REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3185 OF 2020
(Arising out of SLP (Civil) No.7172 of 2020)

GOVERNMENT OF INDIA …APPELLANT

Versus

1. VEDANTA LIMITED
   (Formerly Cairn India Ltd.)
2. RAVVA OIL (SINGAPORE) PTE. LTD.
3. VIDEOCON INDUSTRIES LIMITED … RESPONDENTS

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INDU MALHOTRA, J.

Leave granted.

The present Civil Appeal has been filed by the Government of India to challenge the Judgment and Order dated 19 February 2020 passed by the Delhi High Court,

wherein the application under Section 48 of the Arbitration and Conciliation Act, 1996 being I.A. No. 3558 of 2015 filed by the Government of India has been dismissed; the Application filed under Section 47 read with 49 being O.M.P. (EFA) (Comm) 15 of 2016 for the enforcement of the foreign award by the Respondents, and the I.A. No. 20149 of 2014 for condonation of delay in filing the execution petition by the Respondents were allowed.

I. Background Facts

In 1993, the Government of India was desirous of exploring and developing the petroleum resources in the Ravva Gas and Oil Fields (lying 10 to 15 kms offshore in the Bay of Bengal), for which a global competitive tender was floated to invite bids. Pursuant thereto, Videocon International Ltd. and Command Petroleum Holdings NV, the predecessors of the Respondents submitted their bid to develop the Ravva Field along with other bidders. The contract for this petroleum development was to be given on a production sharing basis through a Production Sharing Contract.

On 28.10.1994, the Production Sharing Contract (the "**PSC**") was executed between the Government of India and the following parties to commercially explore and develop the Ravva Oil and Gas Field:

(a) Command Petroleum (India) Pvt. Ltd, an Australian Company established under the laws of the State of New South Wales, which has since been renamed as Cairn Energy India Pty. Ltd;
(b) Ravva Oil (Singapore) Pty. Ltd, a company established under the laws of Singapore;
(c) Videocon Industries Limited, a company established under the laws of India; and
(d) Oil and Natural Gas Corporation Ltd (ONGC).

The PSC was for a period of 25 years, and the development and exploration of the Ravva Field was to be conducted in terms of the 'Ravva Development Plan'. As per Articles 11.1 and 11.2 of the PSC, Addendums 1 and 2 to the Rvva Development Plan were annexed to the PSC as Appendix F. The Respondents were required to carry out Petroleum Operations in the Ravva Field as per the said Plan. The Ravva Development Plan *inter alia* contemplated the drilling of 19 oil and 2 gas wells in the Ravva Field.

II. Relevant Terms of the Production Sharing Contract

The dispute between the Parties emanates from Article 15 of the PSC which *inter alia* provides for the recoverability of Base Development Costs ("**BDC**") incurred by the Respondents-Claimants for the development of the Ravva Field. The relevant clauses of the PSC are extracted hereinbelow :

(i) Article 11.2 of the PSC reads as :

"**11.2 <u>Ravva Development Plan</u>**

Appendix F to this contract shall constitute the approved development plan for the Existing Discoveries (hereinafter to as "the Ravva Development Plan"). The Ravva Development Plan shall be deemed to have been approved by the Managing Committee."

(ii) The Proposed Development Plan for the Ravva Field (including Addendums 1 and 2), which was accepted by the Parties as the approved Ravva Development Plan, states as follows :

Ravva Field Development Drilling
Estimated Average Well Cost (in US dollars)

<u>TOTAL COST OF AVERAGE WELL $ 2,430,000</u>

Attachment 10
Ravva Field Development Capital Costs

ITEM	***COST US $ million***
Development of R10 and R17 Blocks Oil and Associated Gas Reserves	
<u>Drill and Complete 19 Wells</u>	
SPM and Tanker Loading Line	*201.1*
Four Platforms	
Production/Injection Pipelines to/from Shore	
Infield Flowlines	
Onshore Oil Process Facilities	
Onshore Oil Storage	
Gas Treatment and Compression	
Water Injection	
Gas Lift Pipeline and Compression	
Project Management etc.	
Development of R1,7,9 Non-Associated Gas Reserves	
<u>Drill and Complete 2 Wells</u>	
One Monopod Tower	*16.9*

Production Pipeline to Shore
Onshore Gas Treatment Plan

TOTAL *218.0*

***Note**: This would be the project, as further defined in the Development Plan, which would be the subject of the cost variation condition. The cost stated includes Import Duty but does not include expenditures related to exploration and appraisal or field abandonment. The difference between the US $218 million total and the estimated US $ 236 million total project capital cost quoted in Section 1 of the accompanying letter is the US $ 18 million abandonment cost."*

(emphasis supplied)

(iii) Article 15.5 of the PSC provides for the procedure of recovery of Development Costs incurred by the Respondents in the exploration, discovery and production of oil and gas from the Ravva Oil and Gas Field. Article 15.5 is extracted hereinbelow:

"Article 15

RECOVERY OF COSTS FOR OIL AND GAS

15.1

15.2

15.3

15.4

15.5 Recovery of Development Costs and 5% Cost Cap

(a) Development Costs incurred by the Contractor in the Contract Area shall be aggregated, and the Contractor shall be entitled to recover out of Cost Petroleum the aggregate of such Development Costs at the rate of one hundred percent (100%) per annum.

(b) Notwithstanding the provisions of Article 15.5 (a) and subject to the remaining provisions of this Article 15.5, the Contractor shall not, for the purposes only of determining the volume of Petroleum to which Contractor shall be entitled under Article 15.1 as Cost Petroleum, claim as Contract Costs Contractor's Development Costs incurred after the Effective Date in connection with Development operations under the Ravva Development Plan which exceed Contractor's Base Development Costs (as hereinafter defined) by more than five percent (5%).

(c) For the purpose of this Article 15.5 "Contractor's Base Development Costs" means costs incurred after the Effective Date relating to the construction and/or establishment of such facilities as are necessary to produce, process, store and transport Petroleum from within the Existing Discoveries, in order to enable Crude Oil production of 35,000 BOPD in accordance with the Ravva Development Plan plus such costs as are allowed pursuant to Section 3.3

of the Accounting Procedure. Such costs shall include, but not be limited to costs incurred in relation to the following facilities and matters in connection therewith, such as:

(i) Offshore tanker loading facilities for tankers up to 120,000 DWT;

(ii) Wellhead platforms capable of supporting up to total of 24 development wells;

(iii) Follow lines necessary to transport well fluids ashore for processing;

(iv) Process facilities onshore for processing up to 40,000 Barrels of fluid per day;

(v) Storage facilities with a nominal capacity of 500,000 Barrels;

(vi) Facilities to allow injection of water into the reservoirs for the purposes of reservoir pressure maintenance;

(vii) Construction of an onshore supply base to support production operations;

(viii) Environmental studies;

(ix) Geophysical, geological and petroleum engineering studies;

(x) The drilling of nineteen (19) Development Wells and two (2) Gas Production Wells;

(xi) Facilities for developing, transporting and processing NANG;

(xii) Project insurance; and

(xiii) Project Management.

The Parties agree that for the purposes of this Article 15.5 the Contractor's Base Development Costs shall be the sum of US $188.98 million (as indicated in the August 1993 Addendum to the Ravva Development Plan.)

….

(i) Having regard, inter alia, to the matters referred to in Article 15.5(d), the Parties agree as follows:

(i) Costs relating to Site Restoration and exploration and appraisal drilling shall not be subject to the limit on Contractor's Development Costs as provided in Article 15.5(b);

(ii) the costs of developing the reserves and/or potential reserves and/or Satellite Fields referred to in Article 15.5(d) (i) shall not be subject to the limit on Contractor's Development Costs as provided in Article 15.5(b) notwithstanding that the development of such reserves and/or

potential reserves and/or Satellite Fields may include shared flow lines, injection lines, gas-lift lines and other facilities with those constructed as part of the Ravva Development Plan;

(iii) In the event that the Contractor's Base Development Costs are exceeded by more than five per cent (5%) as a result of:

(aa) delays in carrying out the Development Operations referred to in Article 15.5(d) (iii) due to delay in obtaining necessary approval;

(bb) material changes to the Ravva Development Plan necessitated by Contractor's review of data provided to the Companies by the Government and/or ONGC after the Effective Date pursuant to Article 8.1) (iv), where the Companies are able to establish that had such data been available prior to the Effective Date in the Companies, acting reasonably, would have included such changes in the Ravva Development Plan;

(cc) a material change to the international market conditions referred to in Article 15.5(d)(v);

(dd) the range of physical reservoir characteristics being materially different from the ranges for such characteristics on which the Ravva Development Plan has been based;

(ee) a variation to the Ravva Development Plan approved by the Management Committee; or

(ff) an event of force majeure as provided in Article 32;

Then the Management Committee shall, at the request of the operator, in a meeting convened under Article 6.7, promptly consider what, if any, increase should be made to the Contractor's base Development Costs to fairly reflect the circumstances in the question PROVIDED THAT in the case of delays referred to in Article 15.5 (e) (ii) (aa) the Management Committee shall not be obliged to consider any increase where such delay has been caused by the Contractor's failure to act in a diligent manner.

(e) In the event that:

(i) There is any dispute between the parties, whether or to what extent, a circumstance referred to in Article 15.5(e) (iii) has arisen, or resulted in the Contractor's Base Development Costs being exceeded by more than five percent (5%); or

(ii) The Management Committee is unable to agree whether an increase should be made to the Contractor's Base Development Costs, or is unable to agree on the amount of any such increase; then at any time after thirty (30) days from the date of the Management Committee meeting referred to in Article 15.5(e)(iii),

any Party shall be at liberty to refer the matter to a sole expert for decision in accordance with the provisions of Article 34.2."

(emphasis supplied)

(iv) Article 33 of the PSC provides the law applicable to the PSC, and reads as under:

***"Article 33: APPLICABLE LAW** AND LANGUAGE OF THE CONTRACT*

" 33.1 Indian Law to Govern

Subject to the provisions of Article 34.12 this Contract shall be governed and interpreted in accordance with the laws of India.

33.2 Law of India Not to be Contravened

Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India."

(emphasis supplied)

(v) Article 34.12 of the PSC reads as under :

"***Article 34: Sole expert, conciliation and arbitration***

"*34.1…*

34.2 References to Sole expert

Matters which, by the terms of this contract, the Parties have agreed to refer to a sole expert and any other matter, which the Parties may agree to so refer, shall be referred to an independent and impartial person of international standing with relevant qualifications and experience, appointed by agreement between the Parties. Any sole expert appointed shall be acting as an expert, and not as an arbitrator, and the decision of the sole expert on matters referred to him shall be final and binding on the Parties, and not subject to arbitration. If the Parties are unable to agree on a sole expert, the matter may be referred to arbitration.

34.3 Unresolved Disputes

Subject to the provisions of this Contract, the Parties hereby agree that any matter, unresolved dispute, difference or claim, which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies), or otherwise to an arbitral tribunal for final decision as hereinafter provided.

…

34.12 Venue and Law of Arbitration Agreement

The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia and use the English Language. In so far as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral

proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1 the arbitration agreement contained in Article 34 shall be governed by the laws of England."

(emphasis supplied)

III. Genesis of the Dispute

(i) The PSC contained a Development Plan for the "Existing Discoveries" known as the Ravva Development Plan. The scheme of the PSC was that the Claimants would incur the costs of the petroleum operations, and were entitled to recover their costs from the petroleum produced. The Government and the Claimants would receive their respective share in the ratio fixed under the PSC.

(ii) Article 15 of the PSC provided for recovery of costs for oil and gas; Article 15.1 is a general provision with respect to contract costs; Article 15.2 to 15.4 pertain to exploration costs. The disputes have arisen on the interpretation of Article 15.5 which pertains to Development Costs. Article 15.5(c) defines the Contractor's Base Development Costs, and enumerates a list of facilities and other matters required to be constructed by the Claimants. The Contractor's Base Development Costs were the costs incurred after the effective date, relating to the construction and / or establishment of such facilities as are necessary to produce, process and transport petroleum within the "Existing Discoveries" in order to enable crude oil production of 35,000 Barrels of Oil Per Day ("**BOPD**") in accordance with the Ravva Development Plan. The facilities included the construction of offshore tanker loading facilities for tankers upto 120,000 DWT; wellhead platforms capable of supporting upto a total of 24 Development Wells; process facilities; storage facilities with a nominal capacity of 500,000 Barrels; the drilling of 19 Development Wells and 2 Gas Production Wells, etc. Article 15.5(b) and (c) recorded the Agreement between the parties that the Contractor's Base Development Costs shall be the "sum of US $ 188.98 million plus five percent".

It was envisaged that the production profile of 35,000 BOPD would be reached after about two years, and the said production figure would be maintained as a plateau production for 6 years thereafter. A total field production life of 14 years was estimated.

(iii) The Contractor's Base Development Costs were agreed on certain assumptions and / or factors set out in Article 15.5(d), including the range of physical reservoir characteristics not being materially different from the ranges on which the Ravva Development Plan was based.

(iv) There are specific exclusions contained in Article 15.5(e)(i) and (ii), and sub-Article (e)(iii) which set out the circumstances in which the agreed amount of the Contractor's Base Development Costs may be increased by the Management Committee; or in default by an expert, as provided in the dispute resolution clause.

(v) During the working of the PSC, the production rate of 35,000 BOPD was achieved in 1997-1998. By 1998-1999, when the complete extent of the reserves in the Ravva Field was known, the Claimants requested the Government of India to permit an increased production of 50,000 BOPD. This increase was approved by the Management Committee on 25.03.1998, and by the Government on 01.04.1999. By 1999-2000, the increased rate of production at 50,000 BOPD was achieved. This rate of production was maintained till 2008-2009, after which it decreased to 40,000 BOPD. The oil fields were found to be enormously profitable for both parties.

(vi) The Claimants submitted that by 1999-2000, they had incurred Development Costs to the tune of about US $ 220 million to achieve the production rate of 35,000 BOPD. The Claimants sought that the 'cap' in Article 15.5 should be increased accordingly. After 1999-2000 and until 2007-2008, the Claimants incurred Development Costs totalling a further US $ 278 million, which they contended that they were entitled to recover as Cost Petroleum, since the 'cap' would no longer apply post 1999-2000.

The Claimants claimed that they were entitled to more than US $ 264.35 million with respect to Development Costs incurred in 1994-1995 until 2008-2009.

(vii) On the other hand, the Government contended that all the Development Costs claimed by the Claimants were incurred in connection with the Ravva Plan, and were subject to the 'cap' on such costs as provided by Articles 15.5(b) and (c), notwithstanding the increased quantity of production. The exceptions, were however not subject to the 'cap', and were properly recovered from Cost Petroleum under Article 15.5(a) which totalled to US $ 65.95 million.

(viii) The Government contended that the work contemplated by the Ravva Plan, as per Article 15.5(c) was not completed till 1999-2000, when only 14 wells had

been drilled; the remaining 7 wells stipulated in Article 15.5(c)(xi) were drilled by 2007-2008. Consequently, the 'cap' on the Contractor's Base Development Costs would apply to the whole of the costs incurred till 2007-2008, and not the costs incurred till 1999-2000. The Claimants were not entitled to claim more than the Cost Petroleum agreed at US $ 198.43 million plus US $ 65.95 million (towards exceptions).

(ix) The Government raised counter claims equivalent to the amounts which the Claimants had claimed as Cost Petroleum, in excess of the agreed amount of US $ 198.43 million plus US $ 65.95 million.

(x) On 18.08.2008, the disputes were referred to arbitration under Article 34 of the PSC. The Claimants nominated Mr. Andrew Berkeley as its nominee-arbitrator; the Government of India appointed Hon'ble Dr. Justice Adarsh Sein Anand (former Chief Justice of India) as its nominee-arbitrator. The nominee arbitrators appointed Rt. Hon'ble Sir Anthony Evans as the presiding arbitrator.

(xi) The tribunal passed the Award on 18.01.2011 *inter alia* holding that :

a) The Claimants constructed facilities which were necessary to produce, process, store and transport Petroleum within the Existing Discoveries to enable Crude Oil production of 35,000 BOPD. The Base Development Costs under Article 15.5(c) was to be interpreted with reference to the object of achieving a production profile of 35,000 BOPD, and the facilities contemplated to achieve that profile. The Claimants achieved the target of 35,000 BOPD by 1999-2000 by drilling of 14 wells, and incurred Development Costs of US $ 220,737,381.

Article 15.5(b) and (c) imposed a cap on the Development Costs to the agreed figure of US $ 188.98 million plus 5%. The Claimants were not entitled to recover Development Costs in excess of US $ 198.43 million in view of the cap provided under Article 15.5(c) of the PSC for the period 1994-95 to 1999-2000.

b) The Claimants had wrongly recovered US $ 22,307,381 in excess of the capped figure of US $ 198.43 million as Base Development Costs during the period 1994-95 to 1999-2000. The Government of India was entitled to be credited with the said amount in the final settlement of cost recovery accounts.

c) The PSC contained certain exceptions where the Claimants might incur Development Costs in excess of those anticipated under the PSC and Ravva Development Plan. These exceptions were covered under Article 15.5(d) and (e) for increase of the BDC cap by the Management Committee.

d) During exploration in 1998-1999, when the complete extent of the reserves in the Ravva Field came to be known, the Management Committee approved an increase in the production profile from 35,000 to 50,000 BOPD. The Respondents proceeded to develop the Ravva Field to achieve the production rate of 50,000 BOPD, and drilled 7 additional wells.

e) The tribunal accepted the evidence of the Expert Witness produced by the Claimants, which found that the enlarged reservoir known as Block A/D in the Ravva Field, showed a range of physical characteristics which were "materially different" from those on which the Ravva Development Plan was based. The range of relevant characteristics which were different from what was anticipated included the fault line on the north-west boundary, which was found not to be sealed, but to be porous; the permeability of the rocks was found to be greater leading to increased production pressures; the oil / water contact levels were found to be different. Article 15.5(e)(iii)(dd) provided that a request for an increase in the BDC cap could be made, since materially different characteristics were encountered in the drilling of the additional wells. In such circumstances, Claimants would be entitled to recover the increased amounts, notwithstanding the limit imposed by Article 15.5(b) and (c).

The tribunal held that the Respondents were entitled to recover US $ 278,871,668 from the Cost Petroleum towards Development Costs incurred by the Respondents for the period 2000-01 to 2008-09.

f) The Award declared as under :

"*We therefore declare an award, as follows :*

A. On the true construction of Article 15.5 of the Production Sharing Contract 20th October 1994 (the PSC), all Development Costs incurred by the Claimants after the date of the PSC in connection with development operations under the Ravva Development Plan are subject (as regards cost recovery from Cost Petroleum) to the cap

imposed by Article 15.5 (b) of the PSC, namely, the amount defined as Base Development Cost by Article 15.5(c) plus 5%;

B. *The figure stated in Article 15.5(c) of the PSC, namely, US $ 188.98 million, was agreed as the limit for Base Development Cost to be cost-recovered by the Claimants in connection with the Ravva Development Plan as it was agreed in August / October 1993;*

C. *The Claimants incurred Development Costs totalling $ 220,737,381 in connection therewith up to and including the contract year (31 March annually) 1999/2000;*

D. *The Claimants were not entitled to cost-recover such costs in excess of the agreed amount plus five percent (5 %) namely, $ 198.43 million;*

E. *That the Claimants incurred Development Costs in connection therewith from contract years 2000/2001 until 2008/2009 in the sum of $ 278,871,668;*

F. *That in response to the Claimant's request, the amount of Base Development Cost in respect of such period shall be increased by $ 278,871,668 pursuant to Article 15.5(e)(iii)(dd) of the PSC;*

G. *That the Claimants were entitled to recover all of such costs from Cost Petroleum, namely, $ 278,871,668 made up as follows*

accepted by the Respondent	*$ 65, 952, 604*
increase under (f) above	*$ 212, 919, 064*
Total	*$ 278, 871, 668*

H. *That the Claimants are and shall be entitled to cost-recover further Base Development Cost incurred by them in connection with the Ravva Development Plan after the contract years 2008/2009, if and to the extent that*

   a. *Such costs are incurred in further development of the reserves defined by this Award as being materially different from the physical characteristics of the reservoir on which the original (1993) Ravva Development Plan was based; and / or*

   b. *The amount of the cap under Article 15.5(b) of the PSC may be increased hereafter pursuant to Article 15.5(e)(iii) of the PSC; and / or*

   c. *As the parties may agree;*

   But not otherwise;

I. *That the Respondent is entitled to be credited with the sum of $ 22,307,381 in the final settlement of cost recovery accounts in relation*

to Development Cost incurred during contract years 1994/5 to 1999/2000 in excess of $ 198.43 million."

(xii) The Respondents-Claimants submit that *vide* their letter dated 29.04.2011 addressed to the Government of India, the revised costs recovery account statements as per the Award were enclosed, and credit of the excess Development Costs of US $22,307,381 was given to the Government of India.

IV. Challenge to the Award before the Seat Courts at Kuala Lumpur

(i) On 15.04.2011, the Government of India challenged the Award under Section 37 of the Malaysian Arbitration Act, 2005 before the Malaysian High Court, on three principal grounds:

a) the Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
b) the Award contains decisions on matters beyond the scope of the submission to arbitration; and
c) the Award is in conflict with public policy.

(ii) The High Court *vide* Order dated 30.08.2012 rejected the challenge to the Award holding that the requirements of Sections 37(1)(a)(iv) and (v) and Section 37(1)(b)(ii) of the Malaysian Act have not been met, to sustain the challenge to the award. The Award did not involve any "new difference," which would have been relevant for determination by the arbitral tribunal. The High Court found no reason which would merit intervention with the Award.

(iii) Aggrieved by the Order dated 30.08.2012, the Government of India preferred an Appeal before the Malaysian Court of Appeal, which was dismissed *vide* Order dated 27.06.2014. The Malaysian Court of Appeal held that the tribunal had given effect to the agreement between the parties under the terms of the PSC. There was no determination by the tribunal which was outside the submissions of the parties.

(iv) On 10.07.2014, a show cause notice was issued by the Government to the Respondents-Claimants, raising a demand of US $ 77 million towards the Government's share of Profit Petroleum under the PSC. The Respondents were directed to show cause as to why the said amount ought not to be directly recovered from the amounts payable by the Oil Marketing Companies.

(v) On 21.07.2014, the Government filed an Application for Leave to Appeal before the Malaysian Federal Court, which was rejected *vide* Order dated 17.05.2016.

(vi) During the pendency of the Application for Leave to Appeal before the Malaysian Federal Court, on 14.10.2014, the Respondents-Claimants filed a Petition for enforcement under Sections 47 read with 49 of the 1996 Act before the Delhi High Court, along with an application for condonation of delay.

(vii) The Government filed an Application under Section 48 resisting the enforcement of the Award before the Delhi High Court *inter alia* on the ground that the enforcement petition was filed beyond the period of limitation; the enforcement of the Award was contrary to the public policy of India, and contained decisions on matters beyond the scope of the submission to arbitration.

(viii) The Delhi High Court rejected the Petition under Section 48 *vide* the impugned judgment dated 19.02.2020, allowed the application for condonation of delay filed by the Respondents / Claimants, and directed the enforcement of the Award.

(ix) Aggrieved by the judgment of the High Court, the Government has filed the present Civil Appeal before this Court. This Court issued notice *vide* Order dated 17.06.2020, and directed the parties to maintain *status quo* till further orders.

(x) Subsequently, the Respondents filed I.A. No. 61469 of 2020 for Modification of the Order of *status quo* dated 17.06.2020, and for interim directions. The I.A. was taken up for hearing on 22.07.2020, when the Order of *status quo* was partially modified, and a direction was issued that the sales revenues be paid directly by the Oil Marketing Companies to the Respondents as per the Orders dated 28.05.2020 and 04.06.2020 passed by the Delhi High Court. The Order of *status quo* would, however, continue to operate with respect to the bank guarantees / deposits of US $ 93 million, during the pendency of the present proceedings.

V. Submissions on behalf of the Appellants

Shri. K.K. Venugopal, Learned Attorney General for India instructed by Mr. K.R. Sasiprabhu, Advocate represented the Government of India. It was submitted that the enforcement of the Award was liable to be refused on the following principal grounds:

(a) Maintainability of the Petition

(i) The Appellants raised an objection to the maintainability of the application on the ground that the petition for enforcement / execution of the foreign award under Section 47 was barred by limitation.

Since there is no specific provision in the Limitation Act for enforcement of foreign awards, it would necessarily fall under the residuary provision – Article 137.

(ii) Article 137 applies to the enforcement of foreign awards, which provides a period of 3 years from "when the right to apply accrues". It was submitted that the right to apply would accrue from the date of making the award.

In the present case, the Award was passed on 18.01.2011, and the petition for enforcement / execution was filed by the Respondents on 14.10.2014. The petition was barred by 268 days beyond the period of limitation.

(iii) The execution petition for the purposes of the Limitation Act, has to be treated as an application under the provisions of Order XXI of the CPC. The execution of a foreign award under Section 49 of the 1996 Act, is carried out under Order XXI CPC, as held in *BCCI v Kochi Cricket (P) Ltd*.[1]

(iv) Section 5 of the Limitation Act, 1963 excludes an application filed under Order XXI, CPC.

Section 5 reads as under:-

> "*5. Extension of prescribed period in certain cases. – Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."*
>
> (emphasis supplied)

Consequently, the delay in filing the application for enforcement / execution could not be condoned.

(v) Even if it is presumed that the Respondents could invoke the provisions of Section 5 of the Limitation Act, the Respondents failed to show sufficient cause for condonation of delay in filing the enforcement petition. The ground of pendency of the challenge to the award before the courts in Malaysia, could not be a sufficient ground for condonation of delay.

(vi) It was submitted that the High Court erroneously held that an application for enforcement of an arbitral award would be governed by the limitation period of 12 years under Article 136 of the Schedule to the Limitation Act, 1963.

[1] (2018) 6 SCC 287.

Article 136 deals with an application for execution of any decree or order of a civil court. This finding is contrary to the express holding in *Bank of Baroda* v *Kotak Mahindra Bank*,[2] wherein it has been held that the period of limitation of 12 years prescribed by Article 136 of the Schedule to the Limitation Act, applies only to a decree or order passed by an Indian court. A foreign award could not be treated to be a decree of a civil court.

(vii) It was submitted that the reasoning of the Delhi High Court is contrary to the provisions of the 1996 Act, since it has ignored the express words of Section 49, which provides that the court would require to be "*satisfied that the foreign award is enforceable under this Chapter*". It was submitted that this is further supported by the language of Section 46 of the Act which pre-supposes an inquiry before the award is said to achieve the status of the decree of a court. The purposive interpretation adopted by the Ld. single judge, could not be used to negate the express terms of the statute.

(viii) For the purpose of making a foreign award enforceable, the procedure available under Part II of the Act is required to be followed. A petition for enforcement and execution of such foreign award by way of a composite petition is required to be filed under Section 47. A foreign award does not become a decree until and unless it passes the muster of Sections 47 to 49, only after which it acquires the status of a decree. It was only after the Court adjudicates on the enforceability of the foreign award under Sections 47 to 48, would the foreign award be deemed to be a decree of that Court. Post such adjudication, the foreign award is declared as a deemed decree under Section 49 of the Act.

The foreign award has no legal sanctity, till an affirmative decision is obtained under Section 48 of the 1996 Act. The foreign award gets the imprimatur of the Court, before it can be enforced as a deemed decree under Section 49 of the 1996 Act.

(ix) Section 49 provides that where the Court is satisfied that the foreign award is enforceable, it shall be deemed to be a decree of the Court. The limited purpose of the deeming fiction was to apply the machinery provided under Order XXI of the CPC to enable Indian Courts to execute foreign awards. The foreign award does not transform into a decree of a civil court in India. The foreign award does not lose its

[2] 2020 SCC OnLine SC 324.

character as an arbitral award. It is only presumed to be a decree of the Court, for the purposes of execution.

(b) Challenge on grounds of Public Policy of India

The Government *inter alia* contended that the foreign Award is in conflict with the Public Policy of India as expounded in the *Renusagar*[3] judgment. This Court in *Renusagar* held that public policy of India, in the context of foreign awards would be: (a) fundamental policy of Indian law; or (b) the interests of India; or (c) justice or morality.

(i) The PSC related to the exploration and development of petroleum in its natural state in the Territorial Waters and Continental Shelf of India, which is vested in the Union of India. The Government was desirous that the petroleum resources be exploited in the overall interests of India in accordance with good international petroleum industry practices.

The PSC in recital (1) expressly states that petroleum being a natural resource is vested in the Government of India under Article 297 of the Constitution of India. Since the PSC related to the exploration of a natural resource, there was an inherent character of national and public interest in the implementation of the PSC, and the natural gas was held in the sovereign trust of the people of India. The sovereignty over the petroleum produced would continue to remain with the nation, since the natural gas is a resource which falls squarely within the purview of Article 297 of the Constitution of India.

(ii) The learned A.G. submitted on behalf of the Government of India that the Award was in conflict with the public policy of India. The tribunal had ignored various clauses of Article 15.5(c) read with the Ravva Development Plan, and particularly Attachment 10 thereto, which contained the basis of computation of the "sum" of US $ 188.98 million payable to the Respondents as Base Development Costs.

Article 15.5(c) of the PSC read with the Ravva Development Plan formed the basis of the dispute between the Parties. Article 15.5(c) provided that the Base Development Cost shall mean the costs incurred after the Effective Date relating to

[3] 1994 Supp (1) SCC 644.

the construction and / or establishment of such facilities as were necessary to produce Petroleum from within the Existing Discoveries in order to enable crude oil production of 35,000 BOPD in accordance with the Ravva Development Plan. Such costs "shall include, but not be limited to" costs incurred in relation to the list of facilities mentioned therein.

Sub-clause (xi) under Article 15.5(c) of the PSC specifically referred to the "drilling of nineteen (19) Oil Wells and two (2) Gas Production Wells". Under Article 15.5(c), the parties had expressly agreed that the Contractor's Base Development Costs shall be the "**sum**" of US $ 188.98 million, as indicated in the Ravva Development Plan, which was an integral part of the PSC. The sum of US $ 188.98 million took into consideration the drilling of 21 wells as also the construction of facilities mentioned in Article 15.5(c) of the PSC.

The tribunal proceeded on the false assumption that every aspect of Article 15.5 (c), must be subjugated to the achievement of 35,000 BOPD.

The failure of the tribunal to look into all the relevant documents, particularly Attachment 10 to the Ravva Development Plan, which formed an integral part of the PSC, and contained the computation of the amount payable as Base Development Costs, would shock the conscience of the Court, and the award would be in conflict with the basic notions of justice.

(iii) The Ld. A.G. contended that the said Plan contained the computation of the sum of US $ 188.98 million to be paid towards Base Development Cost under Article 15.5(c) of the PSC. The Ravva Plan provided the approximate cost of drilling one well in the Ravva Field as being US $ 2.43 million.

Attachment 10 to Addendum 2 of the Ravva Development Plan sets out the Development of R10 and R17 blocks – Oil and Associated Gas Reserves. It provides for the drilling and completion of 19 wells, SPM and Tanker Loading Lines, Four platforms, production/ injection pipelines to/from shore in-field flow lines, Onshore oil process facilities, Onshore oil storage, Gas treatment and compression, Water injection, Gas lift pipeline and Compression, Project Management, etc., for which an amount of US $ 201.1 million was earmarked.

The total amount payable for the Ravva Development Cost (i.e. 210.1 + 16.9) was US $ 218 million. After deducting US $ 18 million towards abandonment costs and US $ 11.32 million towards import duty, the amount payable would work

out to US $ 188.98 million, which is the amount mentioned in Article 15.5(c) of the PSC.

(iv) The tribunal on the basis of one isolated criteria mentioned in Article 15.5 (c) of achieving 35,000 BOPD passed the Award in favour of the Claimants. In fact, the Claimants failed to fulfil the other requirements stated in Article 15.5(c) *inter alia* with respect to development facilities, which included the drilling of 19 oil wells and 2 gas reserves. This was specifically mentioned in the Ravva Development Plan, which was an integral part of the PSC as stated in Article 11.2 of the PSC. By deciding the claim on the basis of one isolated criteria, it had given a go-by to all the other conditions, which would amount to re-writing the mandatory terms of the contract between the parties, and foisting the Government with obligations, which were never agreed to. The net result of the arbitral award was that the Government of India suffered a huge loss to the tune of approximately Rs.1,600 crores, which would be contrary to the interests of India.

The tribunal's interpretation of Article 15.5(c) had the effect of substituting the plain language of sub-clause (xi) of the said Article, with a new stipulation that the cost of construction of the wells in the Ravva Field would be borne by the Government, once the production capacity of 35,000 BOPD was achieved. This interpretation rendered the stipulation of drilling 19 oil wells and 2 gas wells contained in Article 15.5(c)(xi) as nugatory. The tribunal omitted any reference to Attachment 10 of the Ravva Development Plan, which was crucial to the determination of the dispute, and formed an integral part of the PSC, since it contained the basis of the computation of the amount payable towards Base Development Cost. Such an Award would shock the conscience of the Court, and would be in conflict with the public policy of India, and contrary to the interests of India.

The daily rate of production specified in Article 15.5(c) i.e. 35,000 BOPD, was the 'plateau' rate of production which had to be achieved and maintained for a period of 6 years of the contract period. It was not a one-time target to be achieved by the Respondents. The plateau rate of production of 35,000 BOPD could not have been related to the cap of US $ 188.98 million, which related only to the costs

incurred for setting up specified facilities under Article 15.5(c), including the 21 wells.

The tribunal failed to note that the cap of US $ 188.98 million was relatable to the facilities mentioned in Article 15.5(c) of the PSC, which expressly included the drilling and completion of 19 oil wells and two gas wells. The tribunal erred in holding that the cap of US $188.98 million related only to the achievement of a production target of 35,000 BOPD, and adjusted the capped figure of US $ 188 million upon the drilling of 14 wells, when the production capacity of 35,000 BOPD was achieved. The tribunal held that the costs with respect to the 7 wells drilled thereafter, amounting to US $ 278 million, would have to be borne by the Government to the Respondents.

(v) It was further submitted that the Counter Claim raised by the Government was summarily disposed of in paragraph 100 of the Award, and the tribunal gave a finding which was contrary to the express provisions of the contract.

(vi) It was submitted that Clauses 33.1 and 33.2 of the PSC provided that the PSC was governed and interpreted in accordance with Indian law. The Malaysian Courts at the seat of arbitration had erroneously applied the Malaysian Arbitration Act (Act 646), 2005 while deciding the challenge to the Award. The Award was to be tested on the basis of Indian law, as mandated by Article 33 of the PSC. The PSC was to be interpreted as per Indian law.

(vii) Reliance was placed on paragraph 76.4 of the judgment in *Reliance Industries v. Union of India*,[4] wherein this Court in the penultimate paragraph of that judgment had observed that since the substantive law governing the contract is Indian law, even the Courts in England (seat of arbitration), would be required to decide the issue of arbitrability by applying the Indian law of public policy.

In this case, the Malaysian Courts had erroneously applied the Arbitration Act of Malaysia to uphold the validity of the award.

VI. Submissions on behalf of the Respondents

The Respondents were represented by Mr. C.A. Sundaram and Mr. Akhil Sibal, Senior Advocates.

[4] (2014) 7 SCC 603.

(a) On Limitation

(i) It was contended that under Section 49 of the 1996 Act, the foreign award becomes a decree of an Indian court after the objections to the award are adjudicated by the enforcement court.

(ii) Article 136 of the Limitation Act prescribes a period of 12 years from the date of the decree of the civil court, which would be the appropriate provision for execution of a foreign award. In the present case, the foreign award was passed on 18.01.2011, and the Respondents had a period of 12 years to seek enforcement of the award i.e. till 17.01.2023. The execution petition was, therefore, filed within the period of limitation.

(iii) In the alternative, it was contended that if Article 137 of the Limitation Act is held to be applicable for the enforcement of foreign awards, the limitation period would commence from "when the right to apply accrues", which does not necessarily mean the date of the award. Had this been the intention of the legislature, it would have been expressly provided so. The right to apply may accrue even on a later date, as it has in the present case.

(iv) The Award was passed on 18.01.2011 granting a declaration in favour of the Respondents-Claimants. The counter claim of the Government of India was partly allowed, directing the Respondents to revise the cost recovery statements. Consequently, an amount of US $ 22 million became payable by the Respondents-Claimants to the Government of India.

On 10.07.2014, the Government of India issued a notice to the Claimants to show cause as to why US $ 77 million ought not to be directly recovered from the amounts payable by the Oil Marketing Companies.

It was thus contended that the right to apply for enforcement of the award accrued on 10.07.2014.

(v) It was further contended that the period of limitation would commence from the date when the award attained finality at the seat of arbitration. In the present case, the award attained finality at the seat court on 10.05.2016, when the Federal Court of Malaysia rejected the application of the Government of India seeking leave to appeal.

(vi) It was submitted that irrespective of whether limitation under Article 136 or 137 is applicable for enforcement of foreign awards, Section 5 would be applicable

in both cases. Section 5 of the Limitation Act is applicable to any appeal, or any application.

The application for enforcement / execution was filed by the Respondent-Claimants under Sections 47 and 49 of the 1996 Act, which was a composite application, as per the judgments in *Fuerst Day Lawson Limited v. Jindal Exports Limited*[5] and *LMJ International Limited v. Sleepwell Industries Co. Ltd.*[6]

(vii) It was further contended that limitation is a mixed question of fact and law. Reliance was placed on Article 113 of the Limitation Act, which provides that any suit for which no period of limitation is provided elsewhere in Schedule, the period of limitation is 3 years from the date when the right to sue accrues. The Counsel placed reliance on the judgment of this Court in *Shakti Bhog Food Industries Ltd. v the Central Bank of India*[7]. Article 137 is similar to the residuary provision in Article 113 for filing applications, for which no period of limitation has been provided elsewhere in this division, and provides a period of 3 years from the date when the right to apply accrues.

If the substantive application was filed under Sections 47 and 49 of the 1996 Act, it would not fall under Order XXI of the CPC, and hence an application under Section 5 of the Limitation Act, 1963 would be maintainable. Furthermore, since there was uncertainty in the law, as the Madras High Court had held limitation for enforcement of a foreign award to be 12 years, while the Bombay High Court treated this as 3 years, there was sufficient ground to condone the delay.

It was submitted that there is a difference between the execution of a foreign decree under Order XXI of the CPC, and the enforcement of a foreign award under Section 49 of the 1996 Act. Further, even though Section 36 refers to the enforcement of a domestic award in accordance with the provisions of the CPC, Section 49 does not refer to the CPC.

The application for enforcement of the foreign award was thus a substantive application under Section 47 of the 1996 Act, and not one under Order XXI of the CPC. The provisions of Section 5 would consequently apply to the application for enforcement, and the High Court was empowered to condone the delay in filing the application.

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[5] 2001 (6) SCC 356.
[6] 2019 (5) SCC 302.
[7] 2020 SCC OnLine SC 482.

(b) On Public Policy of India

(i) It was submitted that the dispute between the parties pertains to the interpretation of Article 15.5(c) of the PSC, which provides for recoverability of Base Development Costs incurred by the Respondent-Claimants in the Ravva Field.

Article 15.5(c) stipulated that the Respondents were entitled to recover US $ 198 million ($ 188 million + 5%) as BDC for the facilities which they developed to achieve a production capacity of 35,000 BOPD. At the time when the PSC was entered into, it was envisaged that for achieving the production capacity of 35,000 BOPD, 21 wells would be required. However, the production capacity was achieved by the Respondents with the construction of 14 wells.

(ii) The Respondents claimed recoverability of BDC as follows:

(a) US $ 220 million for achieving a production profile of 35,000 BOPD, spent by 1999/2000; and

(b) US $ 278 million for raising the production profile from 35,000 BOPD to 50,000 BOPD, spent from 2000/2001 to 2008/2009.

(iii) The Respondents contended that the cap of US $ 198.43 million was applicable only to such facilities as were required to achieve the production capacity of 35,000 BOPD, which in this case was achieved by the drilling of 14 wells. The Respondents were not required to develop the 21 wells enlisted in Article 15.5(c) of the PSC within the cap of US $ 198.43 million.

(iv) The tribunal had correctly interpreted Article 15.5(c) of the PSC, holding that the cap of US $ 198 million on the BDC applied to costs incurred for achieving the production profile of 35,000 BOPD. Since the Respondents had achieved the production capacity of 35,000 BOPD by 1999-2000 by drilling of 14 wells, the Respondents were entitled to recover US $ 198.43 million.

(v) With respect to the balance 7 wells, it was found that the Ravva Field featured materially different physical reservoir characteristics than those originally perceived when the PSC was executed. Accordingly, the trigger under Article 15.5(e)(iii)(dd) came into operation during the period commencing from 1999-2000 to 2007-2008. For the drilling of the remaining 7 wells, the Respondents were entitled to an additional sum of US $ 278 million.

(vi) It was contended that under the Award, the tribunal had made declarations in favour of the parties. The tribunal had upheld the manner in which the Respondents-Claimants had computed and recovered the costs due to them under

the PSC. The tribunal had declared a sum of US $ 22 million as payable by the Respondents to the Government of India, which was paid after the Award was passed.

(vii) It was contended that the issue of interpretation of the PSC, and a review of the merits of the Award, could not be raised under Section 48 of the 1996 Act. The scope of inquiry under Section 48 is limited, and the Appellants cannot invite the Court to take a "second look" at the Award by seeking a review on merits.

Reliance was placed on the judgment of this Court in *Shri Lal Mahal Ltd* v *Progretto Grano Spa*,[8] wherein it was held that:

> *"45. 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.*
>
> *x x x*
>
> *47. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b)."*

This view is further fortified by Explanation 2 of Section 48(2) of the Act which clarifies that "*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*".

(viii) Reliance was placed on the judgment of this Court in *Vijay Karia* v *Prysmian Cavi E Sistemi Srl*[9], wherein it was held that the enforcement of a foreign award cannot be refused by taking a different interpretation of the contract. The Supreme Court held that :

> *"45. The U.S cases show that given the "pro-enforcement bias" of the New York Convention, which has been adopted in Section 48 of the*

[8] (2014) 2 SCC 433.
[9] 2020 SCC OnLine SC 177.

> *Arbitration Act, 1996 - the burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement and not the other way around; in the guise of public policy of the country involved, foreign awards cannot be set aside by second guessing the arbitrator's interpretation of the agreement of the parties; the challenge procedure in the primary jurisdiction gives more leeway to Courts to interfere with an award than the narrow restrictive grounds contained in the New York Convention when a foreign award's enforcement is resisted.*
>
> *x x x*
>
> *96 … As has been held, referring to some of the judgments quoted hereinabove, in particular Shri Lal Mahal (supra), the interpretation of an agreement by an arbitrator being perverse is not a ground that can be made out under any of the grounds contained in Section 48(1)(b). Without therefore getting into whether the tribunal's interpretation is balanced, correct or even plausible, this ground is rejected."*
>
> (emphasis supplied)

(ix) The Respondents contended that the parties had voluntarily chosen Kuala Lumpur, Malaysia as the seat of arbitration. Having made such a choice, the Government could not invite Indian courts to revisit the merits of its case under the guise of Indian public policy. In this regard, reliance was placed on the judgment of this Court in *Bharat Aluminium Co.* v *Kaiser Aluminium Technical Services Inc*[10] wherein it was held that :

> "*116. The legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.*
>
> *x x x*
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> *163. In our opinion, the aforesaid judgment does not lead to the conclusion that the parties were left without any remedy. Rather the remedy was pursued in England to its logical conclusion. Merely, because the remedy in such circumstances may be more onerous from the view point of one party is not the same as a party being left without a remedy. Similar would be the position in cases where parties seek interim relief with regard to the protection of the assets. Once the parties have chosen voluntarily that the seat of the arbitration shall be outside India, they are impliedly also understood to have chosen the necessary incidents and consequences of such choice. We, therefore, do not find any substance in the submissions made by the learned counsel for the appellants, that if applicability of Part I is limited to arbitrations which take place in India, it would leave many parties remediless."*
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> (emphasis supplied)

[10] (2012) 9 SCC 648.

(x) The Counsel submitted that the view taken by the Tribunal was a plausible view, since Article 15.5(e)(iii)(dd) is an exception i.e. when there is a change in the range of the physical reservoir, the cap on the Base Development Costs may be increased. The present case fell in this exception. It was argued that Clause 15.5(c) defined the "Base Development Costs" to mean costs incurred after the effective date relating to the construction and/or establishment of such facilities "as are necessary" to produce petroleum in order to enable crude oil production of 35,000 BOPD in accordance with the Ravva Development Plan. It was argued that the target to be achieved by the Claimants was to produce 35,000 BOPD.

The tribunal correctly relied on Article 15.5(e)(iii)(dd) to hold that the Respondents were entitled to request for an increase in the Base Development Costs, when the range of physical reservoir characteristics of the Existing Discoveries were found to be materially different from those on which the Ravva Development Plan was based. The Respondents had achieved the target of 35,000 BOPD by 1999-2000 with the drilling of 14 wells. The further wells which were drilled subsequently would take into account the changed physical characteristics of the existing reserves. The tribunal had correctly interpreted Article 15.5(c)(xi) to hold that it was not an undertaking given by the Respondents to drill 21 wells, even though only 14 were required.

The Award therefore was not in conflict with the public policy of India, and did not attract the grounds for refusal of enforcement envisaged under Section 48 of the 1996 Act.

VII. Discussion and Analysis

Part A Limitation for filing an enforcement / execution petition of a foreign award under Section 47 of the 1996 Act

(i) On this issue, divergent views have been taken by some High Courts with respect to the period of limitation for filing a petition for enforcement of a foreign award under the 1996 Act. It has therefore become necessary to settle the law on this issue.

Noy Vallesina Engineering Spa* v *Jindal Drugs Limited[11]

[11] 2006 (3) Arb LR 510.

A single judge of the Bombay High Court held that there is no period of limitation provided by any of the Articles in the Schedule to the Limitation Act, for making an application for execution of a foreign award. It was held that the enforcement of a foreign award must take place in two stages. In the first stage, the enforceability of the foreign award would be decided, which would be governed by the residuary provision i.e. Article 137 which provides for 3 years from when the right to apply accrues. After the issue of enforceability of award is determined, the award is deemed to be a decree, and the execution of the award as a deemed decree would be governed by Article 136 which provides a period of 12 years.

***Louis Dreyfous Commodities Suisse* v *Sakuma Exports Limited*[12]**

Another view was taken by another single judge of the Bombay High Court in this case, wherein it was held that the period of limitation for enforcement of a foreign award would be 3 years from the date when the right to apply accrues i.e. Article 137 of the Limitation Act.

***Imax Corporation* v *E-City Entertainment (I) Pvt. Limited*[13]**

In *Imax*, a third view was taken by another single judge of the Bombay High Court, which followed the judgment in *Fuerst Day Lawson*,[14] and held that since the foreign award is already stamped as a decree, the award holder may apply for enforcement after steps are taken for the execution of the award under Sections 47 and 49 of the 1996 Act. In one proceeding there may be different stages, the first stage being that the court would be required to decide on the enforceability of the award, having regard to the requirement of the said provisions; and thereafter, proceed to take further steps for execution of the award. It was concluded that Article 136 of the Limitation Act would be applicable for the enforcement of a foreign award.

***M/s. Compania Naviera 'SODNOC'* v *Bharat Refineries Limited*[15]**

[12] (2015) 6 Bom CR 258.
[13] (2020) 1 AIR Bom 82.
[14] (2001) 6 SCC 356.
[15] (2008) 1 Arb LR 344.

A single judge of the Madras High Court held that under the 1996 Act since the foreign award is already stamped as a decree, the award holder can straight away apply for enforcement of the foreign award as a decree holder, and would have a period of 12 years for enforcement.

***Cairn India Limited* v *Union of India*[16]**

The Delhi High Court in the impugned Judgment in this case held that Article 136 of the Limitation Act would be applicable for the enforcement of a foreign award. The execution of the award takes place in three stages: access, recognition and enforcement. Section 47 deals with the first and second stages i.e. access and recognition. A foreign award which passes the gateway of Section 47 is at that stage enforceable on its own strength as a 'foreign decree', and is not necessarily dependent on whether or not it goes through the process of Section 48. Such a foreign award is treated as being equivalent to a foreign decree, whose enforcement may be refused only under Section 48. Section 48 pre-supposes that a foreign award is a decree whose execution can be resisted by a party against whom it is sought to be executed, if it is able to discharge the burden that the objections can be sustained under one or more of the clauses of sub-section (1) and/or sub-section (2) of Section 48 of the 1996 Act.

The Delhi High Court held that Article 136 of the Limitation Act would be applicable for filing a petition for enforcement of a foreign award. Even if it is assumed that Article 137 of the Limitation Act is applicable, sufficient grounds for condonation of delay had been urged since the Applicants were under the *bona fide* belief that the period of limitation for enforcement of a foreign award was 12 years from the date of the Award, as held in *Compania Naviera* (supra) by the Madras High Court.

(ii) Given the conflicting stands taken by various High Courts, we will now discuss this issue.

[16] 2020 SCC Online SC 324.

The issue of limitation for enforcement of foreign awards being procedural in nature, is subject to the *lex fori* i.e. the law of the forum (State) where the foreign award is sought to be enforced.[17] Article III of the New York Convention on the Recognition and Enforcement of Foreign Awards, 1958 provides that :

> *"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed in the recognition or enforcement of domestic arbitral awards."*
>
> (emphasis supplied)

(iii) It would be instructive to refer to the Report of the General Assembly of the United Nations Commission on International Trade Law in its 41st Session dated 16th June – 3rd July, 2008 with respect to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) (UN Doc A/CN.9/656/Add.1), wherein it was noted that the Convention does not prescribe a time limit for making an application for recognition and enforcement of foreign awards. Article III of the Convention states that recognition and enforcement of arbitral awards should be done in accordance with the rules of procedure of the State where the award was to be enforced. The time limit may be specifically provided in the national legislation for recognition or enforcement of Convention awards, or it may be a general rule applicable to court proceedings.[18]

(iv) The limitation period for filing the enforcement / execution petition for enforcement of a foreign award in India, would be governed by Indian law. The Indian Arbitration Act, 1996 does not specify any period of limitation for filing an

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[17] In *re Consolidated Rail Corp* 867 F Supp 25, 30 (DDC 1994) *M Flatow* v *Islamic Republic of Iran and FMC Corp* 1999 US Dist LEXIS 18957; (2000) XXV Ybk Comm Arbn 641; *Maritime Enterprises Ltd* v *Agromar Lineas Ltd* (1989) XIV Ybk Comm Arbn 693 ; *Minister of Public Works of the Government of the State of Kuwait* v *Sir Fredrick Snow & Partners* [1983] 1 WLR 818 CA; *Northern Sales Company Ltd* v *Comp Maritima Villa Nova SA*, Federal Court of Appeal, Winnipeg, Manitoba, 20 November 1991, (1993) XVIII Ybk Comm Arbn 363; *Good Challenger Nave Gante* v *Metalexportimport* [2003] EWHC 10 (Comm).

[18] Report of the General Assembly of the UN Commission on International Trade Law in its 41st Session dated 16th June – 3rd July, with respect to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) (UN Doc A/CN.9/656/Add.1) (UN Doc A/CN.9/656/Add.1).

application for enforcement / execution of a foreign award. Section 43 however provides that the Limitation Act, 1963 shall apply to arbitrations, as it applies to proceedings in court.

(v) The Limitation Act, 1963 does not contain any specific provision for enforcement of a foreign award. Articles 136 and 137 fall in the Third Division of the Schedule to the Limitation Act. Article 136 provides that the period of limitation for the execution of any decree or order of a "civil court" is twelve years from the date when the decree or order becomes enforceable.

(vi) Article 137 is the residuary provision in the Limitation Act which provides that the period of limitation for any application where no period of limitation is provided in the Act, would be three years from "when the right to apply accrues".

Articles 136 and 137 read as :

Description of the Application	**Period of Limitation**	**Time from which period begins to run**
136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve Years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or deliver in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.
137. Any other application for which no period of	Three years	When the right to apply accrues.

limitation is provided elsewhere in this division.		

(emphasis supplied)

(vii) Section 36 of the Arbitration Act, 1996 creates a statutory fiction for the limited purpose of enforcement of a 'domestic award' as a decree of the court, even though it is otherwise an award in an arbitral proceeding[19]. By this deeming fiction, a domestic award is deemed to be a decree of the court[20], even though it is as such not a decree passed by a civil court. The arbitral tribunal cannot be considered to be a 'court,' and the arbitral proceedings are not civil proceedings. The deeming fiction is restricted to treat the award as a decree of the court for the purposes of execution, even though it is, as a matter of fact, only an award in an arbitral proceeding.

In *Param Singh Patheja* v *ICDS Ltd.*[21], this Court in the context of a domestic award, held that the fiction is not intended to make an award a decree for all purposes, or under all statutes, whether state or central. It is a legal fiction which must be limited to the purpose for which it was created. Paragraphs 39 and 42 of the judgment in *Param Singh Patheja* read as :

> *"39. Section 15 of the Arbitration Act, 1899 provides for "enforcing" the award as if it were a decree. Thus a final award, without actually being followed by a decree (as was later provided by Section 17 of the Arbitration Act of 1940), could be enforced i.e. executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realizing the money awarded. However, the award remained an award and did not become a decree either as defined in CPC and much less so far the purposes of an entirely different statute such as the Insolvency Act are concerned.*
>
> …
>
> *42. The words "as if" demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central."*
>
> (emphasis supplied)

[19] *Umesh Goyal* v *Himachal Pradesh Co-op Group Housing Society Ltd.* (2016) 11 SCC 313.
[20] *Sundaram Finance Ltd.* v *Abdul Saman and Anr.* (2018) 3 SCC 622.
[21] (2006) 13 SCC 322.

(viii) A Constitution Bench of this Court in *Bengal Immunity* v *State of Bihar & Ors.*,[22] held that legal fictions are created only for some definite purpose. A legal fiction is to be limited to the purpose for which it was created, and it would not be legitimate to travel beyond the scope of that purpose, and read into the provision, any other purpose how so attractive it may be.

In *State of Karnataka* v *State of Tamil Nadu*,[23] this Court held that :

> *"74. The Report of the Commission as the language would suggest, was to make the final decision of the Tribunal binding on both the States and once it is treated as a decree of this Court, then it has the binding effect. It was suggested to make the award effectively enforceable. The language employed in Section 6(2) suggests that the decision of the Tribunal shall have the same force as the order or decree of this Court. There is a distinction between having the same force as an order or decree of this Court and passing of a decree by this Court after due adjudication. Parliament has intentionally used the words from which it can be construed that a legal fiction is meant to serve the purpose for which the fiction has been created and not intended to travel beyond it. The purpose is to have the binding effect of the Tribunal's award and the effectiveness of enforceability. Thus, it has to be narrowly construed regard being had to the purpose it is meant to serve."*
>
> (emphasis supplied)

(ix) In *Bank of Baroda* v *Kotak Mahindra Bank*,[24] this Court took the view that Article 136 of the Limitation Act deals only with decrees passed by Indian courts. The Limitation Act was framed keeping in view the suits, appeals and applications to be filed in Indian courts. Wherever the need was felt to deal with an application / petition filed outside India, the Limitation Act specifically provided a time period for that situation. The legislature has omitted reference to "foreign decrees" under Article 136 of the Limitation Act. The intention of the legislature was to confine Article 136 to the decrees of a civil court in India. The application for execution of a foreign decree would be an application not covered under any other Article of the Limitation Act, and would be covered by Article 137 of the Limitation Act.

(x) Foreign awards are not decrees of an Indian civil court. By a legal fiction, Section 49 provides that a foreign award, after it is granted recognition and

[22] (1955) 2 SCR 603.
[23] 2017 (3) SCC 274.
[24] (2020) SCC OnLine 324.

enforcement under Section 48, would be deemed to be a decree of "that Court" for the limited purpose of enforcement. The phrase "that Court" refers to the Court which has adjudicated upon the petition filed under Sections 47 and 49 for enforcement of the foreign award.

In our view, Article 136 of the Limitation Act would not be applicable for the enforcement / execution of a foreign award, since it is not a decree of a civil court in India.

(xi) The enforcement of a foreign award as a deemed decree of the concerned High Court [as per the amended Explanation to Section 47 by Act 3 of 2016 confers exclusive jurisdiction on the High Court for execution of foreign awards] would be covered by the residuary provision i.e. Article 137 of the Limitation Act.

A three judge bench of this Court in *The Kerala State Electricity Board, Trivandrum* v *T.P. Kunhaliumma*[25] held that the phrase "any other application" in Article 137 cannot be interpreted on the principle of *ejusedem generis* to be applications under the Civil Procedure Code. The phrase "any other application" used in Article 137 would include petitions within the word "applications," filed under any special enactment. This would be evident from the definition of "application" under Section 2(b) of the Limitation Act, which includes a petition. Article 137 stands in isolation from all other Articles in Part I of the Third Division of the Limitation Act, 1963.

(xii) The exclusion of an application filed under any of the provisions of Order XXI of the CPC from the purview of Section 5 of the Limitation Act, was brought in by the present Limitation Act, 1963. Under the previous Limitation Act, 1908 there were varying periods of limitation prescribed by Articles 182 and 183 of the said Act, as well as Section 48 of the CPC, 1908. Article 182 provided that the period of limitation for execution of a decree or order of any civil court was 3 years, and in case where a certified copy of the decree or order was registered, the period of limitation was 6 years. Article 183 provided that the period of limitation to enforce a decree or order of a High Court was 6 years. Section 48 of the CPC (which has since

[25] (1976) 4 SCC 634.

been repealed by Section 28 of the Limitation Act of 1963) provided that the period of limitation for execution of a decree was 12 years.

(xiii) The Law Commission in its 3rd Report dated 21st July 1956 noted that different time limits were prescribed for filing an application for execution of decrees or orders of civil courts. It was recommended that the time limit should be absolute, and there should be no scope for any further extension of time by acknowledgments. There was no justification for making a distinction between decrees or orders passed by the High Court in exercise of original civil jurisdiction, and other decrees. The maximum period of limitation for the execution of a decree or order of any civil court was fixed at twelve years in the new Limitation Act, 1963 from the date when the decree or order became enforceable.

In this background, the present Limitation Act, 1963 excludes any application filed under Order XXI from the purview of Section 5 of the Act, with the object that execution of decrees should be proceeded with as expeditiously as possible. The period of limitation for execution of the decree of a civil court is now uniformly fixed at the maximum period of 12 years for decrees of civil courts.

(xiv) In view of the aforesaid discussion, we hold that the period of limitation for filing a petition for enforcement of a foreign award under Sections 47 and 49, would be governed by Article 137 of the Limitation Act, 1963 which prescribes a period of three years from when the right to apply accrues.

(xv) The application under Sections 47 and 49 for enforcement of the foreign award, is a substantive petition filed under the Arbitration Act, 1996. It is a well-settled position that the Arbitration Act is a self-contained code.[26] The application under Section 47 is not an application filed under any of the provisions of Order XXI of the CPC, 1908. The application is filed before the appropriate High Court for enforcement, which would take recourse to the provisions of Order XXI of the

[26] *Fuerst Day Lawson Ltd.* v *Jindal Exports Ltd.* (2011) 8 SCC 333.
Kandla Export Corporation and Anr. v. *OCI Corporation and Anr*., (2018) 14 SCC 715; *Shivnath Rai Harnarain India Co.* v. *G.G. Rotterdam* 164 (2009) DLT 197; *Usha Drager Pvt. Ltd.* v. *Dragerwerk AG*, (170) DLT 628; *Sumitomo Corporation* v. *CDC Financial Services (Mauritius) Limited* (2008) 4 SCC 91; *Conros Steels Pvt. Ltd.* v. *Lu Qin (Hong Kong) Company Ltd. and Ors*., 2015 (1) Arb LR 463 (Bombay): (2015) 2 Bom CR 1.

CPC only for the purposes of execution of the foreign award as a deemed decree. The bar contained in Section 5, which excludes an application filed under any of the provisions of Order XXI of the CPC, would not be applicable to a substantive petition filed under the Arbitration Act, 1996. Consequently, a party may file an application under Section 5 for condonation of delay, if required in the facts and circumstances of the case.

(xvi) In the facts of the present case, the Respondents submitted that after the Award dated 18.01.2011 was passed, the cost account statements were revised, and an amount of US $ 22 million was paid to the Government of India.

On 10.07.2014, a show cause notice was issued to the respondents, raising a demand of US $ 77 million, being the Government's share of Profit Petroleum under the PSC. It was contended that the cause of action for filing the enforcement petition under Sections 47 and 49 arose on 10.07.2014. The enforcement petition was filed on 14.10.2014 i.e. within 3 months from the date when the right to apply accrued.

We hold that the petition for enforcement of the foreign award was filed within the period of limitation prescribed by Article 137 of the Limitation Act, 1963.

In any event, there are sufficient grounds to condone the delay, if any, in filing the enforcement / execution petition under Sections 47 and 49, on account of lack of clarity with respect to the period of limitation for enforcement of a foreign award.

Part B Scheme of the 1996 Act for enforcement of New York Convention awards

On account of certain anomalies in the impugned judgment with respect to the enforcement of foreign awards, it has become necessary to discuss the scheme contemplated under Chapter I Part II of the 1996 Act.

(i) In paragraph 20.5 of the judgment, the High Court has taken the view that a foreign award which passes the gateway of Section 47, is "at that stage", treated as being "equivalent to a foreign decree" whose enforcement can be refused at the

request of the party against whom it is invoked, if it falls within the provisions of Section 48 of the 1996 Act.

In paragraphs 20.7 and 20.8 of the impugned judgment, it has been held that:

> *"20.7 A plain reading of Section 49 would show that does not contain anything which would relate it to Section 48 of the 1996 Act. Pertinently, Section 48 of the 1996 Act opens with the express "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 …*
>
> *20.8 The provision, to my mind, pre-supposes that a foreign award is a decree whose execution can only be impeded by a party against whom it is sought to be executed if it is able to discharge its burden that its objections can be sustained under one or more clauses of sub-section (1) and / or sub-section (2) of Section 48 of the 1996 Act."*

In paragraph 21, it has been held that a foreign award is enforceable on its own strength, and is not necessarily dependent on whether or not it goes through the process of Section 48 proceedings.

(ii) The aforesaid findings are contrary to the scheme of the Act, since a foreign award does not become a "foreign decree" at any stage of the proceedings. The foreign award is enforced as a deemed decree of the Indian Court which has adjudicated upon the petition filed under Section 47, and the objections raised under Section 48 by the party which is resisting enforcement of the award.

A foreign award is not a decree by itself, which is executable as such under Section 49 of the Act. The enforcement of the foreign award takes place only after the court is satisfied that the foreign award is enforceable under Chapter 1 in Part II of the 1996 Act. After the stages of Sections 47 and 48 are completed, the award becomes enforceable as a deemed decree, as provided by Section 49. The phrase "that court" refers to the Indian court which has adjudicated on the petition filed under Section 47, and the application under Section 48.

In contrast, the procedure for enforcement of a foreign decree is not covered by the 1996 Act, but is governed by the provisions of Section 44A read with Section 13 of the CPC.

The scheme of the 1996 Act for enforcement of New York Convention awards is as follows :

(a) Part II Chapter 1 of the Arbitration and Conciliation Act, 1996 pertains to the enforcement of New York Convention awards.

Under the 1996 Act, there is no requirement for the foreign award to be filed before the seat court, and obtain a decree thereon, after which it becomes enforceable as a foreign decree. This was referred to as the "double *exequatur*," which was a requirement under the Geneva Convention, 1927 and was done away with by the New York Convention, which superseded it.[27].

There is a paradigm shift under the 1996 Act. Under the 1996 Act, a party may apply for recognition and enforcement of a foreign award, after it is passed by the arbitral tribunal. The applicant is not required to obtain leave from the court of the seat in which, or under the laws of which, the award was made.

(b) Section 44 of the 1996 Act provides that a New York Convention award would be enforceable, if the award is with respect to a commercial dispute, covered by a written agreement in a State with which the Government of India has a reciprocal relationship, as notified in the Official Gazette.

(c) Section 46 provides that a foreign award which is enforceable under Chapter 1 of Part II of the 1996 Act, shall be treated as final and binding on the parties, and can be relied upon by way of defence, set off, or otherwise, in any legal proceeding in India.

(d) Section 47 sets out the procedure for filing the petition for enforcement / execution of a foreign award. This section replicates Article IV (1) of the New York Convention which requires the applicant to file the authenticated copy of the original award, or a certified copy thereof, alongwith the original agreement referred to in Article II, or a certified copy thereof, at the time of filing the petition.

(e) Section 47 provides that the application shall be filed alongwith the following evidence i.e. :

1. the original award, or an authenticated copy, in accordance with the laws of the seat of arbitration;

[27] Refer to *Renusagar Power Co. Ltd.* v *General Electric Co.* (1994) Suppl. (1) SCC 644, para 41.
See also *Escorts Limited* v *Universal Tractor Holding LLC* (2013) 10 SCC 717.

2. the original arbitration agreement, or certified copy thereof;
3. such evidence, as may be necessary to prove that the award is a foreign award.

In *PEC Limited v Austbulk Shipping*,[28] this Court held that even though Section 47 provides that the award holder "shall" produce such evidence alongwith the application for enforcement of a foreign award, this being a procedural requirement, a pragmatic, flexible and non-formalist approach must be taken. The non-production of documents at the initial stage, should not entail a dismissal of the application for enforcement. The party may be permitted to produce the evidence during the course of the proceedings, to enable the Court to decide the enforcement petition. It was observed that excessive formalism in the matter of enforcement of foreign awards must be deprecated.

(f) The award holder is entitled to apply for recognition and enforcement of the foreign award by way of a common petition. In *Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*,[29] this Court held that a proceeding seeking recognition and enforcement of a foreign award has different stages : in the first stage, the Court would decide about the enforceability of the award having regard to the requirements of Sections 47 and 48 of the 1996 Act. Once the enforceability of the foreign award is decided, it would proceed to take further effective steps for the execution of the award. The relevant extract from the judgment reads as:

> *"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*

[28] (2019) 11 SCC 620.
[29] (2001) 6 SCC 356.

be frustrated and defeated. Under the old Act, after making award and prior to 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 in multiplicity of litigation. It is also clear from objectives contained in para 4 of the Statement 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.

(emphasis supplied)

In a recent judgment rendered in *LMJ International Ltd. v. Sleepwell Industries*[30], this Court held that given the legislative intent of expeditious disposal of arbitration proceedings, and limited interference of the courts, the

[30] (2019) 5 SCC 302.

maintainability of the enforcement petition, and the adjudication of the objections filed, are required to be decided in a common proceeding.

(g) The enforcement / execution petition is required to be filed before the concerned High Court, as per the amendment to Section 47 by Act 3 of 2016 (which came into force on 23.10.2015). The Explanation to Section 47 has been amended, which now reads as:

> *"47. Evidence – (1)…*
>
> *(2)…*
>
> *[**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."*
>
> (emphasis supplied)

(h) Section 48 replicates Article V of the New York Convention, and sets out the limited conditions on which the enforcement of a foreign award may be refused.

Sub-sections (1) and (2) of Sections 48 contain seven grounds for refusal to enforce a foreign award. Sub-section (1) contains five grounds which may be raised by the losing party for refusal of enforcement of the foreign award, while sub-section (2) contains two grounds which the court may *ex officio* invoke to refuse enforcement of the award,[31] i.e. non-arbitrability of the subject-matter of the dispute under the laws of India; and second, the award is in conflict with the public policy of India.

(i) **The enforcement Court cannot set aside a foreign award**, even if the conditions under Section 48 are made out. The power to set aside a foreign award vests only with the court at the seat of arbitration, since the supervisory or primary jurisdiction is exercised by the curial courts at the seat of arbitration.

The enforcement court may "refuse" enforcement of a foreign award, if the conditions contained in Section 48 are made out. This would be evident from

[31] Malhotra's Commentary on the Law of Arbitration, 4th Edition, Vol. 2, Pg. 1163-1164, Wolters Kluwer.

the language of the Section itself, which provides that enforcement of a foreign award may be "**refused**" only if the applicant furnishes proof of any of the conditions contained in Section 48 of the Act.

(j) The opening words of Section 48 use permissive, rather than mandatory language, that enforcement "**may be**" refused. [32] The use of the words "may be" indicate that even if the party against whom the award is passed, proves the existence of one or more grounds for refusal of enforcement, the court would retain a residual discretion to overrule the objections, if it finds that overall justice has been done between the parties, and may direct the enforcement of the award.[33] This is generally done where the ground for refusal concerns a minor violation of the procedural rules applicable to the arbitration, or if the ground for refusal was not raised in the arbitration.[34] A court may also take the view that the violation is not such as to prevent enforcement of the award in international relations.[35]

(k) The grounds for refusing enforcement of foreign awards contained in Section 48 are exhaustive, which is evident from the language of the Section, which provides that enforcement may be refused "**only if**" the applicant furnishes proof of any of the conditions contained in that provision. [36]

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[32] Refer to *Vijay Karia & Ors.* v *Prysmian Cavi E Sistemi SRL & Ors*., 2020 SCC OnLine 177.

[33] This has been eloquently stated by the Supreme Court of Hong Kong in a 1994 decision which confirmed that: '…the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing Court to achieve a just result in all the circumstances'. See Hong Kong, Supreme Court, 13 July, 1994, *China Nanhai Oil Joint Service Corp* v *Gee Tai Holdings Co. Ltd.*, Yearbook Commercial Arbitration, XX-1995, 671, 677.
See also *Westacre Investments Inc.* v *Jugoimport-SDRP Holding Co. Ltd.* [1999] APP. L.R. 05/12; *Cruz City 1 Mauritius Holdings* v *Unitech Limited*, 2017 (3) ArbLR 20 (Delhi) : 239 (2017) DLT 649 [the petition for special leave to appeal against this decision has been dismissed by the Supreme Court *vide* Order dated 19 January 2018 in SLP (Civil) No. 32244/2017].

[34] Hong Kong : Supreme Court of Hong Kong, High Court, 15 January 1993 (*Paklito Investment Ltd.* v *Klockner East Asia*) Yearbook Commercial Arbitration XIX (1994) pp.664-674 (Hong Kong No.6);
Supreme Court of Hong Kong, High Court, 16 December 1994 (*Nanjing Cereals, Oils & Foodstuffs Import & Export Corporation* v *Luckmate Commodities Trading Ltd*.) Yearbook Commercial Arbitration XXI (1996) pp. 542-545 (Hong Kong No.9);
British Virgin Islands, Court of Appeal, 18 June 2008 (I*POC International Growth Fund Limited* v *L.V. Finance Group Limited*) Yearbook Commercial Arbitration XXXIII (2008) pp.408-432 (British Virgin Islands No.1);
United Kingdom : High Court, Queen's Bench Division (Commercial Court), 20 January 1997 (*China Agribusiness Development Corporation* v *Balli Trading*) Yearbook Commercial Arbitration XXIV (1999) pp.732-738 (U.K. No.52).

[35] Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, 1981*, Kluwer Law and Taxation Publishers at page 265.

[36] *Cruz City I Mauritius Holdings* v. *Unitech Ltd.* (2017) 239 DLT 649.

(l) The enforcement court is not to correct the errors in the award under Section 48, or undertake a review on the merits of the award, but is conferred with the limited power to "refuse" enforcement, if the grounds are made out.

(m) If the Court is satisfied that the application under Section 48 is without merit, and the foreign award is found to be enforceable, then under Section 49, the award shall be deemed to be a decree of "that Court". The limited purpose of the legal fiction is for the purpose of the enforcement of the foreign award. The concerned High Court would then enforce the award by taking recourse to the provisions of Order XXI of the CPC.

Part C Whether the Malaysian Courts were justified in applying the Malaysian law of public policy while deciding the challenge to the foreign award?

The Ld. A.G. raised the ground that the Malaysian courts, while deciding the challenge to the Award, ought to have applied the substantive law of the contract, which was Indian law, and particularly the issue regarding conflict with the public policy ought to have been decided in accordance with the law expounded by the Supreme Court in paragraph 76.4 of the judgment in *Reliance*[37] (supra).

This Court *vide* Order dated 24.08.2020 appointed Mr. Gourab Banerji, Senior Advocate, as *Amicus Curiae* to assist on this limited issue.

Submissions of the *Amicus Curiae* :

Mr. Gourab Banerji, learned *Amicus* appeared before this Court on 26.08.2020, and made oral submissions with respect to the law which would be applicable at the stage of challenge before the seat court, and the law applicable at the enforcement stage.

The learned *Amicus inter alia* submitted that:

(i) The applicable law will have to be judged with reference to the specific ground of challenge raised for setting aside the Award.

The Government of India challenged the arbitral award before the Malaysian High Court on three grounds :

a. The Award dealt with a dispute not contemplated by, or not falling within the terms of the submission to arbitration;
b. The Award contains decisions on matters beyond the scope of the submission to arbitration; and

[37] *Reliance Industries* v. *Union of India* (2014) 7 SCC 603.

c. The Award is in conflict with public policy.

The first two grounds relate to excess of jurisdiction, which are covered by Sections 37(1)(a)(iv) and (v) of the Malaysian Act, while the third ground concerns public policy, which is covered by Article 37(2)(b)(ii) of the said Act.

(ii) A perusal of Articles 33.1 and 33.2 of the PSC would show that the substantive law of the contract is Indian law. The arbitration agreement is governed by "the laws of England" as provided by Article 34.12 of the PSC. Since the seat of arbitration was in Kuala Lumpur, Malaysia, the curial law would be the Malaysian law.

(iii) Malaysia has adopted the UNCITRAL Model Law. Section 37 of the (Malaysian) Arbitration Act 2005 ("**Malaysian Act**") is modelled on Article 34 of the UNCITRAL Model Law, and incorporates all its grounds. Section 37 of the Malaysian Arbitration Act reads as follows :

> *"Application for setting aside*
>
> *37. (1) An award may be set aside by the High Court only if—*
>
> *(a) the party making the application provides proof that—*
>
> *(i) a party to the arbitration agreement was under any incapacity;*
>
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;*
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;*
>
> *(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;*
>
> *(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or*
>
> *(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or*
>
> *(b) the High Court finds that—*
>
> *(i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or*
>
> *(ii) the award is in conflict with the public policy of Malaysia*
>
> *(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where—*

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred—

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside."

(emphasis supplied)

(iv) The Malaysian Act provides that the public policy defence is to be decided in accordance with Malaysian law, which is consistent with the Convention on the Recognition & Enforcement of Foreign Arbitral Awards, 1958. The seat court while deciding the public policy challenge, would decide the same in accordance with its own domestic public policy.

(v) With respect to the challenge on the ground of "excess of jurisdiction," it was submitted that the correct position in law is that the issue of excess of jurisdiction would be governed by English law, since Article 34.12 of the PSC provides that the arbitration agreement contained in Article 34 shall be governed by the laws of England.

Even though the substantive law of the contract was Indian law, it would not be applicable for deciding the challenge to the issue of excess of jurisdiction.

(vi) The Malaysian High Court rejected the challenge made by the Government of India to the award, and also the reliance placed on the decision of the Indian Supreme Court in *ONGC* v *Saw Pipes*[38]. While doing so, the High Court commented that the Court of Appeal in Singapore in *PT Asuransi Jasa Indonesia (Persero)* v *Dexia Bank SA*[39] had not followed the decision of the Supreme Court of India in the *Saw Pipes* case. The learned *Amicus* submitted that these observations of the Malaysian High Court were wholly unnecessary to the issues in question.

(vii) It was submitted that the High Court of Malaysia gave contradictory findings with respect to the applicable law while deciding the issue of excess of jurisdiction. Initially, in paragraphs 159 and 161, the Malaysian High Court was of the view that the seat being in Kuala Lumpur, the applicable law to such a challenge

[38] (2003) 5 SCC 705.
[39] [2006] SGCA 41.

would be under Section 37(1)(a)(iv) and (v) of the Malaysian law, being the curial law. Paragraphs 158 to 161 read as :

> *"Applicable law*
>
> *158. I pause here to deal with this matter of the applicable law. The Plaintiff has contended that read with section 30, the Court should set aside the Award under subparagraphs 37(1)(a)(iv) and (v); and (b)(ii). By virtue of section 30, the substantive law of the contract is Indian law of contracts. On the arguments that it had canvassed and which I had set out earlier, the Plaintiff contended that the Court should set aside the Award relying on the Indian Supreme Court decision in* ***Saw Pipes.***
>
> *159. With respect, I must disagree. When dealing with challenges under sub paragraph 37(1)(a)(iv) and (v); and (b)(ii), the challenge is not determined by reference to he substantive law of the contract. As the seat of the arbitration is Kuala Lumpur, the curial law is that of the seat, that is, Malaysian law; and it remains so even after the Award has been granted or handed down.*
>
> *160. The Federal Court in The Government of India v Cairn Energy India Pty. Ltd. & Anor. [2011] 6 MLJ 441, 455 was not inclined to follow the decision of the Indian Supreme Court in Sumitomo Heavy Industries Ltd. v ONGC Ltd. AIR 1998 SC 825, although endorsed subsequently in M/s. Dosco India Ltd. v M/s. Doosan Infracore Co. Ltd. (Arbitration Petition No 5 of 2008) 2010 (9) UJ 4521 (SC) that took an otherwise position :*
>
> *"…Thus, in this case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law is the laws of Malaysia, and we so hold. And we would add that it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards. We are therefore not persuaded that the decision of the Indian Supreme Court should be applied."*
>
> *161. Although Indian law is the substantive law or proper law of the contract or PSC, and English law is the law of the arbitration agreement; that in no way means that Indian lex arbitri applies on the determination of an application under section 37."*
>
> (emphasis supplied)

In paragraph 165, the High Court, however, observed that English law was the substantive law of the arbitration agreement and answers any questions on the jurisdiction of the arbitral tribunal.

> *"165. I appreciate that the Court of Appeal in PT Asuransi was expressing its views in the context of a challenge on the ground of a conflict with*

public policy. This position however, maintains even when dealing with the other grounds relied on here as the Indian law on "excess of jurisdiction" is not the applicable law. I agree with the Defendants that English law which is the substantive law of the arbitration agreement answers any questions on the jurisdiction of the Arbitral Tribunal. This was recognised in Sumitomo Heavy Industries v Oil and Natural Gas Commission 1995 1 Lloyds' Rep 45. .."

(emphasis supplied)

The High Court of Malaysia placed reliance on the judgment of Potter, J. in *Sumitomo Heavy Industries Ltd*. v *Oil and Natural Gas Commission*,[40] the relevant portion of which reads as follows:

"...(2) The proper law of the arbitration agreement, i.e. the law governing rights and obligations of the parties arising from their agreement to arbitrate and, in particular, their obligation to submit their disputes to arbitration and to honour an award. This includes inter alia questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the constitution of the tribunal and the question whether an award lies within the jurisdiction of the arbitrator…"

(emphasis supplied)

(viii) The Government of India filed an appeal before the Malaysian Court of Appeal. The Court of Appeal in paragraph 31 of the judgment, wherein it is opined that :

"31. It is the contention of the Appellant that the applicable law to be applied in the High Court proceeding is Indian curial law. This was rejected by the learned Judge and we agree with the same as we are of the view that the law is settled by the Federal Court in the case of The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441 …"

(emphasis supplied)

(ix) In the decision of the Federal Court in the *Government of India* v *Cairn Energy Pty. Ltd. & Anor*,[41] the Government of India referred five questions to the Federal Court, of which questions 1 and 2 are relevant, and are set out below :

"1. Where an award from an international commercial arbitration is submitted for review before the Malaysian courts under S.24(2) of the Arbitration Act 1952 and the contract provides for the application of one foreign law to govern the contract (namely the laws of India) and another foreign law to govern the arbitration agreement (namely the laws of England), is it proper for the Malaysian Court to apply Malaysian law

[40] [1994] 1 Lloyd's Law Reports 45.
[41] [2011] 6 MLJ 441.

exclusively to decide the scope of intervention in arbitration awards or the dispute at hand where the seat of arbitration is in Malaysia?

2. *If English law is to apply as the choice of the parties, whether the appropriate law is that as stated in the English Arbitration Act 1979 (amending the English Arbitration Act 1950) which provides for an appeal to the High Court on any question of law arising out of an award*"

The first question related to the seat of arbitration. The Government of India contended that the English Law was applicable, and that the Malaysian Court of Appeal ought to have applied the appellate power under the English Arbitration Act, 1979.

The Federal Court however, held that this was an issue of curial law, and the curial law ought to be the law of the seat of arbitration. The Federal Court of Malaysia in paragraph 25 held that :

> *"[25] It is therefore clear that the English Court of Appeal clearly sets out that the curial law ought to be that of the seat of arbitration. As stated above, our courts have adopted a similar position. Thus, in this case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law is the laws of Malaysia and we so hold. And we would add that it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards. We are therefore not persuaded that the decisions of the Indian Supreme Court should be applied."*
>
> (emphasis supplied)

(x) It was submitted that the court at the seat of arbitration, would have exclusive jurisdiction to annul or set aside a foreign award. The learned *Amicus* placed reliance on the judgment of the Constitution Bench in *BALCO* v *Kaiser Aluminium*,[42] and made specific reference to :

> *"153.…The expression under the law is the reference only to the procedural law/curial law of the country in which the award was made and under the law of which the award was made. It has no reference to the substantive law of the contract between the parties. In such view of the matter, we have no hesitation in rejecting the submission of the learned counsel for the appellants."*
>
> (emphasis supplied)

The Malaysian Courts rightly examined the public policy challenge in accordance with the Malaysian Act, being the curial law of the arbitration.

[42] (2012) 9 SCC 552.

With respect to the challenge on the ground of excess of jurisdiction, it was submitted that it ought to have been tested on the basis of the proper law of the arbitration agreement i.e. the English law.

On the applicable law at the enforcement stage, the Courts would determine the same as per the public policy of India.

Discussion and Findings

(i) In the present case, the law governing the agreement to arbitrate was the English law as per Article 34.12 of the PSC, which provides that the arbitration agreement shall be governed by the laws of England. Even though there seems to have been some confusion in the application of the law governing the agreement to arbitrate by the seat courts, as pointed out by the learned *Amicus*, we will not dwell on this issue, since the enforcement court does not sit in appeal over the findings of the seat court. Furthermore, in view of the principles of comity of nations, this Court would not comment on the judgments passed by Courts in other jurisdictions.

The enforcement of the award is a subsequent and distinct proceeding from the setting aside proceedings at the seat. The enforcement court would independently determine the issue of recognition and enforceability of the foreign award in India, in accordance with the provisions of Chapter 1 Part II of the Indian Arbitration Act, 1996.

(ii) The courts having jurisdiction to annul or suspend a New York Convention award are the courts of the State where the award was made, or is determined to have been made i.e. at the seat of arbitration. The seat of the arbitration is a legal concept i.e. the juridical home of the arbitration. The legal "seat" must not be confused with a geographically convenient venue chosen to conduct some of the hearings in the arbitration. The courts at the seat of arbitration are referred to as the courts which exercise "supervisory" or "primary" jurisdiction over the award. The "laws under which the award was made" used in Article V (1)(e) of the New York Convention, is mirrored in Section 48(1)(e) of the Indian Arbitration Act, which refers to the country of the seat of the arbitration, and not the State whose laws govern the substantive contract.

The constitution bench in *BALCO* v *Kaiser Aluminium*[43] held that :

[43] (2012) 9 SCC 552.

"76. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the Uncitral Model Law of 1985. …
….
….
…
123. Thus, it is clear that the regulation of conduct of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award. This is in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the Uncitral Model Law. It also recognises the territorial principle which gives effect to the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country. By way of a comparative example, we may reiterate the observations made by the Court of Appeal, England in C v. D [2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] wherein it is observed that:

"It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award."

In the aforesaid case, the Court of Appeal had approved the observations made in A v. B [(2007) 1 All ER (Comm) 591 : (2007) 1 Lloyd's Rep 237] wherein it is observed that:

"… an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy … as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration."

(iii) The courts before which the foreign award is brought for recognition and enforcement would exercise "secondary" or "enforcement" jurisdiction over the award, to determine the recognition and enforceability of the award in that jurisdiction.

(iv) We will now briefly touch upon the four types of laws which are applicable in an international commercial arbitration, and court proceedings arising therefrom. These are :

a) The governing law determines the substantive rights and obligations of the parties in the underlying commercial contract. The parties normally make a choice of the governing law of the substantive contract; in the absence of a choice of the governing law, it would be determined by the tribunal in

accordance with the conflict of law rules, which are considered to be applicable.

b) The law governing the arbitration agreement must be determined separately from the law applicable to the substantive contract.[44] The arbitration agreement constitutes a separate and autonomous agreement, which would determine the validity and extent of the arbitration agreement; limits of party autonomy, the jurisdiction of the tribunal, etc.

c) The curial law of the arbitration is determined by the seat of arbitration. In an international commercial arbitration, it is necessary that the conduct of the arbitral proceedings are connected with the law of the seat of arbitration, which would regulate the various aspects of the arbitral proceedings. The parties have the autonomy to determine the choice of law, which would govern the arbitral procedure, which is referred to as the *lex arbitri,* and is expressed in the choice of the seat of arbitration.[45]

The curial law governs the procedure of the arbitration, the commencement of the arbitration, appointment of arbitrator/s in exercise of the default power by the court, grant of provisional measures, collection of evidence, hearings, and challenge to the award.

The courts at the seat of arbitration exercise supervisory or "primary" jurisdiction over the arbitral proceedings, except if the parties have made an express and effective choice of a different *lex arbitri*, in which event, the role of the courts at the seat will be limited to those matters which are specified to be internationally mandatory and of a non-derogable nature.[46]

d) The *lex fori* governs the proceedings for recognition and enforcement of the award in other jurisdictions. Article III of the New York Convention provides that the national courts apply their respective *lex fori* regarding limitation periods applicable for recognition and enforcement proceedings; the date from which the limitation period would commence, whether there

[44] Collins, in Lew (ed.), Contemporary Problems in International Arbitration (1986) p.126 at 127-131.
[45] The Conflict of Laws, Dicey, Morris and Collins, (15th ed.) Volume 1, Chapter 16, paragraph 16-035, p. 843.
[46] Russel on Arbitration, Sweet & Maxwell (24th Edition, 2015).

is power to extend the period of limitation. The *lex fori* determines the court which is competent and has the jurisdiction to decide the issue of recognition and enforcement of the foreign award, and the legal remedies available to the parties for enforcement of the foreign award.

(v) In view of the above-mentioned position, the Malaysian Courts being the seat courts were justified in applying the Malaysian Act to the public policy challenge raised by the Government of India.

The enforcement court would, however, examine the challenge to the award in accordance with the grounds available under Section 48 of the Act, without being constrained by the findings of the Malaysian Courts. Merely because the Malaysian Courts have upheld the award, it would not be an impediment for the Indian courts to examine whether the award was opposed to the public policy of India under Section 48 of the Indian Arbitration Act, 1996. If the award is found to be violative of the public policy of India, it would not be enforced by the Indian courts. The enforcement court would however not second-guess or review the correctness of the judgment of the Seat Courts, while deciding the challenge to the award.

(vi) In our view, the observation made in paragraph 76.4 of the *Reliance*[47] judgment does not have any precedential value, since it is an observation made in the facts of that case, which arose out of a challenge to a final partial award on the issue of arbitrability of certain disputes. The last sentence in paragraph 76.4 is not the ratio of that judgment, which is contained in paragraphs 76.1 to 76.3.

(vii) In the present case, the Appellants have challenged the Award *inter alia* on the ground of excess of jurisdiction, and as being contrary to the public policy of India. The observations made in paragraph 76.4 in the *Reliance judgment*, would not be applicable to the present case, since the issue of arbitrability has not been raised, and cannot be relied upon by the Appellants in the present case.

Part D Whether the foreign award is in conflict with the Public Policy of India?

(i) This issue is required to be determined in accordance with the conditions laid down in Section 48 of the 1996 Act, which reads as :

[47] (2014) 7 SCC 603.

*"**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.—Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption."

(3) … "

(emphasis supplied)

(ii) The public policy defence for refusing enforcement under Section 48 of the 1996 Act was interpreted by a three-judge bench of this Court in *Shri Lal Mahal*

Ltd. v *Progetto Grano SPA*[48]. This Court held that the law as expounded in the *Renusagar*[60] judgment, would be applicable to the ambit and scope of Section 48(2)(b) even under the 1996 Act. The relevant extract from the judgment reads as:

> *"27. In our view, what has been stated by this Court in Renusagar with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must equally apply to the ambit and scope of Section 48(2)(b) of the 1996 Act. In Renusagar 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[3] 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 Renusagar. Although the same expression 'public policy of India' is used both in Section 34(2(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the Sections but, in our 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.*
>
> ***x x x***
>
> *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 (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).*
>
> ***x x x***
>
> *45. 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.*
>
> ***x x x***

[48] (2014) 2 SCC 433.

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

(emphasis supplied)

(iii) In *Renusagar Power Co*. v *General Electric Co.*[49] ("*Renusagar*"), this Court held that "public policy" comprised of (1) the fundamental policy of Indian law; (2) interests of India; and (3) justice or morality. It was held that :

"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 merit.

x x x

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 1(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 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 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 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."

(emphasis supplied)

[49] 1994 Supp (1) SCC 644.

The enforceability of the foreign award will be decided in accordance with the parameters laid down in *Renusagar* i.e. whether the award is contrary to the (i) fundamental policy of Indian law, or (ii) interests of India, or (iii) justice or morality.

(iv) The Counsel for the Respondents submitted that it was the amended Section 48, which would be applicable to the present case; or alternately, that the amendments effected by the 2016 Amendment Act would have retrospective effect.

(v) We will now briefly touch upon the amendments made to Section 48, and consider the issue whether the amendments have retrospective application, and are applicable to the present case.

Section 48 was amended by Act 3 of 2016, which came into force w.e.f. 23.10.2015. These amendments were incorporated on the basis of the 246th Report of the Law Commission. The relevant extracts from the 246th Report with respect to the amendments in Section 48 are set out hereunder :

> *"SETTING ASIDE OF DOMESTIC AWARDS AND RECOGNITION / ENFORCEMENT OF FOREIGN AWARDS*
>
> *34. Once an arbitral award is made, an aggrieved party may apply for the setting aside of such award. Section 34 of the Act deals with setting aside a domestic award and a domestic award resulting from an international commercial arbitration whereas section 48 deals with conditions for enforcement of foreign awards. As the Act is currently drafted, the grounds for setting aside (under section 34) and conditions for refusal of enforcement (section 48) are in pari materia. The Act, as it is presently drafted, therefore, treats all three types of awards – purely domestic award (i.e. domestic award not resulting from an international commercial arbitration), domestic award in an international commercial arbitration and a foreign award – as the same. The Commission believes that this has caused some problems. The legitimacy of judicial intervention in the case of a purely domestic award is far more than in cases where a court is examining the correctness of a foreign award or a domestic award in an international commercial arbitration.*
>
> ***x x x***
>
> *37. In this context, the Commission has further recommended the restriction of the scope of "public policy" in both sections 34 and 48. This is to bring the definition in line with the definition propounded by the Supreme Court in Renusagar Power Plant Co Ltd v General Electric Co, AIR 1994 SC 860 where the Supreme Court while construing the term "public policy" in section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961 held that an award would be 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". The*

formulation proposed by the Commission is even tighter and does not include the reference to "interests of India", which is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitrations (under S 34) or foreign awards (under S 48). Under the formulation of the Commission, an award can be set aside on public policy grounds only if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice."

(emphasis supplied)

(vi) After the judgment of the Supreme Court in *ONGC* v *Western Geco*[50], which had expanded the power of judicial review, the Law Commission submitted a Supplementary Report on "Public Policy." It was recommended that a clarification needs to be incorporated to ensure that the phrase "fundamental policy of Indian law" is narrowly construed. It was recommended that a new Explanation being Explanation 2 be inserted into Section 34(2)(b)(ii) i.e. :

"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."

(vii) Section 48 was amended by Act 3 of 2016. By this amendment, the public policy ground was given a narrow and specific construction by statute, by the insertion of two Explanations. The amended Section 48 reads as :

"48. Conditions for enforcement of foreign awards. –

(1) …

(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.

[50] (2014) 9 SCC 263.

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)... ”

(emphasis supplied)

(viii) The highlighted portions show the amendments made to Section 48 by the 2016 Amendment Act. We find that these are substantive amendments, which have been incorporated to make the definition of “public policy” narrow by statute. It is relevant to note that the 2016 Amendment has dropped the clause “interests of India,” which was expounded by the *Renusagar* judgment.

The newly inserted Explanation 2 provides that the examination of whether the enforcement of the award is in conflict with the fundamental policy of Indian law, shall not entail a review on the merits of the dispute.

(ix) The two Explanations in Section 48 begin with the words “For the avoidance of any doubt.” It cannot, however, be presumed to be clarificatory and retrospective, since the substituted Explanation 1 has introduced new sub-clauses, which have brought about a material and substantive change in the section. A new Explanation 2 has been inserted which states that 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. Since the amendments have introduced specific criteria for the first time, it must be considered to be prospective, irrespective of the usage of the phrase “for the removal of doubts.” Reliance is placed on the judgment of this Court in *Sedco Forex International Drill* v *Commissioner of Income Tax, Dehradun*[51] wherein it was held that an Explanation if it changes the law, it cannot be presumed to be retrospective, irrespective of the fact that the phrases used are “it is declared” or “for the removal of doubts”. In *Ssangyong Engineering & Construction Co.* Ltd. v *NHAI,*[52] this Court was considering the amendments made to Section 34, wherein two Explanations to Section 34 had been inserted, which are identically worded with the two Explanations to Section 48. In that case, a similar ground of retrospectivity had been urged. This Court held that since the Explanations had been introduced for the first time, it is the substance of the

[51] (2005) 12 SCC 717.
[52] (2019) 15 SCC 131.

amendment which has to be looked at, rather than the form. Even in cases where "for avoidance of doubt", something is clarified by way of an amendment, such clarification cannot have retrospective effect, if the earlier law has been changed substantially.

(x) Section 26 of the 2016 Amendment Act provided that :

> *"**26. Act not to apply to pending arbitral proceedings**. – Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

(xi) Section 26 of the Amendment Act came up for consideration before this Court in *BCCI v. Kochi Cricket Pvt Ltd.*[53] *("BCCI").* This Court held that the Amendment Act would apply prospectively to:

(a) "arbitral proceedings" initiated on or after 23.10.2015 i.e. the date on which the 2015 Amendment Act came into force;

(b) court proceedings commenced on or after 23.10.2015, irrespective of whether such court proceedings arise out of, or relate to arbitration proceedings which were commenced prior to, or after the commencement of the Amendment Act.

(xii) The 2019 Amendment Act (to the Arbitration Act of 1996) inserted Section 87 as a clarificatory amendment, to provide that arbitral proceedings and court proceedings "arising out of, or in relation to such proceedings" shall constitute a single set of proceedings, for the applicability of the 2016 Amendment Act. Section 87 was inserted with retrospective effect from 23.10.2015 i.e. the date of coming into force of the 2016 Amendment Act. Section 15 of the 2019 Amendment Act provided that Section 26 of the 2015 Amendment Act stood deleted.

(xiii) In *Hindustan Construction Co. Ltd v. Union of India & Ors.,*[54] the Supreme Court struck down Section 87 of the 2019 Amendment Act, and restored Section 26 of the 2016 Amendment Act to the statute book. It was held in paragraph 54 that :

> "*54. The result is that the BCCI judgment will, therefore, continue to apply so as to make applicable salutary amendments made by the 2015 Amendment Act to all court proceedings initiated after 23.10.2015."*
>
> (emphasis supplied)

[53] 2018 6 SCC 287.
[54] 2019 (6) Arb LR 171 (SC).

(xiv) In view of the aforesaid discussion, we hold that the amended Section 48 would not be applicable to the present case, since the court proceedings for enforcement were filed by the Respondents-Claimants on 14.10.2014 i.e. prior to the 2016 Amendment having come into force on 23.10.2015.

(xv) We will now consider the issue whether the award in the present case is in conflict with the public policy of India, and contrary to the basic notions of justice, as submitted on behalf of the Appellants.

Applying the unamended Section 48 to the present case, this Court in the *Renusagar* judgment had placed reliance on the enunciation of the law on international public policy in the judgment of the U.S. Court of Appeals for the 2nd Circuit in *Parsons & Whittemore Overseas Co. Inc.* v. *Societe Generale De L'industrie du Papier (RAKTA),*[55] wherein it was held that :

> *"7. Article V(2)(b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcement, on the defendant's motion or sua sponte, if 'enforcement of the award would be contrary to the public policy of (the forum) country.' The legislative history of the provision offers no certain guidelines to its construction. Its precursors in the Geneva Convention and the 1958 Convention's ad hoc committee draft extended the public policy exception to, respectively, awards contrary to 'principles of the law' and awards violative of 'fundamental principles of the law.' In one commentator's view, the Convention's failure to include similar language signifies a narrowing of the defense [Contini, International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Am J Comp L at p. 304]. On the other hand, another noted authority in the field has seized upon this omission as indicative of an intention to broaden the defense [Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1070-71 (1961)].*
>
> *8. Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. [See Straus, Arbitration of Disputes between Multinational Corporations, in New Strategies for Peaceful Resolution of International Business Disputes 114-15 (1971); Digest of Proceedings of International Business Disputes Conference, April 14, 1971, at 191 (remarks of Professor W. Reese)]. Additionally, considerations of reciprocity – considerations given express recognition in the Convention itself – counsel courts to invoke the*

[55] 508 F. 2d 969 (2nd Cir 1974).

public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

9. We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.

x x x

…To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision is not meant to enshrine the vagaries of international politics under the rubric of "public policy. Rather, a circumscribe public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. Cf. Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct.2449. 41L.Ed. 2d 270, 42 U.S.L.W., 4911, 4915-16 n. 15(1974)"

(emphasis supplied)

The judgment in *Parsons* has been followed in various other jurisdictions.[56] In *International Navigation Ltd.* v *Waterside Ocean Navigation Co. Inc*.,[57] the Court of Appeals, Second Circuit, U.S.A. held that the public policy defence must be interpreted in light of the overriding object of the New York Convention. The Court applied the judgment in *Parsons* (supra), and held that the public policy defence should apply only where enforcement of the award would violate the basic notions of morality and justice of the forum state. Any interference by the national court in international arbitration on this ground should be minimal, and public policy under the New York Convention should be interpreted narrowly. This position was followed in the Southern District of New York in *Telenor Mobile Communications* v *Storm LLC*.[58] It was opined that to refuse enforcement on the ground of public

[56] See, e.g., *BCB Holdings Limited and The Belize Bank Limited* v *The Attorney General of Belize, Caribbean Court of Justice*, Appellate Jurisdiction, 26 July 2013, [2013] CCJ 5 (AJ); *Traxys Europe S.A.* v *Balaji Coke Industry Pvt Ltd*., Federal Court, Australia, 23 March 2012, [2012] FCA 276; *Uganda Telecom Ltd.* v. *Hi-Tech Telecom Pty Ltd*., Federal Court, Australia, 22 February 2011, [2011] FCA 131; *Petrotesting Colombia S.A. & Southeast Investment Corporation* v. *Ross Energy S.A*., Supreme Court of Justice, Colombia, 27 July 2011; *Hebei Import & Export Corp.* v. *Polytek Engineering Co. Ltd.*, Court of Final Appeal, Hong Kong, 9 February 1999, [1999] 2 HKC 205; *Renusagar Power Co. Ltd.* v. *General Electric Company & Anr*., Supreme Court, India, 7 October 1993, 1994 AIR 860; *Brostrom Tankers AB* v. *Factorias Vulcano S.A.*, High Court, Dublin, Ireland, 19 May 2004, XXX Y.B. Com. Arb. 591 (2005).

[57] 737 F.2d 150 (Second Circuit, 1984).

[58] 524 F.Supp. 2d 332 (SDNY 2007).

policy, the decision would have to directly contradict the foreign law in such a manner, so as to make compliance with one a violation of the other.

(xvi) Albert van den Berg in his commentary on "The New York Arbitration Convention, 1958: Towards a Uniform Judicial Interpretation" [59] opines that the scope of jurisdiction of the enforcement court is :

> "*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."*
>
> (emphasis supplied)

(xvii) It would be useful to refer to the recommendations of the International Law Association in the 70th Conference of the ILA held in New Delhi on 2-6 April 2002, known as the "ILA Recommendations, 2002" on Public Policy, which have been regarded as reflective of best international practices.

Clause 1 (a) of the General recommendations of the ILA provides that the finality of awards in international commercial arbitration should be respected, save in exceptional circumstances, and that such exceptional circumstances are found if recognition or enforcement of the international arbitral award would be contrary to international public policy.

Clause 1(d) of the Recommendations state that the expression "international public policy" is used to designate the body of principles and rules, which are : (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned, (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as *"lois de police"* or "public policy rules" and (iii) the duty of the State to respect its obligations towards other States or international organisations. Clause 3(a) states that the violation of a mere mandatory rule (i.e. a rule that is mandatory, but does

[59] The New York Convention of 1958, *Kluwer*, 1981, pp. 267-268, cited in Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* fifth edn., 2009, p. 639, para 11.60.

not form part of the State's international public policy), should not bar its recognition and enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract, or the law of the seat of the arbitration.

(xviii) The International Council for Commercial Arbitration (ICCA) Guide to the Interpretation of the 1958 New York Convention : A Handbook for Judges (2011), states that while considering the grounds for refusal of a foreign award, the Court must be guided by the following principles (i) no review on merits; (ii) narrow interpretation of the grounds for refusal; and (iii) limited discretionary power.

The merits of the arbitral award are not open to review by the enforcement court, which lies within the domain of the seat courts. Accordingly, errors of judgment, are not a sufficient ground for refusing enforcement of a foreign award.

(xix) Given the well-settled position in law with respect to the finality of awards in international commercial arbitrations, and the limits of judicial intervention on the grounds of public policy of the enforcement State, we will advert to the facts of the present case.

The Appellants have contended that the award may not be enforced, since it is contrary to the basic notions of justice. We are unable to accept this submission for the following reasons :

(a) firstly, the Appellants have not made out a case of violation of procedural due process in the conduct of the arbitral proceedings. The requirement of procedural fairness constitutes a fundamental basis for the integrity of the arbitral process. Fair and equal treatment of the parties is a non-derogable and mandatory provision, on which the entire edifice of the alternate dispute resolution mechanism is based. In the present case, there is no such violation alleged.

(b) secondly, the Appellants have not made out as to how the award is in conflict with the basic notions of justice, or in violation of the substantive public policy of India.

In the seminal judgment of *Parsons* (supra), which has been followed in various jurisdictions, including by the Indian Supreme Court in the *Renusagar* case, it was held that enforcement may be refused only if it violates the enforcement State's most basic notions of morality and justice, which has been

interpreted to mean that there should be great hesitation in refusing enforcement, unless it is obtained through "corruption or fraud, or undue means."

The Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero)* v *Dexia Bank SA*,[60] while interpreting international public policy, opined that :

"59 Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" (see Downer Connect ([58] supra) at [136]), or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" (see Deutsche Schachbau v Shell International Petroleum Co Ltd [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA) 508 F 2d, 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at 914):

> *In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice… It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside."*

(emphasis supplied)

This judgment has been recently affirmed by the Singapore High Court in *Dongwoo Mann + Hummel Co. Ltd.* v *Mann + Hummel GmbH*.[61]

(c) The gravamen of the challenge of the Appellants is that the tribunal has given an erroneous interpretation of the terms of the PSC read with the Ravva Development Plan, which would amount to re-writing the contract.

The view taken by the tribunal is based on an interpretation of Article 15.5 (c) read with the exceptions contained in Article 15.5 (e)(iii)(dd). The tribunal held that the exception came into play on account of the range of physical reservoir characteristics being materially different, from what was contemplated in the Ravva Development Plan.

[60] [2006] SGCA 41.
[61] [2008] SGHC 67.

The tribunal relied upon the evidence of the Expert Witness produced by the Claimants who deposed that the enlarged reservoir known as Block A/D showed a range of physical characteristics, which were “materially different” from those of the Fault Blocks defined in Article 11.1 of the PSC, on which the Ravva Development Plan was based. Since there was a material change in the physical reservoir characteristics of the existing reserves, Article 15.5 (e)(iii) (dd) would get triggered, which would enable the Claimants to request for an increase in the capped figure of Base Development Costs under Article 15.5(e) (iii)(dd).

The tribunal noted that the PSC was entered into for a period of 25 years and the parties envisaged the possibility that the Respondents may incur Development Costs greater than those anticipated when the Ravva Development Plan and the PSC were executed. Article 15.5(d) and (e) were events where the capped figure under Article 15.5 (c) could be increased by the Management Committee.

The tribunal held that the cap on Base Development Costs under Article 15.5(c) was to be read with reference to the object of the Plan to achieve the production profile of 35,000 BOPD. The production profile of 35,000 BOPD was achieved on the drilling of 14 wells by about 31st March 1999. The reference to 21 wells under Article 15.5(c)(xi) was interpreted as being an estimate of the number of wells contemplated by the parties in 1993, which would be required to achieve the object of achieving the production profile of 35,000 BOPD. It could not be construed to be an undertaking by the Claimants to drill 21 wells, even though the targeted production profile of 35,000 BOPD had been achieved by the drilling of 14 wells.

The remaining 7 wells were drilled subsequently, not for the purposes of the Ravva Development Plan, but to take into account the changed physical characteristics of the existing reserves which were encountered. The costs of US $ 278 million was incurred by the Respondents as a result of events which fell within Article 15.5(e)(iii)(dd).

In 1998-1999 when the complete extent of the reserves in the Ravva Field was known, the Management Committee, approved an increase in the

production profile from 35,000 BOPD to 50,000 BOPD on 25 March 1998. The Respondents proceeded to develop the Ravva Field to enable a production rate of 50,000 BOPD, and drilled 7 wells. The Respondents incurred costs of $ 278,871,668 million towards the drilling of the 7 wells.

(d) The Appellants herein filed a counter claim, seeking sums equivalent to the amount which the Respondents had claimed as Cost Petroleum, in excess of the agreed figure of US $ 198 million limit.

On the interpretation of Article 15.5(c) of the PSC, and the circumstances in which the PSC and the Ravva Development Plan, were executed, the tribunal held that the Respondents were entitled to costs of US $ 278 million, in excess of the US $ 198 million. The counter claim of the Appellants to the extent of US $ 22 million was allowed by the tribunal.

(e) The Appellants are aggrieved by the interpretation taken by the tribunal with respect to Article 15.5 (c) of the PSC and its other sub-clauses. The interpretation of the terms of the PSC lies within the domain of the tribunal. It is not open for the Appellants to impeach the award on merits before the enforcement court. The enforcement court cannot re-assess or re-appreciate the evidence led in the arbitration. Section 48 does not provide a *de facto* appeal on the merits of the award. The enforcement court exercising jurisdiction under Section 48, cannot refuse enforcement by taking a different interpretation of the terms of the contract.

(f) We feel that the interpretation taken by the tribunal is a plausible view, and the challenge on this ground cannot be sustained, to refuse enforcement of the Award.

(g) With respect to the submission made on behalf of the Appellants that the Production Sharing Contracts are “special contracts” pertaining to the exploration of natural resources, which concerns the public policy of India, we are of the view that the disputes raised by the Claimants emanate from the rights and obligations of the parties under the PSC. The Award is not contrary to the fundamental policy of Indian law, or in conflict with the notions of justice, as discussed hereinabove. The term of the PSC was for a period of 25 years from 28.10.1994, which ended on 27.10.2019. We have been informed that the term of the PSC has since been extended for a further period of 10

years, through the mutual agreement between the parties. This itself would reflect that the performance of the obligations under the PSC were not contrary to the interests of India.

(xx) We conclude that the enforcement of the foreign award does not contravene the public policy of India, or that it is contrary to the basic notions of justice.

We affirm the judgment of the Delhi High Court dated 19.02.2020 passed in I.A. No. 3558 / 2015 rejecting the Application filed under Section 48 of the 1996 Act, and confirm the order of enforcement passed on the petition under Sections 47 read with 49 for enforcement of the award, even though for different reasons.

The interim Orders of *status quo* dated 17.06.2020 and 22.07.2020 passed by this Court stand vacated. The Award dated 18.01.2011 passed by the tribunal is held to be enforceable in accordance with the provisions of Sections 47 and 49 of the Arbitration & Conciliation Act, 1996.

(xxi) Before we part with this judgment, we record our sincere appreciation of the assistance rendered by the Ld. *Amicus Curiae*, Shri Gourab Banerji, Senior Advocate at short notice.

We also record our appreciation of the valuable assistance provided by the Ld. Attorney General for India, Shri K.K. Venugopal, and Mr. Tushar Mehta, Solicitor General of India, Senior Advocates, who represented the Appellants, and Mr. C.A. Sundaram and Mr. Akhil Sibal, Senior Advocates, who appeared on behalf of the Respondents, and assisted us through oral and written submissions.

(xxii) The Civil Appeal is accordingly dismissed, with no order as to costs.

All pending applications are accordingly disposed of.

Ordered accordingly.

New Delhi **……J.**
September 16, 2020 **(S. ABDUL NAZEER)**

……J.
(INDU MALHOTRA)

……J.
(ANIRUDDHA BOSE)