IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

EC 100 of 2022

JALDHI OVERSEAS PTE LTD.

VS.

STEER OVERSEAS PVT. LTD.

For the Petitioner	:	Mr. Tilak Bose, Sr. Adv. Mr. K. Thaker, Adv. Mr. Anurag Bagaria, Adv.
For the Respondent	:	Mr. Joy Saha, Sr. Adv. Mr. Anuj Singh, Adv. Ms. Rashhmi Singhee, Adv. Mr. Aman Agarwal, Adv. Ms. Trinisha De, Adv Mr. Siddhartha Roy, Adv

Last Heard on : June 12, 2023

Judgement on : June 23, 2023

Shekhar B. Saraf, J.:

1. The petitioner/award holder, Jaldhi Overseas Pte. Ltd., in the instant application [being EC 100/2022] under section 46 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the 'Act'] read with Order XXI of the Code of Civil Procedure, 1908 [hereinafter referred to as 'CPC'] is a company incorporated under the appropriate laws of Singapore.

2. The respondent/award debtor, Steer Overseas Private Limited, is a company within the meaning of the Companies Act, 2013, having its registered office at 103, Sahid Nagar, 2nd floor, Bhubaneshwar –751007 outside the jurisdiction aforesaid and its corporate office at 91 A/1, Park Street, Block No. 401, 4th Floor, Kolkata – 700016 within the jurisdiction aforesaid.

3. The instant application has been filed by the award holder for enforcement and execution of a foreign partial award in its favour.

Relevant Facts

4. The relevant facts are produced below: -

   a) The award holder through an email correspondence dated December 24, 2009 (hereinafter referred to the 'first email'), offered to carry the award debtor's cargo of iron ore fines from Haldia and

Visakhapatnam Ports to a Main Port in China on the terms and conditions as contained in the said correspondence.

b) The award debtor, on receipt of the offer, altered its commercial terms and returned a counter offer (hereinafter referred to as the 'second email') to the award holder on the same day, requesting the petitioner to nominate a vessel.

c) The petitioner prepared a fixture note in furtherance of the terms and conditions in its own correspondence dated December 24, 2009 [hereinafter referred to as 'fixture note 1'].

d) The award holder nominated the vessel MV Dong Jin [hereinafter referred to as 'the said vessel']. The said vessel first arrived at Haldia on January 21, 2010 and thereafter loaded the award debtor's cargo. The vessel then reached Vishakhapatnam on February 2, 2010 for loading the remaining cargo. Fixture note 1 was sent to the award debtor on January 27, 2010.

e) Fixture note 1 possessed an arbitral clause under clause 4 of 'OTHER TERMS' which provided for 'ARBITRATION IN SINGAPORE, ENGLISH LAW TO APPLY'.

f) On receipt of fixture note 1, the award debtor amended two terms of the note by hand: -

a. Discharge rate was changed from 15,000 MT to 12,000 MT; and

b. Detention rate was changed from US $30,000 HD PDPR to US $20,000 HD PDPR. [hereinafter referred to as 'modified fixture note 1'].

g) The award debtors forwarded the modified fixture note 1 to the award holders on January 29, 2010.

h) On December 24, 2009, the award holders circulated a separate fixture notice [hereinafter referred to as 'fixture note 2'] to Global Up International Ltd. [hereinafter referred to as 'sister company'] in Hong Kong which is a 100% subsidiary of the award debtors.

i) Succeeding invoices in light of fixture note 2 were raised under the name of the sister company. However, the award holder alleges that the same was conducted under the direction of the award debtor.

j) The appointed vessel could not berth at Visakhapatnam due to non-readiness of cargo documents.

k) The award debtor utilized 2 days 4 hours and 8 minutes in excess of the lay time at the discharge port of Zhenjiang which resulted in the accrual of demurrage and damages worth the sum of USD $299,047.

l) Additionally, the award debtor through its sister company also owed funds to the petitioner in relation to fixtures where other vessels were appointed.

m) In a meeting held on January 24, 2011, the award debtors offered USD 200,000 to the award holder as a full and final settlement of all dues.

n) The award holder did not accept the proposal. Regardless, the award debtors paid the said amount to the award holders.

o) Through a letter dated May 4, 2012, the award holder initiated arbitral references in relation to all the fixtures between the award holder, award debtor, and the sister company.

p) Accordingly, by its letter dated June 25, 2012, the Singapore International Arbitration Centre informed the award debtor and award holder [hereinafter collectively referred to as 'parties'] of the appointment of Mr Marcus Gordon as the sole arbitrator in all the eight references instituted by the award holder.

q) The award debtor has settled all claims of the award holder except the issues pertaining to the fixture note 1 and requested for other references to be discontinued through an email correspondence dated November 8, 2012.

r) The petitioner discontinued all other references except the arbitral reference no. ARB099/2012/MLJ in relation to fixture note 1.

s) The arbitrator issued a partial award in favour of the petitioner on account of existence of a valid contract and jurisdiction of the tribunal to adjudicate the dispute.

t) The partial award was published on January 20, 2017 (hereinafter referred to as 'the award') in favour of the petitioner deciding the liability of the award debtor as follows: -

a. USD 123,645.83/- on account of detention in Visakhapatnam;
b. USD 299,047/- on account of demurrage at Zhenjiang.

u) The tribunal reserved their jurisdiction to award sums by way of costs and interests.

v) The petitioner applied to the High Court of the Republic of Singapore for leave to enforce the said award in Singapore. The respondent contested the application. The appeal preferred by the respondent assailing the award was dismissed by the High Court of Singapore's judgement dated November 27, 2017. By order dated December 1, 2017, the Singapore High Court rejected the respondent's objections and granted leave to enforce the said award in Singapore.

w) In light of the issued partial award, the award holder filed the instant application.

Rival Submissions

5. The counsel on behalf of the award holder made the following submissions: -

a. The foreign award was made in terms of the International Arbitration Act (CAP 143A) of Singapore with the arbitral proceedings conducted in consonance with the Rules of the Singapore International Arbitration Centre.

b. Both India and Singapore are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Chapter I of Part II of the Arbitration and Conciliation Act, 1996 becomes relevant and as such the award holder has complied under Section 47 of the Act by providing the original award annexed at the end of the petition and a duly certified copy of the arbitration agreement, the validity of which has not been disputed.

c. Foreign awards cannot be challenged under the Act except in the country in which it was made. To that effect, the award debtor sought to strike out the leave granted by the High Court of Singapore to the award holder, elevating the award to a decree. However, no application to set aside the award was

made. The award debtor now seeks to challenge the award under section 48 on grounds identical to the application before the High Court of Singapore. The award debtor has already argued in length regarding all their allegations before the arbitrator who had issued a well-reasoned award after considering both oral and documentary evidences. As such no grounds under section 48 of the Act are attracted. Moreover, the award debtor is seeking to challenge the award on grounds of merits which is not permissible.

d. Reliance was placed on ***Shri Lal Mahal Limited v. Progetto Grano Spa*** as reported in **(2014) 2 SCC 433** wherein the Supreme Court held that Indian Courts must not have a second look at a foreign award at the enforcement stage. Similarly in ***Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited and Another*** as reported in **(2022) 1 SCC 753** the Court in India cannot refuse enforcement of a foreign award when it is found to be contrary to the substantive law agreed to by the parties. The same is to be challenged before the Courts under the said substantive law.

e. Through an email correspondence dated November 8, 2012, all arbitral references except the one pertaining to fixture note 1 were settled. Thus, the same also includes a fixture note [hereinafter referred to as 'fixture note 2'] which existed between the award holder and the sister company. As such the

purported existence of fixture note 2 cannot be an impediment to enforcement.

6. The counsel on behalf of the award debtor made the following submissions: -

a. Section 47(1)(b) of the Act requires the submission of a duly certified copy of the original arbitration agreement. As such the arbitrator identified fixture note 1 to possess the arbitration agreement which formed the basis of adjudication. However, the certified copy as attested by the award holder is based on the modified fixture note 1 which according to the arbitrator was not the arbitration agreement as a contrary observation was made by the same. Since a duly certified copy of fixture note 1 has not been provided, the award holder has not complied with the statutory mandate of section 47(1)(b) of the Act and thus, the application itself is to be dismissed.

b. The parties were unable to reach a consensus regarding certain terms as illustrated in the offer and counter offer over chartering of certain products, specifically relating to the quantity and dates of laycan. Moreover, the exchanges of the fixture note 1 and modified fixture note 1 further show cases the absence of consensus ad idem as both parties when circulating the respective fixture note required the counter party

to sign or accept. As such no evidence exists for such acceptance. Ergo, since there was no meeting of minds between the parties there was no valid contract based on the fundamental principles of contract law and consequently, no valid arbitration agreement.

c. Furthermore, the award holder, being dissatisfied with the modified fixture note 1 had approached the sister company with fixture note 2 dated December 24, 2009, which they had accepted. Thus, there was consensus ad idem between the award holder and the sister company and consequently, the award holder expected the sister company to fulfil the obligations as chartered of the said vessel under fixture note 2. As such, the award debtor had no transaction of either purchase or sale of the consignment which was shipped through the said vessel.

d. The award debtor is a separate legal entity from the sister company notwithstanding the fact that they are related. As such, there was no privity of contract between the award debtor and award holder and therefore there cannot be an arbitration agreement between the parties as such agreement would be null and void. In light of the above, the award must be refused to be enforced as per Section 48(2)(a) of the Act. To that effect,

reliance was placed on the Supreme Court's judgement in ***Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Anr.*** reported in **(2005) 7 SCC 234** which on combined reading of sections 45, 48, and 50 allowed for a challenge of an award under section 48 on the grounds that the arbitration agreement is null and void. As such, it was held that if a court is not asked to satisfy itself as to the validity of the agreement at a pre-award stage under section 45, then by virtue of section 48 it is given the opportunity to do so.

e. It is found by examining the documents relied upon by the arbitrator it does not appear that SIAC, a private body which appoints arbitrators to adjudicate disputes, was chosen by the parties. Thus, SIAC has no jurisdiction over the instant dispute as they had no basis to enter upon any reference. Thus, the said lack of jurisdiction penetrates to the root of the matter, rendering the award null and void.

f. Section 48(2)(b) empowers courts to refuse enforcement of a foreign award which it is contrary to the fundamental public policy of India. Identifying the ambit of fundamental public policy, reliance was placed upon the Supreme Court's judgement in ***Vijay Karia and Ors. v. Prysmian Cavi E Sistemi SRL and Ors.*** reported in **(2020) 11 SCC 1** which in turn placed reference upon the case of ***Ssangyong Engg. & Constriction Co. Ltd. v. NHAI*** reported in **(2019) 15 SCC 131**.

On account of the said precedents, it can be ascertained that the grounds for refusing enforcement of domestic award were identical to foreign ones. The same is to be narrowly construed and only when an award that shocks the conscience of the court would it be set aside. Furthermore, ***Vijay Karia (supra)*** relied on the Delhi High Court case of ***Cruz City 1 Mauritius Holdings v. Unitech Ltd.*** as reported in **2017 SCC OnLine Del 7810** as per which it can be concluded that when an award is made without jurisdiction, it is hit by the grounds under section 48(2) of the Act.

Analysis

7. At the outset, it is pertinent to note that the procedural deficiency of not filing a duly certified copy of the fixture note 1 has been cured during the present hearing. Therefore, the objection with regards to non-compliance of Section 47(1)(b) of the Act is infructuous.

8. The constraints and boundaries of the discretion that a court can exercise while determining whether there should be a refusal to enforce a foreign award must be analysed before getting into the factual matrix of the current case.

9. In ***Shri Lal Mahal Limited (supra)***, the Supreme Court was dealing with the same issue of defining the scope of discretion accorded to a

court while entertaining a plea to refuse the enforcement of a foreign award. Relevant extracts are extracted herein below:-

> *'30. It is true that in Phulchand Exports [Phulchand Exports Ltd. v. O.O.O. Patriot, (2011) 10 SCC 300 : (2012) 1 SCC (Civ) 131] a two-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression "public policy of India" in Section 34 in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in para 16 of the Report that the expression "public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law and is overruled.*
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> *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.*
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> *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).'*

10. The Supreme Court pursued a similar line of delineation of the law in ***Vijay Karia and Ors. (supra)*** albeit with a minor change, owing to the amendment in the provisions vide the 2015 Amendment, which

rendered Section 34 and Section 48 to be identical vis-à-vis 'public policy of India'. The important portions are extracted below:-

'43. It will be noticed that in the context of challenge to domestic awards, Section 34 of the Arbitration Act differentiates between international commercial arbitrations held in India and other arbitrations held in India. So far as "the public policy of India" ground is concerned, both Sections 34 and 48 are now identical, so that in an international commercial arbitration conducted in India, the ground of challenge relating to "public policy of India" would be the same as the ground of resisting enforcement of a foreign award in India. Why it is important to advert to this feature of the 2015 Amendment Act is that all grounds relating to patent illegality appearing on the face of the award are outside the scope of interference with international commercial arbitration awards made in India and foreign awards whose enforcement is resisted in India…

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58. When the grounds for resisting enforcement of a foreign award under Section 48 are seen, they may be classified into three groups — grounds which affect the jurisdiction of the arbitration proceedings; grounds which affect party interest alone; and grounds which go to the public policy of India, as explained by Explanation 1 to Section 48(2). Where a ground to resist enforcement is made out, by which the very jurisdiction of the Tribunal is questioned — such as the arbitration agreement itself not being valid under the law to which the parties have subjected it, or where the subject-matter of difference is not capable of settlement by arbitration under the law of India, it is obvious that there can be no discretion in these matters. Enforcement of a foreign award made without jurisdiction cannot possibly be weighed in the scales for a discretion to be exercised to enforce such award if the scales are tilted in its favour.

59. On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone, for example, that a party has been unable to present its case before the arbitrator, and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a court may well enforce a foreign award, even if such ground is made out. When it comes to the "public policy of India" ground, again, there would be no discretion in enforcing an award which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. It can thus be seen that the expression "may" in Section 48 can, depending upon the context, mean "shall" or as connoting that a residual discretion remains in the court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion

is limited to the circumstances pointed out hereinabove, in which case a balancing act may be performed by the court enforcing a foreign award.'

11. In ***Government of India v. Vedanta*** reported in ***(2020) 10 SCC 1***, the Supreme Court held that substantive amendments have been made to make the definition of 'public policy' narrow. The newly inserted Explanation 2 of Section 48(2)(b) prohibits a review on the merits of the dispute while ascertaining whether the enforcement of an award is in conflict with the fundamental policy of India.

12. In ***Gemini Bay Transcription Private Limited (supra),*** the Supreme Court was dealing with an argument that the Arbitral tribunal had wrongly applied the doctrine of piercing the corporate veil and that non-signatory was bound by the said Award. ISS (Award Debtor) and DMC Management (Contracting Party) entered into a representation agreement wherein Contracting Party was required to pay the Award Debtor for bringing customers for the Contracting Party. DMC India, DMC Global & Gemini Bay Consultants (GBC) were owned and controlled by Chairman of the Contracting Party. Gemini Bay Transcription (GBT) was a company with registered office at the same address as that of the Chairman, controlled and dominated by him. These four entities helped the Contracting Party to divert customers away from Contracting Party to other subsidiaries (GBT and GBC), so as to avoid paying commission to the Award Debtor with whom Contracting Party had entered into a representation agreement. The Court held that Section 47(1)(c) does not require substantive evidence

to prove that a non-signatory to an arbitration agreement can be bound by a foreign award. It re-iterated that public policy must be construed narrowly and that something more than mere contravention of law is required. Though speaking vis-à-vis Section 48(1)(a), the Court pointed that *it cannot undertake a review on merit once the arbitrator applied the doctrine of alter ego after applying his mind on the documentary evidence and oral evidence led before him to arrive at a decision***.** Furthermore, given that the foreign award gave reasons on facts to apply the alter ego doctrine, re-appreciation of facts cannot be done**.**

13. Therefore, the scope of enquiry to determine whether the award is in conflict with the 'public policy of India' accords the same discretion to a court under Section 34 as it does under Section 48. However, this discretion is very limited and narrow. The proscription is against courts undertaking a review and re-appreciating the evidence which was produced before the arbitral tribunal. The court should not substitute its view/interpretation with that of the arbitral tribunal's views.

14. The counsel appearing on behalf of the respondent has vehemently harped upon the non-existence of an arbitration agreement and the resulting consequence being refusal to enforce the award. Therefore, it is incumbent upon me to discuss the music that must follow when arbitration agreements are not present or invalid and cases wherein courts have dealt with similar circumstances. The Supreme Court in ***Shin-Etsu Chemical Co. Ltd. (supra)*** was deciding upon the fate of

objections related to validity of arbitration agreement vis-à-vis Section 48 of the Act. The relevant extract is reproduced below:-

> *''55. I may also deal with the contention urged on behalf of the appellant that only a prima facie finding is required to be given on a combined reading of Sections 45, 48 and 50 from which it can be culled out that a party who has suffered an award can always challenge the same under Section 48 on the ground that the arbitration agreement is null and void. This read in conjunction with the right of appeal given under Section 50 and the power of the arbitrator to rule on his own jurisdiction clearly shows the intent of the legislature to avoid delay which would be inevitable if it has to be a final decision and it would defeat the object of soon placing all material before the Arbitral Tribunal.* ***I am afraid that this cannot be accepted as the real purpose of Section 48 is to ensure that at some stage whether pre-award, post-award or both, a judicial authority must decide the validity, operation, capability of performance of the arbitration agreement. In various cases the parties may not resort to Section 45 in the first place, and to overcome such eventuality, the legislature has enacted Section 48(1)(a). In other words, if the court is not asked to satisfy itself as to the validity of the agreement at a pre-award stage (Section 45), then by virtue of Section 48, it is given another opportunity to do so. Apart from this, under Section 48, the court may refuse to enforce the foreign award on the ground other than the invalidity of the arbitration agreement.*** *As far as the question of Section 50 is concerned, it is well settled in law that an appeal is a creature of statute (M. Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd. [(1983) 3 SCC 75]) and a right to appeal inheres in no one. (Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad [(1999) 4 SCC 468] .) The legislature under Section 50 has clearly allowed appeal only in case the judicial authority refuses to refer the parties to arbitration or refuses to enforce the foreign award. The fact that a provision is not made for an appeal in case reference is made to arbitration is not a ground to say that the court should prima facie decide the validity of the agreement ignoring the express provisions of Section 45. The legislature has granted the right of appeal in the event of refusal to refer but not in the event of order being made for reference of the parties to arbitration. This provision for appeal is not determinative of the scope of Section 45 to mean that the determination thereunder has to be only prima facie.'*

Emphasis Added

15. The Delhi High Court in ***Agrigade International Pte. Ltd. v. National Agriculture Co-operative Marketing Federation of India Ltd.*** reported in ***2012 (128) DRJ 371*** was deciding upon a case wherein ultimately no arbitration agreement was found to exist and the enforcement of the award was refused under Section 48(2)(a). The relevant paragraphs are produced below:-

> *'17. It is not that there are no consequences for the failure of a party to file a copy of the arbitration agreement. Section 48(2)(a) of the Act states that enforcement of an award may be refused if the Court finds that "the subject matter of the difference is not capable of settlement by arbitration under the law of India." The question to be asked is whether in terms of the law of India, the dispute between Agritrade and NAFED, in the absence of an arbitration agreement, was capable of settlement by arbitration? The obvious answer has to be in the negative. A reading of Sections 7 and 16(1) of the Act show that the existence of an arbitration agreement is what confers jurisdiction on the arbitral tribunal. At the threshold where a party is able to demonstrate to the satisfaction of the arbitral tribunal under Section 16(1) of the Act that an arbitration agreement does not exist or where it does it is not valid, that brings the arbitration proceedings to a close. Such dispute is therefore "not capable of settlement by arbitration" under Indian law in terms of Section 48(2)(a) of the Act. This is therefore one ground on which the enforcement of the foreign Award in question can be refused in the instant case.*
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> *19. In Shakti Bhog Foods Ltd. v. Kola Shipping Ltd., (2009) 2 SCC 134 the Supreme Court interpreted Section 7 of the Act and held (SCC, p. 142) that "the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement". This was reiterated in Trimex International FZE Limited, Dubai v. Vedanta Aluminium Limited, India, (2010) 3 SCC 1, where it was observed (SCC, p. 32):"It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication." In the absence of a written signed contract between the parties, the burden was on Agritrade to show that there was nevertheless a concluded contract on the basis of other documents on record.'*

It is to be noted, that in this case, there was no direct communication between the award debtor and the award holder, to insinuate that there was an agreement between the said parties. Rather, there was involvement of a third party, who apparently was the agent of the award debtor. In consideration of the fact that there was no direct correspondence and no evidence to confirm that the third party had agency to bind the award debtor to a contract, the Delhi High Court refused to enforce the foreign award. In the facts before me, there exists direct correspondence between the parties and accompanying conduct which the arbitrator has dealt with. On the said basis of which an agreement has been found to exist between the instant parties. Therefore, this case is distinguishable on facts.

17. Similarly, the Delhi High Court in ***Cinergy Corporation PTE Ltd. v. National Agricultural Co-operative Marketing Federation of India Ltd.*** reported in ***2013(133) DRJ 148 (DB)*** and ***Marina World Shipping Corporation Ltd. v. Jindal Exports & Imports Private Ltd.*** reported in ***(2012) 188 DLT 482*** was adjudicating upon the non-existence of an arbitration agreement in an execution application of a foreign award. The relevant portion of the judgement in ***Marina World Shipping Corporation Ltd. (supra)*** is cited below: -

> '25. Section 47(1) does make it mandatory for a party applying for enforcement of a foreign award to produce before the Court the original agreement for arbitration or a duly certified copy thereof. ***While Section 47(1)(a) of the Act does not itself spell out the consequence of a party failing to produce the original arbitration***

agreement, this has to be read in the context of Section 48(2)(a) of the Act which states that a court could refuse to enforce an award if it finds that the subject matter of the dispute "is not capable of settlement by arbitration under the law of India." Under the Act, a dispute between parties cannot be referred to arbitration in the absence of there being an arbitration agreement between them as defined in Section 7 of the Act which reads as under:

"7. Arbitration agreement -
(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in —
(a) a document signed by the parties;
(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

Emphasis Added

18. In ***Marina World Shipping Corporation Ltd. (supra)***, one of the parties attempted to unilaterally impose an arbitration clause after discharge of cargo was complete. Additionally, the arbitration clause was exchanged via a third party and not directly between the parties to the contract. This question of the existence of an arbitration agreement was not even dealt with in the award. Consequentially, the Delhi High Court was not satisfied, even prima facie, as to the existence of an arbitration agreement. In ***Cinergy Corporation PTE Ltd. (supra)***, the

correspondence, on the basis of which the tribunal concluded that an arbitration agreement existed, was never exchanged between the parties. Rather, the communication took place via a third party, allegedly acting as the award debtor's agents, but there was no evidence to suggest that the award debtor was privy to the same. In such peculiar facts and circumstances, the Division Bench upheld a Single Judge's order which refused to enforce the foreign award. To reiterate, in the current scenario, there is direct communication between the parties and accompanying conduct on the basis of which an agreement has been found to exist between the parties. Therefore, both these cases are distinguishable on facts.

19. In ***Rickmers Verwaltung GMBH v. Indian Oil Corporation*** reported in ***(1999) 1 SCC 1***, the parties never acted upon the correspondences and therefore the Supreme Court held that even the correspondences, by themselves, did not establish a concluded contract but were evidence of pre-contract bargaining. While the facts are distinguishable, the Supreme Court in ***Rickmers Verwaltung GMBH (supra)*** and ***Padia Timber Company Private Limited v. Board of Trustees of Visakhapatnam*** reported in ***(2021) 3 SCC 24*** discussed the pre-requisites to consider while deciding upon the existence of a concluded contract. The relevant extracts of ***Rickmers Verwaltung GMBH (supra)*** are produced below:-

'**13.** In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there

was any meeting of mind between the parties, which could create a binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. ***The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract.*** The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.

14. From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by the respective parties. In the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between the parties and no concluded enforceable and binding agreement came into existence between them. Apart from the correspondence relied upon by the learned Single Judge of the High Court, the fax messages exchanged between the parties, referred to above, go to show that the parties were only negotiating and had not arrived at any agreement. There is a vast difference between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract. ***The learned Single Judge of the High Court was, therefore, perfectly justified in holding that clause 53 of the charter party relating to arbitration had no existence in the eye of law because no concluded and binding contract ever came into existence between the parties***. The finding recorded by the learned Single Judge is based on proper appreciation of evidence on the record and a correct application of the legal principles. We find no merit in this appeal. It fails and is dismissed with costs.'

Emphasis Added

20. The law requires the existence of an arbitration agreement, which is imperative for granting legitimacy to the jurisdiction of the arbitral tribunal to decide upon the disputes. There must be consensus ad idem of the parties upon an agreement, which must further include an arbitration clause. However, an agreement and an arbitration clause therein may not be found in a singular document and can be gathered from the correspondence between the parties, which can be further corroborated by resulting conduct of the parties.

21. The following principles can be derived from the judgements cited and discussed above :-

a) The Supreme Court in ***Government of India v. Vedanta (supra)*** and ***Gemini Bay Transcription Private Limited (supra)*** has imposed a bar on courts, which is to be kept in mind while deciding whether a foreign award should be enforced or not. The said bar precludes the courts from :-

(i) re-appreciating evidence,

(ii) substitute its own view with that of the arbitrator, or

(iii) reviewing the matter afresh.

b) In circumstances wherein an arbitration agreement is **evidently** found lacking or there is no concluded contract, the enforcement of an award must be refused and shall fall prey to:-

(i) Section 48(2)(a) – for the subject matter not being capable of settlement by arbitration under the law of India (as per the judgements in ***Agrigade International Pte. Ltd. [supra], Cinergy Corporation PTE Ltd. [supra]*** and ***Marina World Shipping Corporation Ltd. [supra]*)**,

(ii) Section 48(2)(b) of the Act –the enforcement of the award would be in conflict with the public policy of India as unilateral imposition of a contract upon an unwilling and unrelated party would be against the 'most basic notions of justice' and would shock the conscience of any court, as per the judgement in ***Ssangyong Engg. & Constriction Co. Ltd (supra).***

Conclusion

22. The impending question before me is whether there was an agreement between the parties, which furthermore contained an arbitration clause. The interesting dimension to this question is that it is intertwined with the award passed by the arbitrator wherein the arbitrator has come to the conclusion that there existed an agreement along-with an arbitration clause. However, the respondent asserts that

the agreement was never signed by it and the agreement was rather between the petitioner and the respondent's subsidiary, which is a separate legal entity.

23. In my view, this court should tread carefully while undertaking the task of determining whether there was a concluded contract along-with an arbitration clause, specifically when the arbitrator has decided on it. It is not even the respondent's case that there was no contract, but that the correspondence suggests that it was ultimately concluded with the subsidiary of the respondent. Indisputably, there was a contract pursuant to which parties conducted themselves. ***The arbitrator's decision sheds light, <u>not</u> on whether there was a contract, but rather <u>which</u> contract constituted the agreement between the parties***. This further governs the question of which were the parties between whom the agreement was actually concluded. My task of adjudication must be completed while keeping in mind the constraints imposed by law while exercising discretion under Section 48 of the Act, which are to ensure that the court does not (i) re-appreciate evidence, (ii) substitute its own view with that of the arbitrator or (iii) review the matter again. To refuse enforcement, the evidence must be expressly forthcoming to indicate that there was no concluded contract between the petitioner and respondent, wherein the arbitrator has gone completely amiss in his duty.

24. For the sake of convenience and clarity, certain portions of the award are herein extracted below: -

'136. I note that between 24 December 2009 (when the Recap and the Reply to Recap were exchanged) and 27 January 2010 (when Fixture Note 1 was sent to the Respondent), the Vessel: (1) arrived at Haldia; (2) waited at Haldia; (3) was nominated by the Claimant; and (4) tendered a notice of arrival at Vizag.

137. Between the Claimant sending the Respondent Fixture Note 1, and the Respondent sending Revised Fixture Note 1, Prem Jain accepted the notice of the Vessel to load at Vizag on behalf of the Respondent.

138. After Revised Fixture Note 1 had been sent to the Claimant, but before Fixture Note 2 had been sent to the Respondent, a number of events occurred, including: (1) the Vessel commenced loading at Haldia; (2) the Vessel completed loading at Haldia; (3) the Vessel sailed for Vizag; (4) the Vessel gave notice of readiness to load at Vizag; and (5) this notice of readiness was accepted by the Respondent.

139. In my view, the matters set out in paragraphs 136 to 138 are events that evidence that a contract was in fact in place between the Claimant and the Respondent prior to the date on which Fixture Note 2 was sent to the Respondent.

*

141. In particular, I consider that prior to 27 January 2010, there was already an agreement in place that incorporated terms covering demurrage at US$30,000 HD PRPD and discharge at 15,000 MT/hour (as contained in the Recap and the Reply to Recap), but not an arbitration clause.

142. As for Fixture Note 1, according to the Claimant, this was a record of what had already been agreed by the parties, as partially set out in the Reply to Recap, albeit with changes to the quantity of the Cargo and the laycan provisions. [Bothra 1/8; Bothra 2/5.1]. However, both of these changes appear to have been accepted by the parties, which is reflected by the fact that the parties continued to act on these provisions without any apparent difficulty.

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145. For the Respondent's submission, that there was not a binding contract in place prior to Fixture Note 2, to stand true, it would require that numerous steps would have to have been completed without a contract in place, including: (1) the Vessel being nominated and accepted at Haldia and Vizag; (2) the Vessel being loaded with part of the Cargo at Haldia; (3) the Vessel having sailed to Vizag, and given notice of her readiness to load, which was accepted by the Respondent's agent, Bothra Shipping, on behalf of the Respondent.

*

153. Notwithstanding, I am of the view that by the time Revised Fixture Note 1 was sent to the Respondent, the parties had already agreed the demurrage and discharge rates (among other terms such as the price to be paid for the Cargo and the estimated amount of the Cargo). Accordingly, I agree with the Claimant that it was not open to the Respondent to unilaterally alter the demurrage and discharge rates, as it purported to do in Revised Note 1.

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155. In fact, on balance, based on the evidence before me, I consider there was a binding agreement on the terms set out in Fixture Note 1.'

25. The arbitrator passed the award in favour of the petitioner, predominantly on the said factual and legal determinations: -

a) Conduct of the parties indicated there was an agreement pursuant to which actions were being undertaken even before Fixture Note 1 was sent.

b) Conduct that indicated that (i) changes to the second email and (ii) the Fixture Note 1 were accepted by the parties as they went on with their respective obligations even after the said correspondence, and that the

c) Conduct indicated that several actions taken were pursuant to a mutual understanding (which is to say that consensus ad idem existed) between the parties and that a contract was in place, even before the Fixture Note 2 was sent to Global Up International Ltd. (the respondent's subsidiary).

26. The Arbitrator has provided a determination after analyzing facts and applying law to the same. This court should not substitute its own view, replace that of the arbitrator and venture beyond this preliminary determination, ***unless it is manifestly evident that there existed no agreement***. Such is not the case herein as the arbitrator has concluded from appreciation of the evidence that there was an agreement between the petitioner and the respondent, owing to communication and subsequent conduct of the parties. The arbitrator's view is sacrosanct and should not be substituted with an alternate view/opinion which this court may possibly have on re-appreciation of the evidence. To re-iterate, the arbitrator has (i) examined the evidence upon proper application of mind and decided upon what constituted as

the agreement amidst the various correspondences including Fixture Note 1 and the conduct of the parties (including pit-stops taken by the respondent in carrying forward the transaction), and (ii) concluded that there was consensus ad idem between the parties based on an agreement. It is not a simple situation wherein the enquiry is limited to deciding ***whether*** there was an agreement, but rather ***which correspondences and documents constituted the agreement*** between the parties. The difference between the two is a thin line, but is of great significance. Once the latter is decided by the arbitrator, the parties between whom the agreement existed becomes manifest. This decision should not, in my opinion, be tinkered with.

27. Keeping in mind the law with regards to Section 48 of the Act wherein my discretion is very limited, I do not find there was no concluded contract or no arbitration agreement which could have made (i) the matter being incapable of settlement by arbitration in India or (ii) shocked the conscience of the court in light of forceful imposition of a contract not entered into by the respondent. Therefore, the respondent's challenge to the enforcement of the award must fail.

28. In view of the above, the objections raised by the respondent with regard to enforceability of the award are rejected and it is ordered that the award is enforceable and executable as a decree of this court. The respondent is directed to disclose its affidavit of assets within eight

weeks from date. The petitioner shall be at liberty to seek further directions for execution of the award, in accordance with law.

29. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)