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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 15TH DAY OF DECEMBER, 2025

BEFORE

THE HON'BLE MR. JUSTICE S VISHWAJITH SHETTY

WRIT PETITION NO. 12646 OF 2023 (GM-CPC)

BETWEEN:

M/S SS EXPORTS
HAVING THE OFFICE AT NO.19
SHIVASHANKAR PLAZA
RICHMOND CIRCLE, LALBAGH ROAD
BANGALORE - 560 027
REP. BY ITS CHIEF EXECUTIVE
SRI RAJENDRA PATIL
PARTNERSHIP FIRM.

...PETITIONER

(BY SRI M.S. SHYAM SUNDAR, SR. COUNSEL FOR
SMT. VANDANA P.L, ADV.,)

AND:

M/S ARK SHIPPING CO. LTD.
A COMPANY INCORPORATED
UNDER THE LAWS OF KOREA
HAVING ITS REGISTERED OFFICE AT
8TH FLOOR, HAN YONG BUILDING
57-9, SEOSOMUN-DONG
CHUNG-GU SEOUL KOREA

REP. BY ITS PA HOLDER
AND LOCAL PERSON
MR. A.Z. MOOKHTIAR
S/O ZAINUL MOOKHTIAR
AGED ABOUT 58 YEARS
RESIDING AT C/O SHARAD SHRIKHANDE
NO.6104, ANRIA DWELLINGTON
DOLLARS COLONY, RMV EXTENSION

II STAGE, BANGALORE - 560 094.

…RESPONDENT

(BY SRI VIKRAM HUILGOL, SR. COUNSEL FOR
SRI FARHAN *QUAZI, ADV.)

THIS WP IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA PRAYING TO SETTING ASIDE THE IMPUGNED ORDER DTD:16.09.2022 PASSED IN EXECUTION CASE NO.15180/2005 BY THE XIII ADDL. CITY CIVIL JUDGE MAYO HALL BANGALORE WHICH IS PRODUCED AT ANNX-A TO THE W.P.

THIS PETITION, HAVING BEEN RESEREVED FOR ORDERS ON 02.12.2025, COMING ON FOR PRONOUNCEMENT THIS DAY, COURT MADE THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE S VISHWAJITH SHETTY

CAV ORDER

1. This writ petition under Article 227 of the Constitution of India is filed seeking for the following reliefs:-

> *"1. Issue an appropriate writ or order, setting aside the impugned order dated 16.09.2022 passed in Execution Case No.15180/2005 by the XIII Addl. City Civil Judge, Mayo Hall, Bangalore, which is produced at Annexure-A to the writ petition;*
>
> *2. Issue an appropriate writ or order or direction in the nature of declaration by declaring to the effect that the impugned arbitral award presented for recognition and execution in the said case Ex.*

*Corrected vide Court Order Dt: 19.12.2025.

Case No.15180/2005 is unenforceable vide Annexure-A.

3. And pass such other orders or directions deems fit to be passed in favour of the petitioner under the circumstances of the case in the interest of justice and equity."

2. Heard the learned Counsel for the parties.

3. Facts leading to filing of this writ petition as revealed from the records are, the respondent herein (decree-holder) under a Charter Party dated 12.05.2004 had given a ship/vessel on charter to the petitioner/judgment-debtor for transporting certain goods. The decree-holder had laid claim for freight and demurrage charges to the tune of US $ 2,75,479.90 (US dollars), and accordingly had submitted an invoice. Since, the judgment-debtor had failed to pay the claim made, in terms of the arbitration clause found in the Charter Party, the decree-holder had appointed Mr. Jayaprakash as the Arbitrator and accordingly, intimated the judgment-debtor to appoint its arbitrator. Since the judgment-debtor did not come forward to appoint its arbitrator, Mr. Jayaprakash as a Sole Arbitrator had entered upon the reference and issued notice to the judgment-

debtor. However, the judgment-debtor had not appeared before the Sole Arbitrator and therefore, the proceedings in the arbitration case was proceeded ex-parte against the judgment-debtor. The sole arbitrator had passed an award against the judgment-debtor on 21.02.2005 allowing the claim of the decree-holder with simple interest thereof at the rate of 4% for the period from 07.08.2004 upto the date of the award, with costs for arbitration payable by the judgment-debtor and other costs.

4. Execution Petition No.15180/2005 was filed before the Court of XIII Addl. City Civil & Sessions Judge, Mayohall unit, Bengaluru, by the decree-holder with a prayer to recognize and declare that the aforesaid award under execution is a foreign award in accordance with Section 44 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996'), and thereafter, to proceed to execute the said award by attachment and sale of the property of the judgment-debtor or in the alternative by arrest of the judgment-debtor and detention in civil prison.

5. In the said proceedings, the judgment-debtor had appeared and had filed IA.no.5 under Section 48 of the Act of 1996, to suspend the operation of the foreign award and IA.no.6 to condone the delay in filing the application under Section 48 of the Act of 1996. Simultaneously, the judgment-debtor also had filed objections challenging the validity and enforceability of the foreign award which was sought to be executed.

6. The decree-holder had filed rejoinder to the said objection.

7. The Executing Court vide the order impugned passed in Execution Petition No.15180/2005, having dismissed IA.nos.5 & 6, had overruled the objections of the judgment-debtor with respct to the enforceability of the foreign award dated 21.02.2005 passed by the sole arbitrator, Mr. Jayaprakash with arbitration seat at Singapore, and consequently, held that the said award was enforceable as a decree of the court under Section 49 of the Act of 1996. Assailing the said order dated 16.09.2022, the judgment-debtor is before this Court.

8. Learned Senior Counsel for the petitioner having reiterated the grounds urged in the petition, submits that -

- Parties had not executed any Charter party.
- The alleged Charter Party is not signed by the petitioner.
- The amendment provided under Clause 19(A) of the Charter party was behind the back of the petitioner.
- Petitioner was not granted sufficient time by the arbitrator and therefore, petitioner was unable to appear and participate in the arbitration proceedings.
- The sole arbitrator has allowed the claim of the decree-holder solely for the reason that the said claim was not opposed.
- The award in question is opposed to "public policy" of India and this aspect of the matter is not appreciated by the Executing Court.
- Under the amended Clause, namely, Clause 19(A) found in the Charter Party, 'scheme for appointment of arbitrator' is not provided.

- Even if the foreign award is not challenged, in view of Section 48 of the Act of 1996, all contentions regarding validity and enforceability of the award can still be raised in the execution proceedings.

9. In support of his arguments, he has placed reliance on the judgments of the Hon'ble Supreme Court in the case of **RENUSAGAR POWER CO. LTD. VS GENERAL ELECTRIC CO. - 1994 Supp (1) SCC 644, BGS SGS SOMA JV VS NHPC LTD. - (2020)4 SCC 234**, the judgment of the High Court of Justice Queen's Bench Division Commercial Court in the case of **SHAGANG SOUTH ASIA (HONG KONG) TRADING CO. LTD. VS DAEWOO LOGISTICS - (2015) EWHC 194 (COMM)**.

10. Per contra, learned Counsel for the respondent-decree holder submits that -

- The judgment-debtor was put on notice on every stage of the case and he was given proper opportunity to put forth his stand.

- The judgment-debtor had not raised any objection for the arbitration proceedings and on the other hand, he had sought time to respond to the notice

issued on behalf of the decree-holder invoking the arbitration clause in the Charter party.

- Inspite of proper opportunity, petitioner had not participated in the arbitration proceedings.

- The word 'public policy' has been given wider meaning for the purpose of Section 34 of the Act of 1996 and a restricted meaning for Section 48 of the Act of 1996 by the Hon'ble Supreme Court.

- In the communications, which were exchanged between the parties prior to the sole arbitrator entering upon the reference, at no stage, the petitioner had denied the execution of the Charter Party or the amendment to the Charter Party incorporating Clause 19(A).

11. In support of his arguments, he has placed reliance on the judgments of the Hon'ble Supreme Court and the Delhi High Court in the following cases:-

(i) AVITEL POST STUDIOZ LIMITED & OTHERS VS. HSBC PI HOLDINGS (MAURITIUS) LIMITED - (2024)7 SCC 197

(ii) SHRI LAL MAHAL LIMITED VS PROGETTO GRANO SPA - (2014) 2 SCC 433

(ii) CRUZ CITY 1 MAURITIOUS HOLDINGS VS UNITECH LIMITED - 2017 SCC OnLine Del 7810

12. According to the decree-holder under a Charter Party dated 12.05.2004, the decree-holder had given on charter to the judgment-debtor a vessel/ship on the terms and conditions set-out in the Charter Party. Charter Party is a deed between ship owner and a trader (hirer) for the hire of a ship and the delivery of cargo. It is a legal agreement between the owner of the ship/vessel and the trader. This document serves as the contractual agreement that can be referred to if litigation or disaster occurs. Parties to a Charter Party are bound by its terms and conditions. It is found that the decree-holder as well as the judgment-debtor have signed the Charter Party and therefore, they are bound by the terms and conditions of the same.

13. Clause 19 of the Charter Party contains Arbitration Clause which reads as follows:-

"CLAUSE 19: "This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter Party

shall be referred to Arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed bye ach party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final.

*For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association".*

By rider clause 38, Clause 19 aforesaid was amended in the following manner: Rider to Clause 19(a) of Part II (Printed clause). Arbitration in Singapore English Law to apply."

14. The judgment-debtor in its objections filed to the execution petition as well as in this writ petition has raised a

specific contention denying the very execution of the Charter Party. However, the judgment-debtor has not disputed that the consignment belonging to it was transported in the vessel/ship owned by the decree-holder. Material on record would go to show that since the judgment-debtor had failed to pay the amount claimed under the invoice which was raised by the decree-holder towards freight and demurrage charges, certain communications were exchanged between the parties. The communication dated 24.08.2004 which was addressed to the judgment-debtor is a notice of commencement of arbitration wherein it is stated as follows:-

> *"As you are aware, the above vessel was fixed by Ark to Charterers, S.S.Exports of Karnataka, India, under a Gencon Charterparty dated 12th May 2004.*
>
> *Disputes have arisen, and Ark claim a balance of US$ 267,927.35. This is made up of freight, loading and discharging port demurrage and shifting charges, all as set out in their Freight Invoice dated 25th June 2004.*
>
> *Charterers have failed to pay this amount and the matter must therefore be referred to arbitration.*
> *The Charterparty provides:*

CLAUSE NO.38 - ARBITRATION: DELETED
REFER TO CLAUSE 19(A) OF PART II (PRINTED CLAUSE)
ARBITRATION IN SINGAPORE ENGLISH LAW TO APPLY

The reference to clause 19(a) of Part II is in the context of the Gencon 1994 charter, which provides that unless the parties can agree upon a sole arbitrator, one arbitrator is to be appointed by each side."

15. In reply, on 06.09.2004, the following communication was addressed on behalf of the judgment-debtor to the arbitrator, who was appointed on behalf of the decree-holder, which reads as follows:-

"Please refer letter from A. Mehta Laljee and Company dated 25th August 2004 requesting us to nominate our Arbitrator. Please be guided that we have today forwarded the entire documents/file to out lawyers in India who shall make the necessary arrangements in respect of the replies and arbitration proceedings.

Whilst we believe that you shall hear from them shortly, we would like time for 30 days from

the date of our above letter for our solicitors to study the matter and revert."

16. On 10.09.2004, a further communication was issued on behalf of the decree-holder to the judgment-debtor, which reads as follows;-

"We are the London lawyers acting for Ark Shipping Co. Ltd. in the above matter.

On 25th August SS exports received notice of the appointment of Mr Jaya Prakash and were asked to make a responding appointment within 14 days, failing which Mr Prakash would be appointed sole in default.

That 14 day period expired on 8th September. However, you asked on 6th September for a time extension of 30 days while your solicitors "study the matter and revert".

30 days is totally unnecessary. All that is required is for your lawyers to find a suitable arbitrator in Singapore, appoint him and give notice to us.

You will appreciate that by now, we could perfectly legitimately have appointed Mr Prakash sole.

However, as a gesture of goodwill, Ark Shipping hereby allow SS Exports until close of business

Monday, 13th September, but absolutely no later. We expect to have received the notice from you by then, failing which we will act without notice."

17. In continuation of the same, on 15.09.2004, yet another communication was issued on behalf of the decree-holder, which reads as follows:-

"As you are aware, we are the London lawyers acting for Ark Shipping Co. Ltd. in the above matter.

You have not responded to out fax of 10th September.

Please note that Ark Shipping now propose to appoint Mr Prakash sole arbitrator in default.

In accordance with section 17(2) of the Arbitration Act 1996, we hereby give formal notice to S.S.Exports that if you do not, within 7 clear days of this notice, appoint your arbitrator, we will therefore, proceed to appoint Mr Prakash sole."

18. Subsequently, arbitrator appointed on behalf of the decree-holder had issued a communication to the judgment-debtor confirming his acceptance of appointment as sole arbitrator under reference. In addition to the aforesaid

communications, there are several other communications exchanged between the decree-holder and judgment-debtor, which specifically refer to the Charter Party dated 12.05.2004 and also to the arbitration Clause found in the said Charter Party which is referred to hereinabove.

19. Section 2(b) of the Act of 1996 provides for the definition of "arbitration agreement" and it states that arbitration agreement means an agreement referred to in Section 7 of the Act of 1996. Section 7 of the Act of 1996 reads as follows:-

> *"**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 [including communication through electronic means] 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."

20. From a reading of the aforesaid provision of law, it is apparent that an arbitration agreement would include documents signed by the parties and also communications exchanged between them including communications through electronic means which provide a record of the agreement. In the case on hand, the decree-holder has not only produced the original of Charter Party dated 12.05.2004 before the Executing

Court, but it has also produced several undisputed communications exchanged between the parties referring to the Charter Party dated 12.05.2004 and the arbitration clause found in the said document. Therefore, I find no merit in the contention urged on behalf of the petitioner that no Charter Party was signed between the decree-holder and the judgment-debtor and on the other hand, execution of Charter Party stands proved.

21. Learned counsel for the petitioner has also made a submission that under Clause 19(A) of the Charter Party, there is no scheme for appointment of an arbitrator and therefore, the arbitration clause itself is void, which cannot be acted upon. In support of this argument of his, he has placed reliance on the judgment of the High Court of Justice Queen's Bench Division Commercial Court in the case of **SHAGANG SOUTH ASIA (HONG KONG) TRADING CO. LTD.** *(supra).* The judgment in the said case was rendered in an appeal which was filed challenging the award passed by the arbitrator after hearing both the parties.

22. In the case on hand, petitioner herein was notified at every stage of the case i.e., from the stage of invoking the arbitration clause found in Charter Party dated 12.05.2004, till the stage of the sole arbitrator entering upon the reference, but the judgment-debtor had chosen not to participate in the arbitration proceedings nor had he raised any such objection that Clause 19(A) of Charter Party did not provide a scheme for appointment of arbitrator. Clause 19(A) is required to be read along with Clause 19, because by rider Clause 38, Clause 19 was amended only to the extent of change in the seat and the applicable law. Clause 19 clearly provides the scheme for appointment of arbitrator and therefore, the contention urged on behalf of the petitioner that Clause 19(A) of the Charter Party does not provide for a scheme for appointment of arbitrator, does not merit consideration.

23. Learned Counsel for the petitioner has referred to Section 48 of the Act of 1996, and submits that in view of Section 48(1)(b), 48(1)(d) and 48(2)(b) of the Act of 1996, the award in question cannot be enforced in India. Section 48 of the Act of 1996 reads as under:

"48. Conditions for enforcement of foreign awards.—*(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—*

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

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

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

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award

which contains decisions on matters submitted to arbitration may be enforced; or

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

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

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

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

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

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

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

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

24. The international trade has increased manifold with infrastructural advancements and along with it the bilateral and multilateral trade agreements have increased and so the disputes which arise from those agreements. In normal

circumstances, these disputes are preferred to be resolved through arbitration. There are several conventions and treaties which govern enforcement of foreign arbitral awards in a signatory country. India is a signatory to New York Convention, 1958. Earlier, the provisions of Arbitration (Protocol and Convention) Act, 1937, governed enforcement and recognition of foreign arbitral awards. Subsequent to New York Convention, the Foreign Awards (Recognition and Enforcement) Act, 1961, came into force. After the enactment of the Act of 1996, the aforesaid Acts of 1937 and 1961 were repealed.

25. Section 44 of the Act of 1996 defines the word 'foreign award'. Section 44 reads as under:

> ***"44. Definition.***—*In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—*
>
> *(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and*

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

26. In the case of **BHARAT ALUMINIUM CO. (BALCO) V. KAISER ALUMINIUM TECHNICAL SERVICES INC. - (2012)9 SCC 552**, the Hon'ble Supreme Court has held that Part-I of the Act of 1996 would not be applicable to a foreign arbitral award having juridical seat of arbitration outside India. In paragraph nos.195 to 197 of the said judgment, it is observed as under:

"195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International [(2002) 4 SCC 105] and Venture Global Engg. [(2008) 4 SCC 190] In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration

Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

196. We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India.

197. The judgment in Bhatia International [(2002) 4 SCC 105] was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engg. [(2008) 4 SCC 190] has been rendered on 10-1-2008 in terms of the ratio of the decision in Bhatia International [(2002) 4 SCC 105] . Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."

27. In **RENUSAGAR POWER CO.'S** case *(supra)*, the Hon'ble Supreme Court has held that mere violation of Indian laws is not sufficient to refuse enforcement of foreign arbitral award on

the ground the same is opposed to public policy of India. In paragraph no.66 of the said judgment, the Hon'ble Supreme Court has observed as under:

> ***"66.*** *Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act 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 the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the*

> *principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."*

28. In the case of **OIL & NATURAL GAS CORPORATION LTD. VS SAW PIPES LTD. - (2003)5 SCC 705**, the Hon'ble Supreme Court has expanded the test of 'public policy' having reference to Section 34 of the Act of 1996. The judgment in *Saw Pipes Ltd. case* was relied upon by the Hon'ble Supreme Court in **PHULCHAND EXPORTS LIMITED VS O.O.O.PATRIOT - (2011) 10 SCC 300**, and the expression and concept of public policy of India which was given a wider meaning in the said case was extended even to Section 48 of the Act of 1996 and in paragraph no.15, the Hon'ble Supreme Court has observed as under:

"15. *It is true that in Renusagar [1994 Supp (1) SCC 644 : AIR 1994 SC 860] , relied upon by the Division Bench, a narrower meaning has been given to the expression "public policy of India" while this Court in a subsequent decision in Saw Pipes Ltd. has given a wider meaning to that expression. This Court in Saw Pipes Ltd. stated as under : (SCC pp. 727-28, para 31)*

"31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

29. Subsequently, in **SHRI LAL MAHAL LTD.*'s*** case *(supra)*, the judgment in **PHULCHAND EXPORTS** case *(supra)*, was overruled and in paragraphs 24 to 26 of the said judgment, the Hon'ble Supreme Court has observed as under:

"24. *Explaining the concept of "public policy" vis-à-vis the enforcement of foreign awards in Renusagar [Renusagar, this Court in paras 65 and 66 of the Report stated: (SCC pp. 681-82)*

"65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of

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

66. … This would mean that 'public policy' in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are

governed by the principles of private international law, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

(emphasis supplied)

25. *In Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] the ambit and scope of the Court's jurisdiction under Section 34 of the 1996 Act was under consideration. The issue was whether the court would have jurisdiction under Section 34 to set aside an award passed by the Arbitral Tribunal, GAFTA which was patently illegal or in contravention of the provisions of the 1996 Act or any other substantive law governing the parties or was against the terms of the contract. This Court considered the meaning that could be assigned to the phrase "public policy of India"*

occurring in Section 34(2)(b)(ii). Alive to the subtle distinction in the concept of "enforcement of the award" and "jurisdiction of the court in setting aside the award" and the decision of this Court in Renusagar, this Court held in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] that the term "public policy of India" in Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it becomes final. Having that distinction in view, with regard to Section 34 this Court said that the expression "public policy of India" was required to be given a wider meaning. Accordingly, for the purposes of Section 34, this Court added a new category — patent illegality — for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against public policy. Award could also be set aside if it was so unfair and unreasonable that it shocks the conscience of the court.

> ***26.*** *From the discussion made by this Court in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] in para 18, para 22 and para 31 of the Report, it can be safely observed that while accepting the narrow meaning given to the expression "public policy" in Renusagar [Renusagar in the matters of enforcement of foreign award, there was departure from the said meaning for the purposes of the jurisdiction of the Court in setting aside the award under Section 34."*

30. In the said case, the Hon'ble Supreme Court has held that ground of award being patently illegal, would be limited only for the purpose of Section 34 of the Act of 1996, and it cannot be extended to Section 48 of the Act of 1996.

31. At this juncture, it is relevant to note that explanation (2) to sub-clause (b) of sub-section (2) of Section 48 of the Act of 1996, which came into force in 2015, states that with the purview of evaluating the prospects of 'public policy', the opportunity given to the enforcing court shall be very minimal and it shall not entail a review on the merits of the case.

32. In ***Cruz City's*** case *(supra)*, the High Court of Delhi has observed in paragraph nos.25, 26 & 37 to 39, as under:

> ***"25.*** *Thus, notwithstanding that Unitech had not raised or having raised not pursued any of its contentions before the Arbitral Tribunal or before the High Court of Justice, it is entitled to raise contentions to resist the recognition and enforcement of the Award, subject to the same being within the scope of the grounds set out in Section 48 of the Act. However, this Court is not bound to decline the enforcement of the Award. The court while considering such pleas - which were unsuccessfully raised, or could have been raised but were not, before the arbitral tribunal or the supervisory court - would also take into account various factors including but not limited to (i) the nature of objectons; (ii) the reasons for not pursuing the same before the arbitral tribunal or the supervisory court; and (iii) conduct of parties.*
>
> ***26.*** *The opening lines of Section 48(1) and 48(2) of the Act use the word "may", thus enabling the enforcing court to refuse the request of the party resisting enforcement of a foreign award even if one or more of the grounds as set out in Section 48 are established. Of course, the discretion is not subjective and must be exercised on settled*

principles of law. However, this does give a clear window for the courts to reject the party's request to decline the enforcement of the award on grounds akin to principles of issue estoppel and res judicata, even though these grounds are not stricto sensu applicable.

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37. *The grounds as set out in Section 48 of the Act for refusing enforcement of the award encompass a wide spectrum of acts and factors as they are set in broad terms. While in some cases, it may be imperative to refuse the enforcement of the award while in some other, it may be manifestly unjust to do so. Section 48 is enacted to give effect to Article V of the New York Convention, which enables member States to retain some sovereign control over enforcement of foreign awards in their territory. The ground that enforcement of an award opposed to the national public policy would be declined perhaps provides the strongest expression of a Sovereign's reservation that its executive power shall not be used to enforce a foreign award which is in conflict with its policy. The other grounds mainly relate to the structural integrity of the arbitral process with focus on inter party rights.*

38. *In terms of Sub-section (1) of Section 48 of the Act, the Court can refuse enforcement of a foreign award only if the party resisting the enforcement furnishes proof to establish the grounds as set out in Section 48(1) of the Act. However, the court may refuse enforcement of a foreign award notwithstanding that a party resisting the enforcement has not provided any/sufficient proof of contravention of public policy. In such cases, the Court is not precluded from examining the question of public policy suo motu and would refuse to enforce the foreign award that is found to offend the public policy of India. The approach of the court while examining whether to refuse enforcement of a foreign award would also depend on the nature of the defence established.*

39. *Even where public policy considerations are to be weighed, it is not difficult to visualise a situation where both permitting as well as declining enforcement would fall foul of the public policy. Thus, even in cases where it is found that the enforcement of the award may not conform to public policy, the courts may evaluate and strike a balance whether it would be more offensive to public policy to refuse enforcement of the foreign award - considering that the parties ought to be held bound by the decision of the forum chosen by*

them and there is finality to the litigation - or to enforce the same; whether declining to enforce a foreign award would be more debilitating to the cause of justice, than to enforce it. In such cases, the court would be compelled to evaluate the nature, extent and other nuances of the public policy involved and adopt a course which is less pernicious."

33. The judgment in the case of *Cruz City (supra)* has been approved by the Hon'ble Supreme Court in the case of **VIJAY KARIA AND OTHERS VS. PRYSMIAN CAVI E SISTEMI SRL AND OTHERS - (2020) 11 SCC 1**. Referring to the amendment of 2015 to the Act of 1996 in paragraph Nos.42 and 43 of **VIJAY KARIA'S** case, it is observed as follows:-

"42. *At this stage it is important to advert to amendments that were made by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as "the 2015 Amendment Act"). Section 48 was amended to delete the ground of "contrary to the interest of India". Also, what was important was to reiterate the Renusagar position, 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 [vide Explanation 2 to Section 48(2)].

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. In this respect, it is important to advert to paras 41 and 69 of Ssangyong as follows: (SCC pp. 171 & 194)*

> *"41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49*

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

* * *

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement,

or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of "patent illegality", which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal.

This statement of the law applies equally to Section 48 of the Arbitration Act."

34. The question of interpreting the term *"unable to present his case"* under Section 48(1)(b) and "the ground of violation of public policy" was considered in ***VIJAY KARIA*'S** case *(supra)*

and in paragraph Nos.63, 66 and 81 to 83, it is observed as follows:-

> ***"63.*** *A recent Delhi High Court judgment in Glencore International AG v. Dalmia Cement (Bharat) Ltd. [Glencore International AG v. Dalmia Cement (Bharat) Ltd., puts it thus: (SCC OnLine Del paras 25-26)*
>
> > *"25. The inability to present a case as contemplated under Section 48(1)(b) of the Act [which is in pari materia to Article V(1)(b) of the New York Convention] must be such so as to render the proceedings violative of the due process and principles of natural justice. It is rudimentary that for a fair decision each party must have full and equal opportunity to present their respective cases and this includes due notice of proceedings. In the event a party opposing the enforcement of a foreign award is able to present sufficient proof of such infirmity in the arbitral proceedings, the courts may decline to enforce the foreign award.*
> >
> > *26. A clear distinction needs to be drawn between cases where a party is unable to present its case, rendering the arbitral award susceptible to challenge as falling foul*

of the minimal standards of due process/natural justice and cases where the Arbitral Tribunal does not accept the case sought to be set up by a party. The latter case, obviously, does not give rise to a ground as mentioned in Section 48(1)(b) of the Act, even if the decision of the Arbitral Tribunal is erroneous."

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66. *An application of this test is found in Jorf Lasfar Energy Co. v. AMCI Export Corpn. [Jorf Lasfar Energy Co. v. AMCI Export Corpn., 2008 WL 1228930] , where the US District Court, W.D. Pennsylvania decided that if a party fails to obey procedural orders given by the arbitrator, it must suffer the consequences. If evidence is excluded because it is not submitted in accordance with a procedural order, a party cannot purposefully ignore the procedural directives of the decision-making body and then successfully claim that the procedures were unfair or violative of due process. Likewise, in Dongwoo Mann+Hummel Co. Ltd. v. Mann+Hummel GmbH [Dongwoo Mann+Hummel Co. Ltd. v. Mann+Hummel GmbH, 2008 SGHC 67] , the Singapore High Court held:*

"145. A deliberate refusal to comply with a discovery order is not per se a contravention of public policy because the adversarial procedure in arbitration admits of the possible sanction of an adverse inference being drawn against the party that does not produce the document in question in compliance with an order. The Tribunal will of course consider all the relevant facts and circumstances, and the submissions by the parties before the Tribunal decides whether or not to draw an adverse inference for the non-production. Dongwoo also had the liberty to apply to the High Court to compel production of the documents under Sections 13 and 14 of the IAA, if it was not content with merely arguing on the question of adverse inference and if it desperately needed the production by M+H of those documents for its inspection so that it could properly argue the point on drawing an adverse inference. However, Dongwoo chose not to do so.

146. Further, the present case was not one where a party hides even the existence of the damning document and then dishonestly denies its very existence so that the opposing party does not even have the chance to

submit that an adverse inference ought to be drawn for non-production. M+H in fact disclosed the existence of the documents but gave reasons why it could not disclose them. Here, Dongwoo had the full opportunity to submit that an adverse inference ought to be drawn, but it failed to persuade the Tribunal to draw the adverse inference. The Tribunal examined the other evidence before it, considered the submissions of the parties and rightfully exercised its fact-finding and decision-making powers not to draw the adverse inference as it was entitled to do so. It would appear to me that the Tribunal was doing nothing more than exercising its normal fact-finding powers to determine whether or not an adverse inference ought to be drawn."

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81. *Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression "was otherwise unable to present his case" occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this expression would be a*

facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Read along with the first part of Section 48(1)(b), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in Ssangyong. A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award liable to be set aside on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48.

82. *All the cases cited by Mr Nakul Dewan are judgments based on the language of the particular statute reflected in each of them — for example, Section 68 of the Arbitration Act, 1996 (UK), Section 23(2) of the Hong Kong Old Arbitration Ordinance (Cap 391), Section 24(b) of the International Arbitration Act (Singapore) and Section 48(1)(a)(vii) of the Arbitration Act, 2002 (Singapore), all of which are differently worded from Section 48(1)(b). Each of these statutes deal with a breach of natural justice which, as we have seen, is a wider expression than the expression "unable to present his case". Thus, it is not possible to hold that failure to consider a material issue would fall within the rubric of Section 48(1)(b).*

83. *Having said this, however, if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counterclaim in its entirety, the award may shock the conscience of the Court and may be set aside, as was done by the Delhi High Court in Campos on the ground of violation of the public policy of India, in that it would then offend a most basic notion of justice in this country. It must always be remembered that poor reasoning, by which a material issue or claim is rejected, can never fall in this class of cases. Also, issues that the*

Tribunal considered essential and has addressed must be given their due weight — it often happens that the Tribunal considers a particular issue as essential and answers it, which by implication would mean that the other issue or issues raised have been implicitly rejected. For example, two parties may both allege that the other is in breach. A finding that one party is in breach, without expressly stating that the other party is not in breach, would amount to a decision on both a claim and a counterclaim, as to which party is in breach. Similarly, after hearing the parties, a certain sum may be awarded as damages and an issue as to interest may not be answered at all. This again may, on the facts of a given case, amount to an implied rejection of the claim for interest. The important point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counterclaims of the parties, enforcement must follow."

35. In the case of ***Centrotrade Minerals and Metals Inc. vs. Hindustan Copper Limited - (2020) 19 SCC 197***, the Hon'ble Supreme Court has held that "the party unable to

present his case" must establish the said ground unequivocally which should be beyond his control. Party's own failure cannot be taken into consideration to support the contention raised under Section 48(1)(b) of the Act of 1996 and it was held in the said case that the said ground cannot be invoked when the objecting party itself chose not to appear before the arbitrator or did not submit documents and failed to cooperate before the arbitrator. In paragraph Nos.21 and 27 of the said judgment, it has been observed as follows:-

> ***"21.*** *The Court finally summed up its conclusion on this aspect of the case, as follows : (Vijay Karia case SCC p. 84, para 81)*
>
> *"81. :Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression "was otherwise unable to present his case" occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this expression would be a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Read along with the first part of Section 48(1)(b), it is clear that this expression*

would apply at the hearing stage and not after the award has been delivered, as has been held in Ssangyong. A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award unenforceable on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48."

27. *As has been held in para 81 of Vijay Karia the context of Section 48 is recognition and enforcement of foreign awards under the New York Convention of 1958. Given the context of the New York Convention, and the fact that the expression*

> *"otherwise" is susceptible to two meanings, it is clear that the narrower meaning has been preferred, which is in consonance with the pro-enforcement bias spoken about by a large number of judgments referred to in Vijay Karia. Kochuni case dealing with an entirely different Act with a different object cannot, therefore, possibly apply to construe this word in the setting in which it occurs."*

36. In the case on hand, petitioner herein was put on notice right from the inception of invoking the arbitration clause provided under the Charter Party, under the communications which are available on record. The petitioner at no point of time had denied executing the Charter Party nor he had opposed invoking of the Arbitration Clause in the Charter Party. On the other hand, time was sought on behalf of the judgment debtor to respond to the notice issued on behalf of the respondent/decree holder. The party objecting enforcement of award invoking grounds available under Section 48(1) of the Act of 1996 is required to furnish the proof in support of the grounds raised and in the absence, Court is justified in over-ruling such objections. It is not a case where the award shocks the very conscience of the Court or the award offends the

fundamental laws of this country. Poor reasoning and assessment alone cannot be a ground for refusing to enforce a foreign arbitral award. Therefore, in view of the principles laid down in the aforesaid judgments, more so, in the case of **VIJAY KARIYA** *(supra)* and **CENTROTRADE** *(supra)*, I am of the opinion that the objection raised by the judgment debtor for enforcement of the award in question either under Section 48(1)(b) or under Section 48(2)(b) of the Act of 1996, are not tenable and are rightly over-ruled by the Executing Court.

37. IA No.5 was filed by the judgment debtor under Section 48 of the Act of 1996 and IA No.6 was filed seeking to condone the delay caused in filing IA No.5. The statute does not provide any period of limitation for raising objection as provided under Section 48 of the Act of 1996 for recognition and enforcement of the foreign arbitral award. Therefore, the executing Court has rightly rejected IA No.6 filed under Section 5 of the Limitation Act, 1963. In addition to filing IA No.5 under Section 48 of the Act of 1996, separate objections were also filed on behalf of the judgment debtor opposing the recognition and enforcement of the foreign arbitral award. It is under these

circumstances, IA No.5 filed under Section 48 of the Act of 1996 has been disposed off as the said application was superfluous. The Executing Court having rejected IA Nos.5 and 6 for the aforesaid reasons, by a reasoned order has over-ruled the objections raised by the judgment debtor for recognition and enforcement of the foreign arbitral award dated 21.02.2005 passed by the learned sole arbitrator Mr. Jaya Prakash, at Singapore. In view of the aforesaid analysis of the matter, I am of the opinion that the said order passed by the Executing Court which is challenged in this writ petition does not warrant any interference. Accordingly, the writ petition is ***dismissed***.

38. In view of the disposal of the main petition, pending interlocutory application, if any, does not survive for consideration. Accordingly, the same is disposed off.

Sd/-
(S VISHWAJITH SHETTY)
JUDGE

KK/DN