emphasized that the award has already attained the finality as the respondent has chosen not to challenge the same and thus, the respondent cannot be allowed to raise the grounds challenging the aforesaid award itself. It is submitted that the contract

pursuant to which the award dated 22.03.2022 was passed, is a concluded contract and it cannot be objected to at this stage on the ground that it is not signed by the respondent, as the same could have been the defence of the respondent on merits, and this Court under Section 47 and 48 of the Act cannot decide whether the contract stood concluded. Counsel has also submitted that the petitioner has emphatically denied that the contract was required to be signed by the respondent also because it is a well settled law that a contract need not be signed and can be concluded over electronic media also, even an exchange of e-mails would suffice. It is submitted that the parties were *ad-idem* that there was a concluded contract in place, as can be seen by the respondent's own communication, which is also a matter of record. Shri Shankar has also drawn the attention of this Court to the petitioner's e-mail dated 14.09.2020, containing the counter signed contract. Thus, it is submitted that no case for any interference is made out in the award. In support of his submissions, Shri Shankar has relied upon ***Avitel Post Studioz Ltd & Ors. Vs. HSBC PI Holdings (Mauritius Ltd)*** reported as ***2024 SCC OnLine SC 345; Vijay Karia & Ors. Vs. Prysmian Cavi E Sistemi SRL & Ors.*** reported as ***(2020) 11 SCC 1; Arbaza Alimentos Ltda Vs. MAC Impex and others [Bombay High Court in Commercial Arbitration Petition (L) No.8122 of 2020 dated 05.06.2023; Aircon Beibars FZE Vs. Heligo Charters Private Limited*** reported as ***2022 SCC OnLine Bom 329; Trimex International FZE Ltd, Dubai Vs. Vedanta Aluminium Limited, India*** reported as ***(2010) 3 SCC 1; Gemini Bay Transcription Pvt Ltd Vs. Integrated Sales Service Ltd. & Anr.***

reported as ***(2022) 1 SCC 753; State of M.P. Vs. Som Datt Builder Pvt Ltd.*** reported as ***2014 SCC OnLine MP 6753; Sepco Electric Power Construction Corporation Vs. Power Mech Projects Ltd*** reported as ***2022 SCC OnLine SC 1243; Jagdish Ahuja & Anr. Vs. Shree Ahuja Properties & Realtors Pvt. Ltd.*** reported as ***2020 SCC OnLine 849; and Savita Jain Vs. Krishna Sales Rajni Malpani*** reported as ***2021 SCC OnLine Del 2548.***

23] Heard counsel for the parties and perused the record.

24] Since the matter relates to enforcement of foreign award, it would be apt at this juncture only to refer to the relevant provisions dealing with the same, provided in Part-II of the Act of 1996, ss. 44, 46, 47, 48 and 49 of the same, read as under :-

> **"44. Definition.—**In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—
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> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
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> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.
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> xxxxx
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> **46. When foreign award binding**.—Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.
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> **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 in this Chapter, "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.]

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.

49. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court."

(*Emphasis Supplied*)

25] On perusal of the aforesaid provisions of the Act of 1996, regarding enforcement of foreign award, it is found that the same is enforceable subject to the conditions as enumerated u/s. 47 are satisfied, which relates to evidence regarding the foreign award, and the enforcement may be refused as provided u/s.48. In the light of the

aforesaid legal provisions, the arguments as advanced by the counsel for the respondent can be considered in seriatim, in the following manner:-

I. Non-compliance of Section 47(1)(a) of Arbitration and Conciliation Act, 1996.

26] The contention of the respondent is that clauses (a) and (b) of Sub-section (1) of Section 47 of the Act of 1996 have not been complied with hence the award is not executable. Clause (a) refers to original award or copy of the same, duly authenticated in the manner required by law in the country in which it was made.

27] A close scrutiny of the award dated 22.03.2022, filed along with the application, would reveal that it has been issued under the seal of The Grain and Feed Trade Association, *i.e.,* GAFTA, and on perusal of the same, it is found that although it is a copy of the original award, but is also signed by *D. Lucas*, the Chairman of GAFTA, whose original signatures are also appended just on the left side of his signature in the photocopy of the award, which this court finds in consonance with Rule 9.1 of GAFTA 125, which provides that, "*All awards shall be in writing and shall be signed by the sole arbitrator or, in case of an award made by a three-man tribunal, by the chairman.",* thus, this court has no hesitation to hold that the award is duly authenticated in the country in which it is made. The petitioner has also filed on record an affidavit executed at Madrid, in Spain, of Mr. Jesus Maria Fernandez Albeniz, the Director of the petitioner, confirming the accuracy of the hard copies of the print outs of the electronic records annexed to the petition, in accordance with Section

65-B of the Act of 1872, whereas the award has been passed in London. It is also found that the information of the award was also sent by the petitioner to the respondent vide letter dated 13.06.2023. Thus, the contention of the counsel for the respondent that the aforesaid arbitration award is a copy notarized by a notary based in Mumbai, being without any substance, is hereby rejected. It is also found that the notary at Bombay had authenticated all the documents filed along with the application/petition. In such circumstances, it cannot be said that the petitioner has not filed on record the original award or a copy thereof, duly authenticated.

II. Non-compliance of Arbitration Rules, 1997.

28] So far as the non-compliance of the M.P. Arbitration Rules is concerned, it is found that in its rejoinder, the petitioner has rebutted the contentions of the respondent in the following manner:-

> "7. With reference to paragraph 6:
>
> a. It is denied that the Petition is defective as it is not signed and verified as per Rule 4 of the 1997 Rules. An affidavit in support of the Petition has been provided at pages 10 to 11 of the Petition.
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> b. The Petition already contains substantial particulars prescribed in Sub - Rule (2) of Rule 11 of Order XXI of the CPC. Without prejudice and in the alternative, the Award dated 22nd March 2022 is not yet been declared enforceable as a decree of this Hon'ble Court, thus strict compliance with Order XXI Rule 11(2) is not possible. Without prejudice and in the alternative, since the Petitioner does not have all the information required to be furnished, it has separately filed Interim Application No. 7975 of 2023 for appropriate orders directing the Respondent to disclose details of its assets which can then be attached. It is also relevant that under Rule 9(2)(b) of the 1997 Rules, this Hon'ble Court is not mechanically bound by the provisions of the CPC and this Hon'ble Court may proceed otherwise than the provisions of the CPC upon being satisfied, in the interest of justice. All the rules of

procedure are handmaids of justice.

c. The Petition is not required to comply with 'Format 05' of the 1997 Rules. Format 05 was inserted into the 1997 Rules by way of amendment on 22nd September 2023. However, the Petition was filed prior to that date i.e. *on 17th August 2023*. The said amendment does not have retrospective application. The relevant extract from the Madhya Pradesh Gazette dated 22.09.2023 is annexed hereto as **Annexure P/2**.

8. Without prejudice to the contents of the preceding paragraphs, the Petitioner states, in compliance with Rule 4(5) of the 1997 Rules that:

a. The Award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

b. The subject matter of award is capable of settlement by arbitration under the law of India;

c. The Award has been made by the arbitral tribunal provided for in the submission to and arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

d. The Award has become final in the country in which it has been made, in the sense that it will not be considered as such if it open to opposition or appeal or if it proved that any proceedings for the purpose of contesting the validity of the Award are pending."

(Emphasis Supplied)

29] In para 9, in the alternative, the petitioner has also furnished the details in the proper format as prescribed under Order XXI, Rule 11(2) of C.P.C.

30] On perusal of the aforesaid reply to the respondent's objection regarding the non-compliance of the Rules of 1997, this court finds force with submissions of the respondent and is of the considered opinion that there is no violation of the Rule of 1997, and even otherwise, the rules are of the procedure only, and infirmity, if any in the application of the format has been rectified by the petitioner in para 9 of the Rejoinder.

III. Not a concluded contract.

31] So far as the agreement between the parties is concerned, it is also filed on record as Annexure-P/2. On perusal of the same, it is found that it is also a copy of the agreement between the parties, signed by the respondent only containing the arbitration clause.

32] In the considered opinion of this Court, since the copy of the agreement which is signed by the respondent only, has already been certified in the original petition itself, the filing of the counter signed copy of the same along with the rejoinder, supported by a certificate under Section 65B of the Evidence Act, would certainly not make the case of the petitioner any less effective, and it cannot be said that the aforesaid copy of the agreement is not authenticated.

33] The respondent has also tried to bank upon the averments made in the rejoinder by the petitioner, in which a copy of the agreement concluded over the electronic mode is filed along with the supporting affidavit under Section 65B of the Act of 1872, to submit that the agreement has not been signed by the respondent, but, in the considered opinion of this court, when the agreement itself was entered into between the parties via electronic mode, i.e., by e-mail, and a signed copy of which was initially sent by the respondent via its email dated 12.09.2020, which is filed as annexure-P/2, and subsequently, the petitioner via its email dated 14.09.2020, sent a signed copy of the same agreement (which is filed as Annexure P/4 with the rejoinder) to the respondent, which is also duly authenticated by the authorized signatory of the petitioner, it cannot be said that these authenticated copies of the agreement would not form a valid

and original agreement.

34] This Court is also of the considered opinion that in this era of artificial intelligence and digitalization of most of the business transactions, an agreement between the parties entered into through emails, evidencing transaction between them cannot be left out and excluded from the definition of evidence, specially, when a certificate under Section 65B of the Evidence Act has also been filed.

IV. No arbitration clause in agreement-express or implied.

35] The arbitration clause is referred to in the 'Other Conditions' of the agreement, which reads as under:-

> "**OTHER CONDITIONS**
>
> FUMIGATION IS NOT ALLOWED BEFORE/ DURING/ AFTER LOADING OF THE VESSEL.
> IN NO CONTRADICTION TO THE ABOVE AS PER GAFTA 89. ARBITRATION AS PER GAFTA 125.
> THE OWNERSHIP OF THE GOODS UNDER THIS CONTRACT IS FOR THE SELLER UNTIL THE FULL PAYMENT OF THEM."
>
> ***(Emphasis supplied)***

36] The contention of the respondent is that the aforesaid clause does not form an arbitration agreement and as it refers to GAFTA 125, whereas GAFTA 125 is the arbitration Rules No.125. Thus, it has been contended that a reference to the arbitration rules would not be considered as arbitration agreement between the parties.

37] On due consideration, this Court finds that so far as the arbitration clause is concerned, it may not be happily worded, however, it does refer to the arbitration, and if the arbitration is to be carried out in accordance with the GAFTA Rules, in that case, it has to be held that there was an arbitration agreement between the parties by way of reference to GAFTA Rules, and mere reference to the Rules of

arbitration would not invalidate the arbitration clause and on the contrary it would authenticate the arbitration clause as has also been held by the Supreme Court in the case of ***M. R. Engineers and Contractors (P) Ltd. (supra)*** on which reliance has also been placed by the respondent only. Paras 22 to 24 of the same read as under:-

> **"22.** A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract.The exception to the requirement of special reference is where the referred document is not another contract, but a Standard form of terms and conditions of a Trade Associations or Regulatory institutions which publish or circulate such standard terms & conditions for the benefit of the members or others who want to adopt the same.
>
> **23.** The standard forms of terms and conditions of Trade Associations and Regulatory Institutions are crafted and chiselled by experience gained from trade practices and conventions, frequent areas of conflicts and differences, and dispute resolutions in the particular trade. They are also well known in trade circles and parties using such formats are usually well versed with the contents thereof including the arbitration clause therein. Therefore, even a general reference to such standard terms, without special reference to the arbitration clause therein, is sufficient to incorporate the arbitration clause into the contract.
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> **24**. The scope and intent of Section 7(5) of the Act may therefore be summarized thus:
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> > *"(i)* An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled :
> >
> > (1) The contract should contain a clear reference to the documents containing arbitration clause,
> >
> > (2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,
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> > (3) The arbitration clause should be appropriate, that is capable of application in

> respect of disputes under the contract and should not be repugnant to any term of the contract.
>
> *(ii)* When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.
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> *(iii)* Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.
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> *(iv)* Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.
>
> *(v)* Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties."
>
> ***(Emphasis Supplied)***

38] The arbitration agreement existed between the parties, which is also apparent from the communication dated 12.05.2020, filed an Annexure-P/4 with the application, in which the respondents have also

admitted the same in the following manner, *".....We understand route to litigation and arbitration through GAFTA is open for both of us*", and in the respondent's e-mail, it is also mentioned that, "*we cannot afford the litigation, its fee or to appoint a arbitrator".*

39] The respondent has also relied upon Sections 5 and 52 of the Arbitration Act, 1996 as is applicable in U.K., to submit that neither the agreement nor the award was in accordance with law. On perusal of the Arbitration Act of 1996, this Court finds that s.4 of the same which refers to mandatory and non-mandatory provisions of this Arbitration Act are provided is also relevant, thus it would be apt to refer to the aforesaid relevant sections 4, 5 and 52, which read as under:-

> **"4 Mandatory and non-mandatory provisions**.
> (1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.
>
> (2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.
>
> (3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.
>
> (4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.
>
> (5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.
>
> For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.

5 Agreements to be in writing.

(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing—

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

xxxxx

52 Form of award.

(1) The parties are free to agree on the form of an award.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.

(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

(5) The award shall state the seat of the arbitration and the date when the award is made."

(Emphasis Supplied)

40] On perusal of the aforesaid provisions of law as applicable in the U.K. also, this court is of the considered opinion that the certified copies of the agreement as also that of the award meet the requirements of Section 47 of the Act of 1996 have been complied with for the reasons as assigned hereinabove. It is also found that in the Schedule 1 as provided u/s.4, s.52 is not enumerated as one of the sections which is mandatory, and since s.4(3) also provides that the parties may agree to the application of institutional rules or may also agree on the means by which a matter may be decided, since the parties have already agreed that GAFTA rules would be applicable, there is no escaping from the same.

V. No proper notice of arbitration proceedings.

41] So far as the contention of the respondent that there was no proper notice of arbitration proceedings and even if it is assumed that the notices were served to the respondent, they were served through some unknown e-mail addresses and hence, escaped the attention of the respondent are a concerned, it is found that the aforesaid contention itself is contradictory, as on one hand the respondent's claim is that he is not served any notice of arbitration by Gafta and on the other hand, the respondent's contention is that he has been sent e-mails from multiple unknown e-mail addresses which escaped the attention of the respondent. On perusal of the documents filed on record by the parties, it is found that the petitioner's notice of arbitration was duly served to the respondent, however, he has chosen not to respond to the same. Petitioner's claim to the arbitrator, was

also sent via e-mail dated 01.12.2021 to the respondent, which is also filed along with the rejoinder as Annexure-P/5, however, vide its e-mail dated 13.12.2021, the respondent himself has expressed his inability to participate in the arbitration proceedings, and has also requested the petitioner to comply with the agreement and release the balance payment. In such circumstances, this Court is of the considered opinion that the respondent's claim that he was not served proper notice of arbitration, deserves to be rejected.

42] So far as the case of ***Centrotrade Minerals and Metals Inc. (Supra)*** is concerned, which has been cited in support of the respondent's submission that the respondent was not given proper opportunity of hearing, counsel has referred to para 21 of the same in which the Supreme Court has relied upon its earlier decision in the case of ***Vijay Karia Vs. Prysmian Cavi E Sistemi SRL,*** reported as ***(2020) 11 SCC 1***. Para 21 of ***Centrotrade Minerals and Metals Inc. (Supra)*** reads as under:-

> **"21.** The Court finally summed up its conclusion on this aspect of the case, as follows : (*Vijay Karia case* [*Vijay Karia* v. *Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1 : (2021) 1 SCC (Civ) 389] , SCC p. 84, para 81)
>
> "*81 [**Ed.** : Para 81 corrected vide Official Corrigendum No. F.3/Ed.B.J./10/2020 dated 18-3-2020.]* . Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression "was otherwise unable to present his case" occurring in Section 48(1)(*b*) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this expression would be a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Read along with the first part of Section 48(1)(*b*), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in *Ssangyong* [*Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131 : (2020) 2

> SCC (Civ) 213] . A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award unenforceable on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48."
>
> ***(Emphasis Supplied)***

43] A perusal of the aforesaid finding recorded by the Supreme Court in the case of ***Vijay Karia (Supra)***, it is found that the Supreme Court was dealing with a matter in which no opportunity of hearing was given to the respondent and thus, it was held that the foreign award is unenforceable, whereas, in the present case, although shri Agrawal, learned sr. counsel for the respondent has submitted that no opportunity was afforded to the respondent, but in the considered opinion of this court, no such situation has existed, as apparently, the respondent was given reasonable opportunity to contest the matter, however, he has chosen not to contest the same.

VI. Award contrary to public policy of India.

44] Lastly, so far as the contention of the respondent that the award is against public policy of India, as damages worked out by the Tribunal are based on guess work, in the absence of any proper evidence to show actual damages suffered by the petitioner, is concerned, Shri Agrawal has drawn the attention of this Court to

Section 74 of the Indian Contract Act, 1872, and has also relied upon the decisions rendered by the Supreme Court in the case of flags 6,7 and 8and t, it is submitted that the findings regarding damages is based on guess work only, which is against the public policy of India. In the case of ***National Agricultural Cooperative Marketing Federation of India (Supra)*** it is held as under:-

> **"68.** In *Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI* [*Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the Court concerning the public policy held : (SCC pp. 169-71, 174 & 176, paras 34, 37, 41, 42 & 44-48)
>
> "*34.* What is clear, therefore, is that the expression 'public policy of India', whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to the "*Renusagar* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] " understanding of this expression. This would necessarily mean that *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post-amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(*a*)(*iii*) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .
>
> ***
>
> *37.* Insofar as domestic awards made in India are concerned, an additional ground is now available under

sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

***

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

42. *Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply*, it is necessary to advert to the grounds contained in Sections 34(2)(*a*)(*iii*) and (*iv*) as applicable to the facts of the present case.

***

44. In *Renusagar* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] , this Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 ("the Foreign Awards Act"). The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"), which is almost in the same terms as Sections 34 and 48 of the 1996 Act, *the said judgment is of*

great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same.

45. After referring to the New York Convention, this Court delineated the scope of enquiry of grounds under Sections 34/48 (equivalent to the grounds under Section 7 of the Foreign Awards Act, which was considered by the Court), and held : (*Renusagar case* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] , SCC pp. 671-72 & 681-82, paras 34-37 & 65-66)

> "*34*. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (*a*) to (*e*) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition, and enforcement of the award would be refused if the Court was satisfied in respect of matters mentioned in clauses (*a*), (*b*) and (*c*). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (*See* Dicey & Morris, *The Conflict of Laws*, 11th Edn., Vol. 1, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (*a*) to (*e*) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (*a*) and (*b*) of clause (2) of Article V. None of the grounds set out in sub-clauses (*a*) to (*e*) of clause (1) and sub-clauses (*a*) and (*b*) of clause (2) of Article V postulates a challenge to the award on merits.

35. Albert Jan van den Berg in his treatise *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, has expressed the view:

> 'It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention, the task of the enforcement judge is a limited one. *The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country*. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration.' (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

> 'The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted.' (Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2nd Edn., p. 461.)

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, *the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits*.

***

65. *This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly*. In this context, it would also be of relevance to mention that under Article I(*e*) of the Geneva Convention Act, 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act, 1837 (sic 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(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 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 I(*c*) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act, 1937. *This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India.* Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(*b*)(*ii*) of

> the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria, it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to *(i) fundamental policy of Indian law : or (ii) the interests of India : or (iii) justice or morality*.

46. This judgment was cited with approval in *Redfern and Hunter on International Arbitration* by Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter (Oxford University Press, 5th Edn., 2009) ("Redfern and Hunter") as follows:

> '11.56. First, the New York Convention does not permit any review on the merits of an award to which the Convention applies. [This statement, which was made in an earlier edition of this book, has since been cited with approval by the Supreme Court of India in *Renusagar Power Co. Ltd.* v. *General Electric Co.* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] The Court added that in its opinion 'the scope of enquiry before the court in which the award is sought to be enforced is limited (to the grounds mentioned in the Act) and does not enable a party to the said proceedings to impeach the award on merits'.] Nor does the Model Law.'

47. The same theme is echoed in standard textbooks on international arbitration. Thus, in *International Commercial Arbitration* by Gary B. Born (Wolters Kluwer, 2nd Edn., 2014) ("Gary Born"), the learned author deals with this aspect of the matter as follows:

> '**[12] No Judicial Review of Merits of Foreign or Non-Domestic Awards in Recognition Actions**
>
> It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions contained in foreign or non-domestic arbitral awards in recognition proceedings. Virtually every authority acknowledges this rule and virtually nobody suggests that this principle should be abandoned. When national courts do review the merits of awards, they labour to categorise their action as an application of public policy, excess of authority, or some other Article V exception, rather than purporting to justify a review of the merits.

[a] No Judicial Review of Awards Under New York and Inter-American Conventions

Neither the New York Convention nor the Inter-American Convention contains any exception permitting non-enforcement of an award simply because the arbitrators got their decision on the substance of the parties' dispute wrong, or even badly wrong. This is reasonably clear from the language of the Convention, which makes no reference to the possibility of a review of the merits in Article V's exhaustive list of the exclusive grounds for denying recognition of foreign and non-domestic awards. There is also no hint in the New York Convention's drafting history of any authority to reconsider the merits of an arbitral award in recognition proceedings.

Likewise, the prohibition against review of the merits of the arbitrator's decision is one of the most fundamental pillars of national court authority interpreting the Convention. This prohibition has repeatedly and uniformly been affirmed by national courts, in both common law and civil law jurisdictions. Simply put:'*the court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact*' (*Karaha Bodas Co. LLC* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [*Karaha Bodas Co. LLC* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274 (5th Cir 2004)] , F 3d at pp. 287-88). Thus, in the words of the Luxembourg Supreme Court (Judgment of 24-11-1993 [(1996) 21 YB Comm Arb 617 (Luxembourg Cour Supérieure de Justice)] , YB Comm Arb at p. 623):

> 'The New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits, with as the only reservation, the respect of international public policy. Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal's award.'

Or, as a Brazilian recognition decision under the Convention held (Judgment of 19-8-2009, *Atecs Mannesmann GmbH* v. *Rodrimar S/A Transportes Equipamentos Industriais e Armazes Gerais* [*Atecs Mannesmann GmbH* v. *Rodrimar S/A Transportes Equipamentos Industriais e Armazes Gerais*, (2010) 35

YB Comm Arb 330 (Brazilian Tribunal de Justiça)] , YB Comm Arb at p. 331):

> 'These questions pertain to the merits of the arbitral award that, according to precedents from the Federal Supreme Court and of this Superior Court of Justice, cannot be reviewed by this Court since recognition and enforcement of a foreign award is limited to an analysis of the formal requirements of the award.'
>
> Commentators have uniformly adopted the same view of the Convention [*see*, for e.g., K.-H. Bockstiegel, S. Kroll & P. Nacimiento, Arbitration in Germany 452 (2007)].' (at pp. 3707-10)

48. Likewise, the *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (2016 Ed.) ["UNCITRAL Guide on the New York Convention"] also states:

> '9. The grounds for refusal Under Article V do not include an erroneous decision in law or in fact by the arbitral tribunal. A court seized with an application for recognition and enforcement under the Convention may not review the merits of the arbitral tribunal's decision. This principle is unanimously confirmed in the case law and commentary on the New York Convention.'"

(emphasis in original)

69. It is apparent from the abovementioned decisions as to enforceability of foreign awards, Clause 14 of the FOSFA Agreement and as per the law applicable in India, no export could have taken place without the permission of the Government, and NAFED was unable to supply, as it did not have any permission in the season 1980-1981 to effect the supply, it required the permission of the Government. The matter is such which pertains to the fundamental policy of India and parties were aware of it, and contracted that in such an exigency as provided in Clause 14, the Agreement shall be cancelled for the supply which could not be made. It became void under Section 32 of the Contract Act on happening of contingency. Thus, it was not open because of the clear terms of the Arbitration Agreement to saddle the liability upon NAFED to pay damages as the contract became void. There was no permission to export commodity of the previous year in the next season, and then the Government declined permission to NAFED to supply. Thus, it would be against the fundamental public policy of India to enforce such an

award, any supply made then would contravene the public policy of India relating to export for which permission of the Government of India was necessary.

70. In our considered opinion, the award could not be said to be enforceable, given the provisions contained in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act. As per the test laid down in *Renusagar* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] , its enforcement would be against the fundamental policy of Indian Law and the basic concept of justice. Thus, we hold that award is unenforceable, and the High Court erred in law in holding otherwise in a perfunctory manner."

(Emphasis Supplied)

45] In the backdrop of the said decision, this Court finds that so far as the finding of the Arbitration Tribunal **GAFTA**, regarding the damages suffered by the petitioner is concerned, the relevant paras of the same read as under:-

"7.7 Having reviewed the price evidence offered by Buyers, **WE FIND** as follows with reference to each date of default:

21 January: no relevant evidence was offered of the market price at or around this date: the purchase from Narmada Foods over four weeks later did not in our judgment constitute good evidence of the market price on 21 January. However, it is evident to us that the market had risen compared to the Contract price and that Buyers delayed buying in against Sellers for this instalment in the hope that performance would eventually be forthcoming - a hope which was evidently dashed when on 16 February Sellers notified Buyers that their certification had been withdrawn. Absent specific market evidence for 21 January, exercising our judgment we estimate the value of the goods on that date at USD713/MT CFR Gijon, i.e. USD 50/MT above the Contract price.

19 February: we accept Buyers' evidence of their purchase of 19 February from Narmada Foods at USD705 FOB and of freight rates of USD125, making a CFR market price of USD830.

19 March: the purchase from Midas Overseas at USD737 FOB was concluded 10 days earlier than the default date, whereas the quotations offered by Marubeni

India Private Limited and Abhay Oil Industries at USD925 FOB and USD980 FOB were 3 days later. In general, we prefer evidence of actual transactions to quotations or offers which did not result in deals. We recognise that the market was rising steeply over this period but also note that on 29 March Buyers bought from Narmada Foods at USD850 FOB and, doing the best we can with the limited evidence before us, we estimate the FOB value of the goods on 19 March at USD840. We accept Buyers' evidence of freight rates of USD135, making a CFR market price of USD975.

21 April: the only evidence we have for prices around 21 April was Sellers' settlement offer in paragraph 5) of their email of 28 April based, before discount, on a price of USD1,150 FOB. Such a settlement offer in such circumstances is of only limited value in assessing the market price. Again, doing the best we can with the limited evidence before us, we estimate the FOB value of the goods on 21 April at USD980. We accept Buyers' evidence of freight rates of USD150, making a CFR market price of USD1, 130.

20 May: the only evidence we have for prices around 20 May are the quotations of Omshree Agrotech 9 days earlier and 5 days later at USD1,405 CIF and USD1,332 CIF respectively. Once more, doing the best we can with the limited evidence before us, we estimate the CIF value of the goods on 20 May at USD1,332.

21 June: the only evidence near to the default date we have for prices around 21 June are the quotations of Tejawat 17 and 14 days earlier at USD1,120 and USD1,135 FOB respectively. Once more, doing the best we can with the limited evidence before us, we estimate the FOB value of the goods on 21 June at USD1, 120, being the price contended for by Buyers. We accept Buyers' evidence of freight rates of USD160, making a CFR market price of USD1,280.

xxxxx

7.9 **WE ACCORDINGLY FIND** that the difference between the Contract price and the estimated value of the goods on the dates of default amounted to the above- stated total of USD1,369,200. Against this sum, Buyers conceded a credit of USD76.810.14 for the reasons set out in paragraphs 5.19 - 5.23 above, so that the damages payable are reduced to USD1,292,389.86.

7.10 We should add that we debated whether the said credit of USD76,810.14 should indeed be deducted. As we have

> noted in paragraphs 5.19-5.22, this sum represented the net amount which Buyers conceded that they owed Sellers in respect of other sales contracts. We have no jurisdiction in respect of those other sales contracts and therefore have no power to resolve any disputes arising thereunder. Accordingly, had evidence of such debt owing pursuant to such other sales contracts been placed before us by Sellers but had not been conceded by Buyers, we could not have taken it into consideration. However, the present circumstances are different: Sellers have elected not to participate in this arbitration and, in particular, have not sought to claim the said debt. Instead, it is Buyers who have voluntarily conceded that the sum in question should be deducted from the damages claimed under the Contract. A claimant is always at liberty voluntarily to claim a sum lesser than his legal or contractual entitlement and it is no part of a tribunal's duty to award more than is claimed. Accordingly, **WE HAVE CONCLUDED AND FIND** that damages should be reduced as we have found in the preceding paragraph."

46] On perusal of the aforesaid decisions of the Supreme Court in the case of ***National Agricultural Cooperative Marketing Federation of India (Supra)***, and in the light of the finding recorded by the GAFTA, which appears to be a reasonable approach by the GAFTA, it is found that the case of ***National Agricultural Co-operative Marketing Federation of India (Supra)*** relates to Sections 32 and 56 of the Indian Contract Act, 1872. Section 32 provides for enforcement of contracts contingent on an event happening, whereas Section 56 refers to agreement to do impossible act. Both the aforesaid sections are not applicable in the present case where, even according to the respondent, Section 74 of the Contract Act would be applicable, which provides for compensation for breach of contract where penalty stipulated for. In the considered opinion of this court, any infraction of Section 74 of the Contract Act would not touch upon the contours of the fundamental policy of India.

47] Similarly, so far as the case of ***Kailashnath Associates (Supra)*** is concerned, para 35 of the same reads as under:-

> **"35.** Similarly, in Maula Bux v. Union of India (UOI), 1970 (1) SCR 928, it was held:
>
> "Forfeiture of earnest money under a contract for sale of property-movable or immovable-if the amount is reasonable, does not fall within Section 74. That has been decided in several cases :Kunwar Chiranjit Singh v. Har Swarup, A.I.R.1926 P.C.1; Roshan Lal v. The Delhi Cloth and General Mills Company Ltd., Delhi, I.L.R. All.166; Muhammad Habibullah v. Muhammad Shafi, I.L.R. All. 324; Bishan Chand v. Radha Kishan Das, I.D. 19 All. 49. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.
>
> Counsel for the Union, however, urged that in the present case Rs. 10,000/- in respect of the potato contract and Rs. 8,500 in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act), "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation". <u>It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where</u>

> the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.
>
> In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made."
>
> **(*Emphasis Supplied*)**

48] It is apparent from the aforesaid decision that the Supreme Court has clearly held that where the Court is unable to assess the compensation, the sum named by the parties, if it be regarded as a genuine pre-estimate may be taken into consideration as a measure of reasonable compensation, but not if the sum named is in the nature of penalty. Where loss in terms of money can be determined, the party claiming the compensation must prove the loss suffered by him.

49] If the aforesaid findings as quoted above in the case of ***Kailashnath Associates (Supra)***, is considered on the point of damages by GAFTA, this Court finds that the Arbitral Tribunal GAFTA has taken a reasonable approach in awarding the damages to the petitioner, and has admittedly not awarded the full sum claimed by the petitioner which is also apparent from para 7.10. Apart from that, the petitioner has also given voluntarily, credit to the respondent for sums due under different contract even though the respondent did not take part in the arbitration proceedings.

50] On the other hand, Shri Shankar, learned counsel for the petitioner has relied upon the decision rendered by the Supreme Court in the case of ***Gemini Bay Transcription (Supra)***, para 77, 78 and 82, of the same read as under:-

> **"77.** The arbitrator correctly held that as nothing was forthcoming from any of the appellants, he would have to make a best judgment assessment for damages. In making that assessment, he took into account the commission that was being earned by GBT from the two clients of DMC and arrived at a figure of 100,000 USD per month and then found, on a reasonable estimate, that they would continue to be clients for a period of four years, as a result of which the figure of 6,948,100 USD was reached.
>
> **78.** That such "guesstimates" are not a stranger to the law of damages in the US and other common law tradition nations has been established very early on in a judgment of Asutosh Mookerjee, J. reported as *Frederick Thomas Kingsley* v. *Secy. of State for India* [*Frederick Thomas Kingsley* v. *Secy. of State for India*, AIR 1923 Cal 49] . In this judgment, a learned Division Bench of the Calcutta High Court put it thus:
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> > "It may be conceded that though every breach of duty arising out of a contract gives rise to an action for damages, without proof of actual damage, *Marzetti* v. *Williams* [*Marzetti* v. *Williams*, (1830) 1 B & Ad 415 : 109 ER 842 : 35 RR 329] , *Embrey* v. *Owen* [*Embrey* v. *Owen*, (1851) 6 Ex 353 : 155 ER 579 : 86 RR 331] , the amount of damages recoverable is, as general rule, governed by the extent of the actual damage sustained in the consequence of the defendant's act, *Hiort* v. *London & North West Railway Co.* [*Hiort* v. *London & North West Railway Co.*, (1879) 4 Exch Div 188] In cases admitting proof of such damage, the amount must be established with reasonable certainty, *Commerce, In re* [*Commerce, In re*, (1850) 3 W Rob 286 : 166 ER 969] . But this does not mean that absolute certainty is required, nor in all cases, is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. As Harlan, J. observed in delivering the judgment of the Supreme Court of the United States in *Hetzel* v. *Baltimore & O.P. Co.* [*Hetzel* v. *Baltimore & O.P. Co.*, 1898 SCC OnLine

> US SC 12 : 42 L Ed 648 : 169 US 26 (1898)] , US at p. 38 certainty to reasonable extent is necessary, and the meaning of that language is that the loss of damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it is most likely to follow from the breach of the contract and was a probable and direct result thereof. To the same effect is the decision in *Morris* v. *United States* [*Morris* v. *United States*, 1899 SCC OnLine US SC 105 : 43 L Ed 946 : 174 US 196 (1899)] that where absolute certainty is impossible, judgment of fair men as to damages directly resulting governs."
>
> (at pp. 50, 51)
>
> xxxxx
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> **82.** In any case, the damages so awarded in the facts of this case cannot even remotely be said to shock the conscience of this Court so as to clutch at "the basic notion of justice" ground contained in Section 48(2) Explanation 1(*iii*)."
>
> **(*Emphasis Supplied)***

51] In such circumstances, to reiterate the observations made by the Supreme Court in the case of ***Gemini Bay Transcriptions (Supra)***, the damages awarded to the petitioner in the facts and circumstances of the case cannot even remotely be said to shock the conscience of this Court so as to crush at "*the basic notion of justice*" ground contained in Section 48(2) Explanation 1(iii).

52] In such facts and circumstances of the case, this Court is of the considered opinion that the petitioner has made out a case for enforcement of the foreign arbitral award and the objections raised by the respondent are hereby, rejected.

53] List the matter on 15.07.2024 for further orders.

(SUBODH ABHYANKAR)
JUDGE

Bahar