2021 INSC 392

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.8343-8344 OF 2018

Gemini Bay Transcription Pvt. Ltd. … Appellant

Versus

Integrated Sales Service Ltd. & Anr. … Respondents

WITH

CIVIL APPEAL NOS.8345-8346 OF 2018

J U D G M E N T

R.F. Nariman, J

1. These appeals raise interesting questions relatable to Part II of the Arbitration and Conciliation Act, 1996 [the "**Arbitration Act, 1996**"] which provisions deal *inter alia* with recognition and enforcement of foreign awards. The facts necessary to appreciate the points raised in these appeals are as follows.

2. On 18th September, 2000, a representation agreement was entered into between Integrated Sales Services Ltd. ["**ISS**" / Respondent No. 1], a company based in Hong Kong and DMC Management Consultants Ltd.

["**DMC**"], a company registered in India, whose principal business address is at Nagpur. By this agreement, ISS was to assist DMC to sell its goods and services to prospective customers, and in consideration thereof was to receive commission. The relevant clauses of the agreement are clauses 2 and 3 which read as follows: -

> "2. Duties of Representative
>
> Representative shall assist Company with its efforts to sell its Goods and Services to prospective customers. Secondly, where acceptable to the Company, identify potential sources of investment and Investors, and assist Company in negotiating the terms of purchase, sale and/or investment.
>
> 3. Validity
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> The right of representation under this Agreement is not limited by time. Compensation is due Representative as defined under "Payment" hereinafter. However, if Company finds Representative's efforts to be unsatisfactory, it will state so in writing with specific and, reasonable guidelines which, if accomplished within six months, shall constitute satisfactory performance, If Representative is unable to substantially- satisfy these guidelines, then Company may cancel this Agreement forthwith. However, compensation for existing or potential customers identified by the Representative, shall continue according to the Payment clause below."

3. The commission payable is then referred to in clause 4. The agreement under clause 8(d) which is "General" then states as follows: -

> (d) Interpretation, Amendment, Law, Arbitration, and Assignments

(i) This Agreement is subject to the laws of the State of Missouri, U.S.A.

(ii) In the event a dispute arises in connection with this Agreement, such dispute shall be referred to a single arbitrator in Kansas City, Missouri, U.S.A. to be appointed by agreement between the parties hereto, or failing agreement to be appointed according to the rules of the American Arbitration, Association the same rules under which any dispute which any dispute shall be decided.

(iii) In the event a dispute is committed to arbitration, the party deemed at fault shall reimburse the full cost of the arbitration and legal process to the aggrieved party.

(iv) The Agreement shall not be amended in any way other than by agreement in writing, signed by both parties.

4. It is important to note that this agreement was signed by one Shri Rattan Pathak as Managing Director of DMC, and by one Shri Terry Peteete, Director of ISS. Though this agreement was entered into on 18th September, 2000, it came into force on 3rd October, 2000. A first amendment to this representation agreement was made between the aforesaid parties, which was signed by one Shri Arun Dev Upadhyaya [Appellant in CA No. 8345-8346/2018] on behalf of DMC, and Terry Peteete on behalf of ISS. We are not directly concerned with the changes made by this first amendment except to indicate that Arun Dev Upadhyaya, one of the appellants before us, was a signatory on behalf

of DMC. Likewise, a second amendment agreement was entered into on 1st January, 2008, again with effect from 3rd October, 2000, in which various amendments were made to the original representation agreement. We are concerned, with sub-clause (4) of this amendment, which reads as follows: -

> 4. In modification of clause 8(d)(1) of the Agreement, this Agreement is subject to the laws of the State of Delaware, U.S.A., and shall survive the expiration of any other clauses in this Amendment.

5. Disputes arose between the parties, as a result of which a notice for arbitration dated 22nd June, 2009 was sent by ISS to Arun Dev Upadhyaya. Ultimately, a statement of claim dated 22nd June, 2009, was filed before the learned Arbitrator naming Arun Dev Upadhyaya, DMC (India), DMC Global (company registered in Mauritius), Gemini Bay Consulting Limited (company registered in the British Virgin Islands) and Gemini Bay Transcription Private Limited ["**GBT**" / Appellant in CA No. 8343-8344/2018] as respondents. The statement of claim alleged as follows: -

> 6. DMC Management Consultants, through the Chairman (Upadhyaya) and/or with his family, in turn owns or controls all the stock of DMC Global, which has assumed the obligations of DMC Management Consultants under the agreement referred to below, including the agreement for

arbitration; and the Chairman controls and dominates the activities of DMC Global. Both DMC Management Consultants and the Chairman have disregarded the corporate form of DMC Global to effect the wrongs complained of herein, in such a manner and to such an extent that DMC Global should be bound as a party to this arbitration.

7. Gemini Bay Consulting Limited ("GBC") is a company formed in the British Virgin Islands, which is owned and/or controlled and dominated by the Chairman, who has disregarded its corporate form to effect the wrongs complained of herein, and GBC has been used by the Chairman among others as a continuation corporation of DMC Management Consultants and DMC Global to divert funds away from ISS as complained of herein, in such a manner and to such an extent that GBC should be bound as a party to this arbitration.

8. Gemini Bay Transcription Private Limited ("GBT") is a company formed in India, with a registered office at the same address as that of the Chairman, which is owned and/or controlled and dominated by the Chairman, who has disregarded its corporate form to effect the wrongs complained of herein, and GBT has been used by the Chairman among others as a continuation corporation of DMC Management Consultants and DMC Global to divert funds away from ISS as complained of herein, in such a manner and to such an extent that GBT should be bound as a puny to this arbitration.

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13. As the relationship developed, Claimant ISS as Representative brought to the Company two substantial "PC" customers, identified as MedQuist Transcriptions Ltd, of Mt. Laurel, New Jersey ("MedQuist"), and AssistMed, Inc. of Los Angeles, California ("AssistMed") (sometimes hereinafter

collectively referred to as the "Customer"). ISS acted as representative of the company with the Customers.

14. Under the original terms of the Representation Agreement, ISS was to receive commission of 20% of the gross revenues to Company from these Customers for so long as they continue to be customers.

15. Throughout the relationship between ISS and Respondents, the principal representative of ISS has been Terry Peteete, a resident of Kansas City, Missouri.

16. Throughout the same period, the principal representative of DMC Management Consultants and DMC Global has been the Chairman, Respondent Arun Dev Upadhyaya. In that regard, the Chairman has made regular trips from India to the United States, approximately 4 trips per year, for business and personal reasons.

17. Those trips have included at least four trips to Kansas City, Missouri, to conduct business with ISS representative Terry Peteete, regarding the subject matter of this arbitration. Therefore, he has purposely availed himself of this jurisdiction, and requiring his participation in this arbitration in Kansas City, Missouri does not offend traditional or constitutional notions of justice arid fair play.

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30. From September 18, 2000, until approximately June 30, 2008, the relationship among the parties proceeded agreeably. ISS performed its obligations, and upon information and belief, both DMC Management Consultants and DMC Global performed their obligations.

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38. On July 22, 2008, DMC Management Consultants gave notice by email entitled "Contract Termination Notice," to the two "PC" Customers, MedQuist and Assistmed, of its

intention to terminate the Customer contracts 90 days later. (Note that the Customer Contract with MedQuist had been signed by DMC Global, but was terminated by DMC Management Consultants). DMC Management Consultants requested the Customers "begin the ramping down process 15 days from now," and further that the "ramping down be completed within a period of 90 days.

39. This purported "ramping down" of the Customer Contracts by DMC Management Consultants and DMC Global in fact never took place. Upon information and belief, as part of the scheme to divert funds from DMC Management and evade payment to ISS of commissions Respondents caused new contracts to be executed by the Customers with Respondent Gemini Bay Consultants (GBC). During the same time, the Chairman caused a new company Respondent Gemini Bay Transcriptions (GBT) to be set up as the company that actually performed the work for both PC Customers, and continues to do so today. The employees of both DMC Management employees Consultants and DMC Global became GBT, and work in the same facilities, using the same equipment, and managed by the same management team. These two July 22, 2008, email termination notices were part of a scheme by Respondents to divert the business from the Customer Contracts away from DMC Management Consultants and DMC Global to GBC and GBT.

41. The primary purpose of doing so was to evade the contractual obligations of the Respondents under the Representation Agreement to pay ISS its commissions for revenues earned from these Customers.

42. At all times, DMC Management Consultants and DMC Global acted under the direct instruction of the Chairman in furthering this scheme to deprive ISS of its commissions.

43. The Chairman dominated and manipulated the activities of DMC Management Consultants and DMC Global for his

personal and business advantage, for the sole improper purpose of harming ISS and breaching his personal obligations and the obligations of his two companies to ISS under the Representation Agreement.

44. The Chairman used the companies as alter egos of himself, and he ignored the corporate forms of both DMC Management Consultants and DMC Global to achieve his improper purpose of breaching the Representation Agreement.

6. Based on these averments, damages were claimed on the basis of "Accounting for Lost Commissions" as follows:

64. Upon information and belief, the revenues being paid to Respondents by the "PC" Customers since October 22, 2008, continue at a rate such that the commissions payable under the Representation Agreement for the period since October 22, 2008, is approximately $100,000 per month.

65. Upon information and belief, the amount of lost commissions, past, present and reasonably certain to occur in the future, are determined at a rate of $100,000 per month for the period of 48 months following the termination date of October 22, 2008, aggregates $4.8 million due and to become due to ISS from Respondents due to their breach of contract.

7. It was then averred:

74. By making its claims pursuant to the Representation Agreement and the corporate law of Delaware in this arbitration, Claimant ISS is not making, and hereby specifically reserves: (i) all claims which may arise in the future, under the Representation Agreement, for commissions which may become payable in a manner other than as described above, and (ii) all claims for any additional right, title, interest and other matters ISS may make at

another time or in another forum against any of these Respondents based in tort, fraud, abusive conduct, or any other wrongful conduct under the law of any of the United States. India. Mauritius, or any other jurisdiction, whether for equitable relief, compensatory damages, punitive or exemplary damages, moral damages, or otherwise.

8. To this statement of claim, objections were filed by GBT and Arun Dev Upadhyaya, in which all the aforesaid averments were denied. Meanwhile, a suit was filed by GBT against ISS before the Civil Judge, Senior Division, Nagpur, with the following prayers: -

(i) Pass a decree of declaration in favour of the plaintiff and against the defendants, their agent, servants and all other persons claiming through or under them, declaring therein that the Arbitration Agreement entered into between the Defendant No. 1 and Defendant No. 3, is not binding or enforceable against the Plaintiff and therefore the defendant Nos. 1 & 2 cannot prosecute/ proceed with any proceeding against the plaintiff or any one claiming through or under the plaintiff, in any manner whatsoever, in the peculiar facts and circumstances of the present case;

(ii) Pass a decree of permanent injunction in favour of the plaintiff and against the defendants, their agent, servants and all other persons claiming through or under them, restraining them from prosecuting or proceeding or continuing with any arbitration proceedings against the Plaintiff, based on the so-called Arbitration Agreement entered into between the Defendant No. 1 and Defendant No. 3, the same being not binding or enforceable against the Plaintiff, in the peculiar facts and circumstances of the case and in the interest of justice;

(iii) Pass a decree of Rs. 10,00,000/ (Rupees Ten Lacs only) towards compensation in favour of the plaintiff and against

Defendant Nos. 1 and 2, in the peculiar facts and circumstances of the case;

(iv) Award costs of the suit against the defendant Nos. 1 & 2;

(v) And be further pleased to pass such order/orders and grant such other reliefs, as this Hon'ble Court may deem fit in the given facts and circumstances of the case.

9. Though a temporary injunction was prayed for, it was rejected on 25th January, 2010.

10. On 23rd December, 2009, the learned Arbitrator raised four issues in a preliminary award as follows: -

1)The determination of applicable law; and

2) The jurisdiction of this tribunal over non-signatory parties; and

3) Whether facts warrant piercing the corporate veil of certain corporations; and

4) Whether certain non-signatory parties to the original agreement should be excluded from this arbitration.

Only ISS and DMC filed briefs. DMC's brief addressed only the issue of applicable law and in spite of the arbitrator's numerous warnings, other Respondents and non-signatory parties failed to file relevant briefs on the matters and submitted affidavits.

11. Issues 1 and 2 were answered stating that Delaware law is the substantive law which controls the agreement and its interpretation and that, since neither the claimant nor the respondent challenged the

validity of the agreement or the validity of the arbitration clause, the Arbitrator has jurisdiction to decide whether a non-signatory to the representation agreement can be bound by the award. The other two issues were stated to require an in-depth review and analysis of factual, testimonial and documentary evidence as a result of which the decision on these two issues was “postponed”.

12. The learned Arbitrator in his final award dated 28th March, 2010, set out the issues that were to be adjudicated as follows: -

> I THE UNDERSIGNED ARBITRATOR, Alain Frecon, (the "tribunal") having been designated in accordance with the arbitration agreement entered into by ISS and DMC Management Consultants Limited, dated September 18 2000, having been duly sworn, having given the parties full and complete opportunity to present their respective case, and having heard all the proofs and allegations of the parties, including all the witnesses and reviewed all the documents, demonstrative evidence and submissions presented in this case, do hereby Award as follows:
>
> TO BE DECIDED
>
> 1) Does the "alter ego" doctrine warrant piercing the corporate veil?
>
> 2) Was there a breach of the Representation Agreement and by whom?
>
> 3) Should damages be awarded, and if the answer is yes, how much?

13. After describing the parties and the claim made, Issue 1 which was styled “Alter ego doctrine and piercing of the corporate veil” was answered as follows: -

> Before piercing a corporate veil, this tribunal must carefully review a complex set of factual, documentary and testimonial evidence. As Professor William W. Park (Boston University Law Faculty) points out in his well-known (among international arbitrators) article “Non Signatories and International contracts: an arbitrator's dilemma" (1, Belinda MacMahon, ed, Oxford University Press (2009), the proverbial devil in the details lurks in the complex fact patterns underlying most situations that might justify extension of arbitration clauses and arbitrators must consider "un faisceau d'indices" (a bundle of criteria) before reaching such a decision (See page 8).
>
> Having found that Delaware law was the applicable law (see Order # 4), we must follow the precedents of the Delaware Court of Chancery.
>
> To determine whether the "alter ego" doctrine applies to his case and whether the corporate veil should be lifted, we must consider [the] "bundle of criteria” including control, whether the corporate form was used as a facade to commit a fraud, and the timing of these events.
>
> The control of DMC by Mr. Upadhyaya, the timing of events and coordination of efforts between him and Mr. Pathak clearly demonstrate that the transfer of the medical business from DMC to Gemini Bay simply was not, and could not be, the result of mere coincidence. Their combined actions and conducts facilitated and orchestrated the use of the corporate forms of DMC and Gemini Bay to achieve, through deceit, a result which eliminated an otherwise valid and enforceable contract. Mr. Upadhyaya totally controlled the business operations of DMC (a family majority owned business) and

his minority shareholding did not prevent him from running the business as he deemed fit (we received for example no evidence whatsoever that Mr. Upadhyaya's decisions were ever reviewed/challenged nor even questioned by the board of directors of DMC). Whatever Mr. Upadhyaya decided, whether in coordination with, or with the cooperation of Mr. Pathak and the Board of DMC, that is what DMC would do, and the board always voted in line with Mr. Upadhyaya's recommendations. He was as a result, the sole decision maker. The total control and domination of ĐMC by Mr. Upadhyaya is therefore not questionable, in spite of his minority shareholding.

The correlation existing between DMC and Gemini Bay is also, not the result of mere coincidence. Not only did the very existence of Gemini Bay germinate within the confines of DMC (but for Mr. Pathak's position as "Managing Director" of DMC, he would have never known about Medquist or AssistMed), but both companies shared (even if ever so temporarily) the same employees, address, telephone numbers, e-mail addresses, SVPs, customers (primarily Medquist and AssistMed), and shared almost identical contracts with the same customers.

Respondents' affirmations that DMC's corporate formalities were respected and that some of these facts were only temporary, are simply not convincing or credible and, in totality, we find that the control of DMC by Mr. Upadhyaya, and the collusion with Mr. Pathak and the use of the corporate forms of DMC and Gemini Bay were simply a "facade" used to shield or cover-up the unjust result of eliminating ISS. The alter ego doctrine is therefore an appropriate justification for lifting the corporate veil.

14. Under the head “Breach of the representation agreement”, it was recorded that the agreement was not challenged by either party and is therefore valid and enforceable. It was then held: -

To determine that question, we must turn to the Representation Agreement. That Agreement was not challenged by either party and is therefore a valid and enforceable Agreement. It is clear and not ambiguous and therefore not subject to interpretation.

ISS's obligations under that Agreement are also clear. ISS must I) sell its Goods and Services (which means the "products and services being offered for sale by the company" (i.e. DMC) and 2) "Where acceptable to the Company (i.e. DMC), identify potential sources of investment and investors, and assist the company in negotiating the terms, purchase, sale and/or investment" (See Clause #2).

The Agreement did not specify how many customers, how often. Neither did it specify how many investors, at what price, by what date and since it was for an indefinite term ("is not limited by time" See Clause # 3), it is not legally sustainable to justify the termination of the ISS/DMC business relationship based on the fact that ISS did not find an investor.

DMC could terminate that Agreement if "the Company (DMC) was not satisfied with the Representative efforts provided that it determined "specific and reasonable guidelines" (See Clause # 3). Respondents failed to prove by reliable and relevant evidence that any such "specific and reasonable guidelines" were ever established by the Board of DMC or Mr. Upadhyaya or Mr. Pathak. More importantly, even if DMC could prove that such guidelines had been established, it could not escape the obligation of clause # 4 of the Agreement which specifically provides that "this clause (payment of commissions) survives cancellation of this Agreement for any reason".

15. Under the head “Did DMC/Gemini Bay try to avoid/eliminate the payment of such commissions to ISS?”, the oral and documentary evidence was referred to as follows:

In this respect, Ms. Parker best summarized the situation in her testimony (See Parker's/deposition at p 16 lines 7 through 16). Her statement at page 18 (lines II through 25) further demonstrates the purpose and intent of DMC'S decision to abandon the medical transcription business, for the benefit of Gemini Bay minus the payment of commissions to ISS. Her statement was even acknowledged by Mr. Pathak himself when she asked him if the purpose of DMC's termination was "to cut out the Peteetes" (ISS) he responded." In essence that's what it does". (See Parker's deposition at pages 19 lines 18 through 20).

Even though we agree with Respondents that DMC had no obligation to remain in the medical transcription business, it could only do so by respecting the terms of the Representation Agreement by making sure that the "compensation for existing or potential customers identified by the Representative, shall continue according to the Payment Clause" (See Clauses #3 and #4 of the Representation Agreement).

The decision by DMC to abandon such business for the stated purpose (ISS failure to find an investor) does conflict with the terms of the Representation Agreement which did not give DMC an option to terminate it under such rationale and certainly not by refusing (or avoiding) the payment of commissions in violation of Clause # 4 of the Representation Agreement.

Had DMC really and totally left the medical transcription business (without helping any other company to get that business) we could have found a justifiable rationale for it but the payment of commissions could not be avoided (or voided as DMC attempted to do).

In spite of DMC's announcement to abandon the medical transcription business, Mr. Upadhyaya and Mr. Pathak engaged in a pattern of well-timed efforts and actions which resulted in Gemini Bay receiving that business through an

orchestrated chain of events, to the detriment of ISS and avoiding, through deceit, the payment of commissions.

Since Gemini Bay "inherited" the Medquist and AssistMed's business from DMC, it did so inheriting also the terms and conditions of the ISS/DMC Representation Agreement. To that effect, Gemini Bay is subrogated to DMC and therefore DMC's breach can be inputted to all Respondents.

We therefore find that Mr. Upadhyaya, DMC and Gemini Bay colluded together and find them jointly and severally liable for breaching the Representation Agreement by terminating it abruptly in violation of the indefinite term of that contract and by refusing to pay commissions as obligated under the Representation Agreement.

16. In deciding what damages should be paid, the learned Arbitrator found :

Respondents DMC, Mr. Arun Dev Upadhyaya and Gemini Bay's failure to fully cooperate with certain discovery requests of Claimant, rendered the task of proving damages with any reasonable certainty, almost impossible.

DMC biased the discovery process by refusing to make its books and records available for inspection by ISS's agent, Mr. Gupta (See Exhibit 169 page II and following). Mr. Upadhyaya and Gemini Bay further biased the discovery process by refusing to participate directly in the arbitration process.

Claimant's failure to use an independent expert on damages is not a relevant argument because in the absence of documentary proof, no independent expert could have possibly reached a reliable and non-speculative opinion, Under such circumstances, Mr. Peteete's intimate understanding of the business was the only and best available option afforded to Claimant. In the absence of such reliable documentary evidence, Claimant cannot be penalized for attempting 'to prove damages the best way

possible' under the circumstances. Since Delaware law accepts the submission of damage testimony by lay opinion so must this tribunal.

The conduct of Respondents gives us no other alternative but to conclude that damages should be computed as Claimant proposes. In essence, Respondents brought this result upon themselves.

Claimant's request for damages focuses on the commissions due for finding Medquist and AssistMed and for no other reason (Claimant does not claim any damage for its efforts for trying to find an investor). We find that claim reasonable.

We must not however assume that the Gemini Bay/Medquist/AssistMed Agreements would have, could have, lasted any specific amount of time in the future and we must determine the most reasonable period of duration. There is no guarantee that either the AssistMed or Medquist contracts would last for the length of their original 3 year term. The Medquist agreement can be terminated any time upon a 90 days' notice. The AssistMed contract can be terminated without cause with a 120 days' advance notice (See Exhibit 5 page 3). This tribunal therefore concludes that damages should be limited in time and cannot be assumed to last forever in the future.

Claimant's assumptions that both the Medquist and Assisted contracts would last until 2012 (they are still in force as of the date of this Award), is not entirely satisfactory as it leads us to contemplate future damages. Since however we found a breach of the Representation Agreement, we have a legal basis to award future damages and find that ending damages in 2012 is reasonable under the circumstances. Mr. Upadhyaya's testimony (re: C-Bay' and Mr. Raman Kumar) that the Medquist contract will be terminated in the near future is self-serving, not substantiated by any relevant or reliable information, and therefore, not credible.

17. As a result, the Award was as follows:

AWARD

1. Within thirty (30) days from the date of transmittal of this Award to the Parties, DMC Management Consultants, Ltd, DMC Global, Inc., Arun Dev Upadhyaya, Gemini Bay Consulting Limited and Gemini Bay Transcription Private Limited, hereinafter referred to as Respondents, shall jointly and severally pay to Integrated Sales Services Ltd, hereinafter referred to as Claimant, the sum of six million, nine hundred and forty-eight thousand, one hundred dollars ($6,948,100.00).

2. In the event that the award is not fully paid within thirty days from the date of this Award, Claimant shall be entitled to also seek recovery of interest computed from the date of termination of the Representation Agreement (July 22, 2008) on the total sum of the Award at the highest legal rate allowable under Delaware law.

3. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totalling fourteen thousand dollars ($14,000.00), and the compensation and expenses of the arbitrator totalling forty-nine thousand, nine hundred and three dollars ($49,903.00), shall be borne entirely, jointly and severally by Respondents. Therefore, Respondents shall jointly and severally reimburse Claimant the sum of sixty-three thousand, nine hundred and three dollars ($63,903.00), representing that portion of said fees and expenses (including the Arbitrator's fees and expenses) previously incurred by Claimant.

4. Since the arbitration clause did not provide for the award of attorneys' fees, Claimant and Respondents shall be responsible for their own attorneys' fees, costs and expenses.

5. As ordered by this tribunal, all the costs and expenses of the video conference call held on Friday, March 5, 2010 shall

be borne exclusively by Respondents but Claimant shall be responsible for the costs and expenses of its attorneys present during that call.

6. This award is in full settlement of all claims and counterclaims submitted to this Arbitration. Any claim or counterclaim not specifically awarded is hereby denied.

18. To enforce the aforesaid Award, the Respondent first knocked at the doors of the Principal District Judge, Nagpur, but given the fact that, being a foreign award, a District Judge would have no jurisdiction to enforce the same, a learned Single Judge of the High Court of Judicature at Bombay, Nagpur Bench, was then approached. By his judgment dated 18th April, 2016, the learned Single Judge expressly recorded:

> 4. …. The parties have agreed that the question of leading oral evidence in support of their rival contentions does not at all arise and the pure questions of law are raised, which can be decided on the basis of the documents which are admitted and placed on record.

19. After discussing as to whether the ingredients of a foreign award were met, the learned Single Judge found :

> 16. It is not in dispute that the Representation Agreements in force containing clause 8(d) of arbitration brought into force from 3/10/2000 undertaking to submit to arbitration all or any differences concerning the subject-matter capable of settlement by arbitration, are signed by the Director Terry L. Peteete of the applicant-Company, and by the non-applicant No.3(i) Rattan Ram Pathak in his capacity as the Managing

> Director of the non-applicant No.1 Company. There exists a defined legal relationship in writing in the form of the Representation Agreements.
> The arbitral award passed on 28/3/2010 by the International Arbitration Tribunal is on the differences between the parties to the arbitration agreement. The said award, therefore, satisfies the test of "foreign award", as defined under Section 44 of the said Act. The question No. (1) is answered accordingly.

20. After discussing in detail certain judgments of this Court, the learned Single Judge held that the agreement and the arbitration clause cannot be enforced against persons who are non-signatories, even though such non-signatories may participate in the arbitration, as no acquiescence or estoppel can apply to issues relatable to jurisdiction. So holding, the learned Single Judge applied Sections 48(1)(c) to (e) to hold that as GBT and Arun Dev Upadhyaya were not parties to the arbitration agreement, the award would not be enforceable against them. However, turning down a "public policy plea" by DMC, the learned Single Judge held that the Award would be enforceable against DMC as it was a party to the agreement.

21. A side skirmish took place as to whether an appeal could be filed from the learned Single Judge's judgment, and arguments were raised based on the application of Section 3 of the Maharashtra High Court (Hearing

of Writ Petitions by Division Bench and Abolition of Letters Patent) Act, 1986, to arrive at the conclusion that an appeal against the learned Single Judge's order would be maintainable (See judgment dated 23rd June, 2016 of the Bombay HC in Arb Appeal No. 3/2015). Vide judgment dated 30th September, 2016 in Civil Appeal No. 8475-76/2016, this Court, after hearing the parties, then ordered that such appeal would be maintainable but only under Section 50 of the Arbitration Act, 1996.

22. The Division Bench of the High Court, after stating the facts and after observing that the foreign award in this case had not been challenged in the USA, then held that the award could only be challenged under Section 48 if the Delaware law has not been followed on the *alter ego* principle. Being satisfied that the Arbitrator had properly applied the Delaware law on the facts of this case, the Court held that none of the grounds contained in Section 48 would apply so as to resist enforcement of the foreign award in this case. The Division Bench then held that Section 48 required that the grounds that are pressed to resist enforcement must be "proved". The Division Bench held that "proof" is of a higher order than mere evidence being adduced and then held that the appellants have miserably failed to "prove" that any of the grounds

contained in Section 48 were attracted. As a result, the Division Bench allowed the appeal and set aside the judgment of the Single Judge by the impugned judgment dated 4th January, 2017. A review petition was subsequently dismissed on 24th February, 2017.

23. When the matter came to this Court, in DMC's Special Leave Petition (SLP (Civil) No. 20802/2016), special leave was granted by an order dated 11th January, 2017, subject to DMC depositing a sum equivalent to 2.5 million US Dollars within three months. If this was not done, leave would automatically stand revoked. DMC defaulted in depositing the aforesaid amount, as a result of which leave stood revoked, which is reflected in our order dated 21th August, 2017. As a result, the foreign Award against DMC is now final and binding.

24. Shri K.V. Vishwanathan, learned Senior Advocate appearing on behalf of GBT, read Sections 44 and 47 of the Arbitration Act, 1996, and then argued that under Section 47(1)(c), the burden of proving that a foreign award may be enforced under Part II is on the person in whose favour that award is made, and that such burden in the case of a non-signatory to an arbitration agreement can only be discharged by adducing evidence which would independently establish that such non-signatory

can be covered by the foreign award in question. This not being done in the facts of this case, the threshold burden of proof requirement is not met, as a result of which the enforcement petition ought to have been thrown out on this ground alone. The learned Senior Advocate then drew our attention to Section 48 and in particular sub-section (1) sub-clause (a). According to him, a non-signatory to an arbitration agreement would be directly covered by sub-clause (a) as well as sub-clause (c), and if the Award were to be read, it would be clear that the reasons given are extremely sketchy and based on *ipse dixit* and not on facts, rendering the Award liable to be set aside on these two grounds. He also added that though Section 48(1)(b) refers to a natural justice ground, the giving of reasons being part of natural justice ought to be included in this ground, and as no proper reasons have been given by the learned Arbitrator, the Award should be set aside on this ground as well. He then argued that the Award is in any case perverse, and that the two clients of DMC that were shifted to GBT was vital evidence in the case, and the non-examination of these two clients would also vitiate the Award. He cited a number of judgments to buttress these submissions.

25. Shri Vishwanathan also argued that damages were awarded without actual loss having been proved before the learned Arbitrator contrary to the judgment of the Delhi High Court in ***Agritrade International (P) Ltd. v. National Agricultural Coop. Mktg. Federation of India Ltd.,*** **2012 SCC OnLine Del 896,** as a result of which the Award stood vitiated on this ground also.

26. Shri Harish Salve, learned Senior Advocate appearing on behalf of Arun Dev Upadhyaya, argued that the commission of a tort would be outside contractual disputes that arise under the Arbitration Agreement and that since the cause of action really arose in tort, the Award was vitiated on this ground. He also argued relying heavily upon ***Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan*** **[2010] 3 WLR 1472** ["**Dallah**"] that a full review based on oral and/or documentary evidence ought to have been undertaken which was not done on the facts of this case, the Division Bench merely echoing the Arbitrator's findings. He then made a distinction between Section 46 and Section 35 of the Arbitration Act, and argued that under Section 46, a foreign award is to be treated as binding only on persons as between whom it was made and not on persons who

may claim under the parties. He also argued that insofar as his client was concerned, there was no evidence to show his involvement in any manner and that the findings against his client are unreasoned and perfunctory, and on this ground also the Award stands vitiated.

27. Shri Arif Bookwala, learned Senior Advocate appearing on behalf of ISS, supported the Division Bench judgment and took us through the facts pointing out how, as was correctly held by the learned Arbitrator, the address of Shri Arun Dev Upadhyaya, DMC and GBT were all at the very same place in Nagpur. He took us painstakingly through the Award to show that the learned Arbitrator not only applied his mind to the oral and documentary evidence in this case which consisted of Ms. Parker deposing on behalf of ISS, and Shri Pathak and Shri Arun Upadhyaya deposing on behalf of DMC, and then argued that elaborate reasons need not be given in an arbitral award so long as the award happens to be reasoned. He then countered the submissions of Shri Vishwanathan and Shri Salve by arguing that their clients had conceded before the learned Single Judge that only questions of law arose as a result of which no evidence need be led – which was contrary to the submissions made by Shri Vishwanathan and Shri Salve before us. He then argued

that none of the grounds under Section 48 had been made out as neither Section 48(1)(a) nor Section 48(1)(c) would even remotely deal with non-signatories to an arbitration agreement and that, as no objection *qua* enforcement of the Award being contrary to public policy being argued by either appellant in the courts below, the appeals should be dismissed. He also referred to various judgments to buttress his submissions.

28. Having heard the learned counsel for all the parties, it is important to first set out the relevant statutory provisions 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.
>
> xxx xxx xxx
>
> **46. When foreign award binding**.— Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between

whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

47. Evidence.—

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

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

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

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

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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;

xxx xxx xxx

29. A reading of Section 44 of the Arbitration and Conciliation Act, 1996 would show that there are six ingredients to an award being a foreign award under the said Section. First, it must be an arbitral award on differences between persons arising out of legal relationships. Second, these differences may be in contract or outside of contract, for example, in tort. Third, the legal relationship so spoken of ought to be considered "commercial" under the law in India. Fourth, the award must be made on or after the 11th day of October, 1960. Fifth, the award must be a New York Convention award – in short it must be in pursuance of an agreement in writing to which the New York Convention applies and be in one of such territories. And Sixth, it must be made in one of such territories which the Central Government by notification declares to be territories to which the New York Convention applies.

30. The expression “legal relationships” has been explained in ***Vidya Drolia v. Durga Trading Corpn.,*** **(2021) 2 SCC 1** as follows:

> **24.** … The expression “legal relationship”, again not defined in the Arbitration Act, means a relationship which gives rise to legal obligations and duties and, therefore, confers a right. …

31. Also, the award may deal with differences arising out of breach of contract or tort.

32. Likewise, what is considered to be “commercial” under the law of India is well explained in the UNCITRAL Model Law as follows: -

> "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring, leasing, construction of works; consulting, engineering, licensing investment, financing: banking; insurance; exploitation agreement or concession, joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail, or road."

33. In ***R.M. Investment and Trading Co. (P) Ltd. v. Boeing Co.*****, (1994) 4 SCC 541,** at page 546, this court held:

> **12.** [in] construing the expression “commercial” in Section 2 of the [Foreign Awards (Recognition & Enforcement) Act, 1961] it has to be borne in mind that the

> "Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction." [See : *Renusagar Power Co. Ltd.* v. *General Electric Co.* [(1984) 4 SCC 679] (SCC at p. 723-24) and *Koch Navigation Inc.* v. *Hindustan Petroleum Corpn. Ltd.* [(1989) 4 SCC 259, 262 (para 8)]
>
> The expression "commercial" should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today.

34. We now come to Section 47. As the marginal note indicates, this Section provides that the pre-requisites for the enforcement of a foreign award are: (1) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it is made; (2) the original agreement for arbitration or a duly certified copy thereof, and; (3) such evidence as may be necessary to prove that the award is a foreign award.

35. Section 47 is based on Article IV of the New York Convention which is contained in Schedule I to the Arbitration Act, 1996. Article IV reads as follows:

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

36. In his treatise titled *International Commercial Arbitration* by Gary B. Born (Wolters Kluwer, 2nd Edn., 2014) [“**Gary Born”**], the learned author while discussing Article IV of the New York Convention has this to say:

> Under the convention, it is clear that national arbitration legislation is not permitted to impose more demanding requirements of proof of the existence of a foreign or nondomestic award than those contained in Article IV; Article IV prescribes a maximum standard of proof of an award and Contracting States may not impose stricter or more onerous requirements of proof.
>
> xxx xxx xxx
>
> Article IV was drafted in order to advance the Convention’s general pro-enforcement policies. As one national court put it:

> "Article IV must be interpreted in accordance with the spirit of the Convention… The Contracting States wished to reduce the obligation for the party seeking recognition and enforcement of a foreign arbitral award as much as possible." [Judgment of 15 April 1999, XXVI Y.B. Comm. Arb. 863, 866 (Geneva Cour de justice) (2001)]
>
> Consistent with this objective, national courts have generally rejected efforts to complicate the proof requirements under Article IV, taking a practical and relatively flexible approach towards proof requirements.
>
> (at pages 3396-3397)

37. From this, is clear that all the requirements of sub-section (1) are procedural in nature, the object being that the enforcing court must first be satisfied that it is indeed a foreign award, as defined, and that it is enforceable against persons who are bound by the award. Shri Vishwanathan and Shri Salve's arguments that to prove that a non-signatory to an arbitral agreement can only be roped in to the aforesaid agreement on evidence being adduced before the enforcing court as to whether the non-signatory is a person who claims under a party or is otherwise affected by the *alter ego* doctrine, is disingenuous to say the least. Section 47(1)(c) being procedural in nature does not go to the extent of requiring substantive evidence to "prove" that a non-signatory to an arbitration agreement can be bound by a foreign award. As a matter of fact, Section 47(1)(c) speaks of only evidence as may be

necessary to prove that the award is a foreign award. This Section only has reference to the six ingredients of a foreign award that have been outlined hereinabove, which are contained in the definition section, namely, Section 44. Ingredients 1 to 4 can easily be made out from the foreign award itself as the award would narrate facts which would show the legal relationship between the 'persons' bound by the award (who need not necessarily be parties to the arbitration agreement), and as to whether the award deals with matters that can be considered commercial under the law in force in India. Equally, the date of the foreign award would appear on the face of the foreign award itself. Thus, Section 47(1)(c) would apply to adduce evidence as to whether the arbitration agreement is a New York Convention agreement. Also, the requisite Central Government notification can be produced under Section 47(1)(c), so that Section 44(b) gets satisfied. To argue that the burden of proof is on the person enforcing the award and that this burden can only be discharged by such person leading evidence to affirmatively show that a non-signatory to an arbitration agreement can be bound by a foreign award is outside Section 47(1)(c). This argument consequently stands dismissed.

38. We now come to Section 48 which deals with enforcement of a foreign award being refused. It is important to notice that when enforcement of a foreign award is resisted, the party who resists it must prove to the court that its case falls within any of the sub-clauses of sub-section (1) or sub-section (2) of Section 48. Since some arguments were made as to the expression "proof" contained in Section 48(1), it is necessary to deal with the same. In ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*****, (2018) 9 SCC 49**, a question arose under the *pari materia* provision contained in Section 34 of the Arbitration Act, 1996 as to what the expression "proof" means therein. After referring to a number of High Court judgments, and to an amendment that has now been made to Section 34, in which the expression "furnishes proof that" is now substituted by "establishes on the basis of the record of the arbitral tribunal that", this judgment held that the expression "proof" cannot possibly mean the taking of oral evidence as it will otherwise defeat the object of speedy disposal of Section 34 petitions. This was so stated as follows:

> **21.** It will thus be seen that speedy resolution of arbitral disputes has been the reason for enacting the 1996 Act, and continues to be the reason for adding amendments to the said Act to strengthen the aforesaid object. Quite obviously,

if issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated. It is also on the cards that if Bill No. 100 of 2018 is passed, then evidence at the stage of a Section 34 application will be dispensed with altogether. Given the current state of the law, we are of the view that the two early Delhi High Court judgments [*Sandeep Kumar* v. *Ashok Hans*, 2004 SCC OnLine Del 106 : (2004) 3 Arb LR 306] , [*Sial Bioenergie* v. *SBEC Systems*, 2004 SCC OnLine Del 863 : AIR 2005 Del 95] , cited by us hereinabove, correctly reflect the position in law as to furnishing proof under Section 34(2)(*a*). So does the Calcutta High Court judgment [*WEB Techniques & Net Solutions (P) Ltd.* v. *Gati Ltd.*, 2012 SCC OnLine Cal 4271]. We may hasten to add that if the procedure followed by the Punjab and Haryana High Court judgment [*Punjab SIDC Ltd.* v. *Sunil K. Kansal*, 2012 SCC OnLine P&H 19641] is to be adhered to, the time-limit of one year would only be observed in most cases in the breach. We therefore overrule the said decision. We are constrained to observe that *Fiza Developers* [*Fiza Developers & Inter-Trade (P) Ltd.* v. *AMCI (India) (P) Ltd.*, (2009) 17 SCC] was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure. However, this judgment must now be read in the light of the amendment made in Sections 34(5) and 34(6). So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(*a*), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. We, therefore, set aside the judgment [*Girdhar Sondhi* v. *Emkay Global Financial Services Ltd.*, 2017 SCC OnLine Del 12758] of the Delhi High

> Court and reinstate that of the learned Additional District Judge dated 22-9-2016. The appeal is accordingly allowed with no order as to costs.

39. Given that foreign awards in convention countries need to be enforced as speedily as possible, the same logic would apply to Section 48, as a result of which the expression "proof" in Section 48 would only mean "established on the basis of the record of the arbitral tribunal" and such other matters as are relevant to the grounds contained in Section 48.

40. It is important to remember that the New York Convention, which our Act has adopted, has a pro-enforcement bias, and unless a party is able to show that it's case comes clearly within Sections 48(1) or 48(2), the foreign award must be enforced. Also, the grounds contained in Sections 48(1)(a) to (e) are not to be construed expansively but narrowly. Thus, in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131** ["***Ssangyong***"], it was held: -

> **45.** After referring to the New York Convention, this Court delineated the scope of enquiry of grounds under Sections 34/48 (equivalent to the grounds under Section 7 of the Foreign Awards Act, which was considered by the Court), and held : (*Renusagar case* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] , SCC pp. 671-72 & 681-82, paras 34-37 & 65-66)
>
> > "*34*. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral

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

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

> '*It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator*.

> Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration.' (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

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

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

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65. *This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly*. In this context, it would also be of relevance to mention that under Article I(*e*) of the Geneva Convention Act of 1927, it is permissible to raise objection

to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

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

(emphasis supplied in *Ssangyong*)

41. Likewise, in ***Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1** ["***Vijay Karia***"], this Court held:

> **24.** Before referring to the wide-ranging arguments on both sides, it is important to emphasise that, unlike Section 37 of the Arbitration Act, which is contained in Part I of the said Act, and which provides an appeal against either setting aside or refusing to set aside a "domestic" arbitration award, the legislative policy so far as recognition and enforcement of foreign awards is that an appeal is provided against a judgment refusing to recognise and enforce a foreign award but not the other way around (i.e. an order recognising and enforcing an award). This is because the policy of the legislature is that there ought to be only one bite at the cherry in a case where objections are made to the foreign award on the extremely narrow grounds contained in Section 48 of the Act and which have been rejected. This is in consonance with the fact that India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereinafter referred to as "New York Convention") and intends — through this legislation — to ensure that a person who belongs to a Convention country, and who, in most cases, has gone through a challenge procedure to the said award in the country of its origin, must then be able to get such award recognised and enforced in India as soon as possible. This is so that such person may enjoy the fruits of an award which has been challenged and which challenge has been turned down in the country of its origin, subject to

grounds to resist enforcement being made out under Section 48 of the Arbitration Act. ….

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44. Indeed, this approach has commended itself in other jurisdictions as well. Thus, in Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd. [Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd., 2010 SGHC 62] , the Singapore High Court, after setting out the legislative policy of the Model Law that the "public policy" exception is to be narrowly viewed and that an arbitral award that shocks the conscience alone would be set aside, went on to hold:

> "48. It is clear, therefore, that in order for SSGC to have succeeded on the public policy argument, it had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice. Nothing of the sort had been pleaded or proved by SSGC, and its ambiguous contention that the award was "perverse" or "irrational" could not, of itself, amount to a breach of public policy."

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50. The US cases show that given the "pro-enforcement bias" of the New York Convention, which has been adopted in Section 48 of the Arbitration Act, 1996 — the burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement and not the other way around; in the guise of public policy of the country involved, foreign awards cannot be set aside by second guessing the arbitrator's interpretation of the agreement of the parties; the challenge procedure in the primary jurisdiction gives more leeway to courts to interfere with an award than the narrow restrictive grounds contained in the New York Convention when a foreign award's enforcement is resisted.

42. Given these parameters, let us examine arguments of the appellants insofar as Section 48(1)(a) is concerned. If read literally, Section 48(1)(a) speaks only of parties to the agreement being under some incapacity, or the agreement being invalid under the law to which parties have subjected it. There can be no doubt that a non-party to the agreement, alleging that it cannot be bound by an award made under such agreement, is outside the literal construction of Section 48(1)(a). Also, it must not be forgotten that whereas Section 44 speaks of an arbitral award on differences between "persons", Section 48(1)(a) refers only to the "parties" to the agreement referred to in Section 44(a). Thus, to include non-parties to the agreement by introducing the word "person" would run contrary to the express language of Section 48(1)(a), when read with Section 44. Also, it must not be forgotten that these grounds cannot be expansively interpreted as has been held above. The grounds are in themselves specific, and only speak of incapacity of parties and the agreement being invalid under the law to which the parties have subjected it. To attempt to bring non-parties within this ground is to try and fit a square peg in a round hole.

43. Quite apart from the fact that Section 48(1)(a) was not put forward either before the learned Single Judge or the Division Bench, let us examine the judgment in ***Dallah*** (supra) which appears to justify the bringing of a non-signatory to the agreement's objection to a foreign award under Section 48(1)(a).

44. In ***Dallah's*** case (supra), a Saudi company applied under the United Kingdom's Arbitration Act, 1996 for leave to enforce an award against a ministry of the Government of Pakistan. There was no doubt on the facts of that case that the Government was not a party to the arbitration agreement, which was between Dallah and the Awami Hajj Trust. The Supreme Court of the United Kingdom found, on a trial conducted before it, that the agreement containing the arbitration clause fell to be decided under French law as the law of the country where the award was made, which required that there be a common intention between the parties to the agreement that the Government of Pakistan be bound by the arbitration agreement. It was found, contrary to the Tribunal's finding, that the agreement had been deliberately structured to reflect a common intention that only the parties to the agreement were to be bound, a non-

party being an outsider. The Tribunal's award had held on the facts of that case as follows: (para 146 of *Dallah*)

> "Certainly, many of the above-mentioned factual elements, if isolated and taken into a fragmented way, may not be construed as sufficiently conclusive for the purpose of this section. However, Dr Mahmassani believes that when all the relevant factual elements are looked into globally as a whole, such elements constitute a comprehensive set of evidence that may be relied upon to conclude that the defendant is a true party to the agreement with the claimant and therefore a proper party to the dispute that has arisen with the claimant under the present arbitration proceedings. Whilst joining in this conclusion Dr Shah and Lord Mustill note that they do so with some hesitation, considering that the case lies very close to the line."

45. This was referred to as a "weak conclusion" in para 146, and in any case did not conform to French law as the doctrine of *alter ego* was completely different from common intention of parties to the agreement which was required under French law. As a result, the arbitral award was set aside under Section 103(2)(b) of the UK Act, which is substantially similar to Section 48(1)(a) of the Indian Arbitration Act, 1996.

46. The leading judgment of **Lord Mance JSC** set out the facts and posed the question before the Court thus: -

> **2** ...The tribunal in a first partial award dated 26 June 2001 concluded that the Government was a true party to the agreement and as such bound by the arbitration clause, and so that the tribunal had jurisdiction to determine Dallah's

> claim against the Government. The central issue before the English courts is whether the Government can establish that, applying French law principles, there was no such "common intention" on the part of the Government and Dallah as would make the Government a party.

47. The learned Judge then noted, in para 11, that the argument made before the Tribunal was that the Trust was either the *alter ego* of the Government of Pakistan or the Government of Pakistan was the successor to the Trust. Since the '*alter ego'* argument found favour with the Tribunal, and since it was not pursued before the Supreme Court, the conclusion that the award was bad would necessarily follow. In para 31, Lord Mance JSC made it clear that a court seized of an issue under Section 103(2)(b) will examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination before arriving at its own conclusion on facts.

48. In a separate concurring judgment**, Lord Collins of Mapesbury JSC** set out as to why, in His Lordship's opinion, Article V(1)(a) of the New York Convention (equivalent to Section 103(2)(b) of the UK Act and Section 48(4)(a) of the Indian Arbitration Act, 1996) would be attracted as follows: -

> **77** Although article V(1)(a) (and section 103(2)(b)) deals expressly only with the case where the arbitration agreement

> is not valid, the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement. Thus in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 it was accepted by the Court of Appeal that section 103(2)(b) applied in a case where the question was whether a Swedish award was enforceable in England against Yukos on the basis that, although it was not a signatory, it had by its conduct rendered itself an additional party to the contract containing the arbitration agreement. In *Sarhank Group v Oracle Corp* (2005) 404 F 3d 657 the issue, on the enforcement of an Egyptian award, was whether a non-signatory parent company was bound by an arbitration agreement on the basis that its subsidiary, which had signed the agreement, was a mere shell; and in *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corpn* (2003) 334 F 3d 274 enforcement of a Chinese award was resisted on the ground that the agreement was a forgery. See also *Born*, *International Commercial Arbitration* (2009), Vol II, pp 2778–2779.

49. Given the conclusion on Section 48(1)(a) when read with Section 44 of the Arbitration Act 1996, we cannot follow what is stated to be "international practice" in trying to fit a non-signatory's objection to a foreign award being binding upon it under Section 48(1)(a). We therefore distinguish ***Dallah's*** case on facts as well as on law – a non-signatory's objection cannot possibly fit into Section 48(1)(a) as has been held by us hereinabove. Without delving deep into this problem, it may perhaps be open in an appropriate case for a non-signatory to bring its case

within Section 48(2) read with Explanation 1(iii), as explained in ***Ssangyong*** (supra) (see paras 70 and 76 in *Ssangyong*).

50. Shri Vishwanathan relied on a judgment of the Supreme Court of Victoria, Australia, in the case of ***IMC Aviation Solutions Pty Ltd. v Altain Khuder LLC*** **[2011] VSCA 248** to submit that, where a party resists enforcement of a foreign award on the ground that it is not a signatory to the arbitration agreement, the enforcing court is duty bound to examine the question of jurisdiction by itself.

51. In the said case, the Supreme Court of Victoria, after citing ***Dallah's*** case with approval, held that the foreign award in that case cannot be enforced against a party who was not a signatory to the arbitration agreement. This decision was premised on the reasoning that the words 'the arbitration agreement is not valid' appearing in Section 8(5)(b) of the Australian International Arbitration Act, 1974 ["**Australian Act**"] (which is equivalent to Section 48(1)(a) of the Indian Arbitration Act, 1996) includes the ground that the 'award-debtor was not a party to the arbitration agreement'.

52. What is important to note is that there is a significant difference in the Australian Act i.e., Section 8(1) of the Australian Act (which is analogous

to Section 46 of the Indian Arbitration Act, 1996) which states that "a foreign award is binding …. on the parties to the arbitration agreement in pursuance of which it was made".

53. The Supreme Court of Victoria, after initially expressing some doubt on whether 'not being signatory to the agreement' can be a ground that can be canvassed under Section 8(5)(b), held that, since Section 8(1) clearly does not intend enforcement of foreign awards against non-signatories, such a plea can be brought within the ambit of Section 8(5)(b). The relevant paras are as follows:

> **135** In our opinion, at stage one, the award creditor must satisfy the Court, on a prima facie basis, of the following matters before the Court may make an order enforcing the award:
>
> (a) an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor;
>
> (b) the award was made pursuant to an arbitration agreement; and
>
> (c) the award creditor and the award debtor are parties to the arbitration agreement.
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> xxx xxx xxx
>
> **156** Thirdly, s 8(1) appears prominently in the scheme of s 8. This is not surprising, as it defines the subject matter of Part II of the Act, namely, that by virtue of the Act, a foreign arbitral award is binding on 'the parties to the arbitration agreement in pursuance of which it was made'. In thus identifying that

which is binding, s 8(1) limits the Court's jurisdiction pursuant to s 8(2) to enforcing a foreign arbitral award against a party to the arbitration agreement in pursuance of which it was made.

159 Logically, the expression 'the arbitration agreement is not valid' in s 8(5)(b) may be inapt to accommodate the ground that a person is not a party to the arbitration agreement. This is because a person that seeks to establish that he or she is not a party to an agreement may have no legal or factual basis for impugning the validity of the agreement. The agreement may be valid as between the parties to it, and simply not apply to any person that is not a party to it. A person who establishes that he or she is not a party to an arbitration agreement does not thereby establish that the arbitration agreement is not valid.

160 Sixthly, a reading of s 8(5) as a whole indicates that the provision assumes that the question of whether the person resisting the enforcement of the award was a party to the arbitration agreement in pursuance of which the award was made has already been resolved against that person. This is evident from s 8(5)(a), which refers to 'a party to the arbitration agreement', and s 8(5)(f), which refers to 'the parties to the arbitration agreement'. If these provisions are read literally, the grounds covered by them are only available to parties to the arbitration agreement. It is not clear why these provisions should be so confined if it is the intention of the Act to permit a person that alleges that he or she is not a party to an arbitration agreement to resist enforcement of the award under s 8(5).

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165 It cannot be said that the ground that the award debtor was not a party to the arbitration agreement in pursuance of which the award was made is more significant than, for example, the ground that the arbitration agreement pursuant to which the award was made was not valid. There is no

reason to think that an award debtor has greater justification to be aggrieved because it maintains that it was not a party to the arbitration agreement than an award debtor that maintains that the arbitration agreement was invalid because it was forged or obtained by fraud. If the forgery or fraud are not apparent on the face of the arbitration agreement, and an ex parte order is made to enforce the award, the award debtor would have the onus under s 8(5)(b) to persuade the Court that the arbitration agreement was a forgery or was obtained by fraud. There is no justification for adopting a different approach where, on the face of the arbitration agreement, the award debtor was a party to that agreement.

166 Fourthly, the ordinary and natural meaning of the expression 'the arbitration agreement is not valid' is that the arbitration agreement is of no legal effect under the relevant law. A person who asserts that he or she is not a party to an arbitration agreement is, in substance, asserting that the arbitration agreement is of no legal effect as against him or her. Accordingly, s 8(5)(b) may be taken to include the ground that the award debtor was not a party to the arbitration agreement in pursuance of which the award was made.

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171 In relation to the question of whether s 8(5)(b) extends to the ground that the award debtor was not a party to the arbitration agreement, we respectfully agree with the approach that has been adopted in the United Kingdom.

172 In Dallah, Lord Collins JSC said that, notwithstanding that para 1(a) of art V of the Convention – which is reflected in s 8(5)(b) of the Act – deals expressly only with the case where the arbitration agreement is not valid, 'the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement.' In support of this proposition, Lord Collins JSC referred to Dardana Ltd v Yukos Oil Co. In that

> case, Mance LJ said that '[i]t is clear, and was effectively common ground before us, that [the UK equivalent of s 8(5)(b) of the Act] is one vehicle enabling the present appellants to challenge the recognition and enforcement of the Swedish award, by maintaining that they never became party to the [arbitration agreement]'
>
> xxx xxx xxx
>
> **272** It will be recalled from [166] and [171] to [172] above that the words 'the arbitration agreement is not valid' in s 8(5)(b) of the Act include the ground that the award debtor was not a party to the arbitration agreement.
>
> (emphasis supplied)

54. This case in inapplicable when construing Section 48(1)(a) of the Arbitration Act, 1996 for the same reason as ***Dallah*** is inapplicable.

55. As a matter of fact, the Singapore High Court in ***Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd & Anr.,*** **[2006] SGHC 78**, has arrived at a conclusion, on facts similar to ours, that the equivalent of Section 48(1)(a) in the Singapore Act would not be attracted.

56. In the facts of this case, Aloe Vera of America, Inc. ["**AVA**"], a company incorporated and existing under the laws of Texas, USA, was a manufacturer and distributor of aloe vera products. One Mr. Chiew was employed by AVA to be an independent distributor of the aforesaid products. When AVA decided to close its Singapore office, Mr. Chiew persuaded AVA to let him take over AVA's Singapore operations. He

established Asianic Food (S) Pte Ltd. ["**Asianic**"] for this purpose, as a result of which, an Exclusive Supply, Distributorship and License Agreement was entered into between AVA and Asianic. Mr. Chiew signed the agreement on behalf of Asianic. This agreement was subsequently terminated, with AVA commencing arbitral proceedings against both Asianic and Mr. Chiew. Mr. Chiew took the position that, not being a party to the agreement, he had not agreed to arbitration or to the laws of Arizona applying to him personally. However, the learned Arbitrator, in his award, ordered both Asianic and Mr. Chiew to pay AVA damages, compensation, administrative fees and expenses. In this fact situation, when Section 31(2)(b) of Singapore's International Arbitration Act [the "**Singapore Act**"] (equivalent of Section 48(1)(a) of the Indian Arbitration Act, 1996) was pressed in support of Mr. Chiew's objection to the foreign award, the Singapore High Court held: -

> **61.** First of all, it should be remembered that under s 31(2) of the Act, it is the party who wishes the court to refuse enforcement of the award who has the burden of establishing that one of the grounds for refusal exists. Sub-section (2)(b) calls on the challenger to establish that the arbitration agreement in question is not valid under the law to which the parties have subjected it. In this case, the arbitration agreement was subject to the law of Arizona and therefore Mr Chiew bore the burden of establishing that it was not valid under the law of Arizona and that under the law of Arizona

the clauses of the Agreement could not have any application to him. It would not be correct in this situation for me to construe cl 13.7 or any other clause of the Agreement in the same way as I would be able to if it were subject to Singapore law in order to establish whether there was a valid arbitration agreement binding Mr Chiew.

62. The same argument was brought before the assistant registrar who correctly held that the issue as to whether there was a valid arbitration agreement had to be determined on the basis of foreign law. He also recognised that Mr Chiew had the burden to adduce evidence to establish his contention. The assistant registrar found that Mr Chiew had failed to adduce such evidence. On the contrary, the evidence showed that Mr Chiew had signed the Agreement and was also active in running Asianic. The assistant registrar found support from the reasoning of the US District Court decision in the Sarhank case [*Sarhank Group v Oracle Corporation* reported in Yearbook Comm Arb'n XXVIII (2003) p 1043)]. Batts J who decided it at first instance stated:

> [T]he court has been asked to enforce an international arbitral award in which arbitrability has already been established under the laws of Egypt. …
>
> …
>
> [T]he Convention … does not sanction second-guessing the arbitrator's construction of the parties' agreement. … It is well-settled that absent "extraordinary circumstances", a confirming court is not to reconsider the arbitrators' findings. …
>
> …
>
> [The arbitrators'] conclusion of partnership under the contract is one of "construction of the parties' agreement" and will not be reviewed by the Court, absent extraordinary circumstances. In the instant case, no such extraordinary circumstances exist.

> Whilst the decision of Batts J may have been reversed by the Court of Appeals [404 F 3d 657 (2nd Cir, 2005)], I respectfully agree with his observations which are in line with the general approach taken by an enforcement court to the decision of the arbitral tribunal in question. They are also consonant with the views of the court in the Hebei case which underline that the approach towards the decisions of foreign arbitral tribunals in Convention countries is to recognise the validity of the same and give effect to them subject to basic notions of morality and justice. The Court of Appeals in the Sarhank case took a different view, one that I hope will not be generally endorsed.

57. In the facts of the present case, what this Court is being asked to do, in the guise of applying Section 48(1)(a), is really to undertake a review on the merits. As has been pointed out by us hereinabove, the application of the *alter ego* doctrine under Delaware law would depend primarily upon the Arbitrator applying the oral and documentary evidence led before him to arrive at this conclusion on facts. This he has done by not only adverting to the documentary evidence, but also adverting to the oral evidence of Ms. Parker of ISS, Mr. Pathak, MD of DMC and Arun Dev Upadhyaya, Chairman of DMC. Given the fact that the foreign award gives reasons on facts in this case to apply the *alter ego* doctrine, it would not be possible for us to re-appreciate these facts especially when the burden lies on the appellants to establish the grounds made out in Section 48(1), none of which go to the merits of the case.

58. Shri Vishwanathan also argued that the award is perverse in that vital evidence was not led in support of the claimant's case before the arbitrator. Perversity as a ground to set aside an award in an international commercial arbitration held in India no longer obtains after the 2015 amendment to the Arbitration Act, 1996. This Court in ***Ssangyong*** (supra) held as follows:

> **41.** What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders* v. *DDA*, (2015) 3 SCC 49, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.
>
> **42.** Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(*a*)(*iii*) and (*iv*) as applicable to the facts of the present case.
>
> (emphasis supplied)

59. The judgment in ***Ssangyong*** (supra) noted in para 29 that Section 48 of the Act has also been amended in the same manner as Section 34 of

the Act. The ground of "patent illegality appearing on the face of the award" is an independent ground of challenge which applies only to awards made under Part I which do not involve international commercial arbitrations. Thus, the "public policy of India" ground after the 2015 amendment does not take within its scope, "perversity of an award" as a ground to set aside an award in an international commercial arbitration under Section 34, and concomitantly as a ground to refuse enforcement of a foreign award under Section 48, being a *pari materia* provision which appears in Part II of the Act. This argument must therefore stand rejected.

60. The appellants then pressed Section 48(1)(c) into operation. As can be seen, Section 48(1)(c) relates to an award which 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 submissions to arbitration. Given the fact that the expression 'submission to arbitration' would refer primarily to the arbitration agreement (see ***Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan,* (1999) 5 SCC 651** at para 19), sub-clause (c) only deals with disputes that could be said to be outside the scope of the arbitration

agreement between the parties – and not to whether a person who is not a party to the agreement can be bound by the same. In fact, the proviso to Section 48(1)(c) makes this even clearer, in that it states that an award may be partially enforced, provided that matters which are outside the submission to arbitration can be segregated, thereby again showing that the thrust of the provision is whether the dispute between parties are *qua* excepted matters for example, or are otherwise outside the scope of the arbitration agreement. In ***Ssangyong*** (supra), this Court narrowed the scope of the challenge contained in Section 34(2)(a)(iv), which is *pari materia* with Section 48(1)(c) as follows:

> **58.** So far as this defence is concerned, standard textbooks on the subject have held that the expression "submission to arbitration" either refers to the arbitration agreement itself, or to disputes submitted to arbitration, and that so long as disputes raised are within the ken of the arbitration agreement or the disputes submitted to arbitration, they cannot be said to be disputes which are either not contemplated by or which fall outside the arbitration agreement. The expression "submission to arbitration" occurs in various provisions of the 1996 Act. Thus, under Section 28(1)(*a*), an Arbitral Tribunal "… shall decide the dispute submitted to arbitration …". Section 43(3) of the 1996 Act refers to "… an arbitration agreement to submit future disputes to arbitration …". Also, it has been stated that where matters, though not strictly in issue, are connected with matters in issue, they would not readily be held to be matters that could be considered to be outside or beyond the scope of submission to arbitration. ….

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67. In *State of Goa* v. *Praveen Enterprises*, (2012) 12 SCC 581 (*Praveen Enterprises*), this Court set out what is meant by "reference to arbitration" as follows : (SCC pp. 587-88, paras 10-11)

> "*10*. "Reference to arbitration" describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate:
>
> > (*a*) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the "reference" contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.
> >
> > (*b*) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the "reference" contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.
> >
> > (*c*) Where the parties fail to concur in the appointment of the arbitrator(s) as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the

disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where “all disputes” are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counterclaims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.”

68. A conspectus of the above authorities would show that where an Arbitral Tribunal has rendered an award which decides matters either beyond the scope of the arbitration agreement or beyond the disputes referred to the Arbitral Tribunal, as understood in *Praveen Enterprises*, the arbitral award could be said to have dealt with decisions on matters beyond the scope of submission to arbitration.

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.

61. In the ***Aloe Vera of America*** case (supra), the Singapore High Court adverted to Section 31(2)(d) of the Singapore Act (which is the equivalent to Section 48(1)(c) of the Indian Arbitration Act, 1996), and then held:

> **64.** Under s 31(2)(d), enforcement of the Award may be refused if it "deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration".
>
> **65.** Mr Loh submitted that the Award should not be enforced in Singapore because it contains a decision on matters that are beyond the scope of the submission to arbitration – the arbitration agreement was between AVA and Asianic and the submission to arbitration was restricted to those parties only. Joining Mr Chiew and entering an award against him went beyond the scope of the submission to arbitration. *Javor v Francoeur* [2003] BCJ No 480 was cited in support. Additionally, Mr Loh said certain academics (though he referred me to only one article, that by Prof Wedam-Lukic, "The Jurisdictional Problems of Arbitration" (1994) 1 Croatian Arbitration Yearbook 51) were also of the view that an award

seeking to bind non-parties to an arbitration agreement was a ground for refusal of enforcement under Art V(1)(c) of the Convention (the equivalent of s 31(2)(d) of the Act).

66. On behalf of AVA, Mr Dhillon submitted that s 31(2)(d) dealt with the grounds of excess of power or authority of the arbitrator. He cited para 20.145 of *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) where the author stated that this ground of challenge assumed that the tribunal had jurisdiction over the parties and that the excess of jurisdiction should be looked at in relation to the scope of the arbitration agreement and not be restricted to the pleadings filed in the arbitration. The author added that when the court examined such a challenge, it should be cautious that in doing so it did not go into the merits in the case raised before the arbitrator, including any issue of law.

67. Mr Dhillon further submitted that s 31(2)(d) did not overlap with s 31(2)(b) which was the proper section to invoke when a challenge was being made on the basis that a person was not a party to the arbitration agreement. He pointed out that in *Peter Cremer GmbH & Co v Co-operative Molasses Traders Ltd* [1985] ILRM 564, the appellant had argued that there was no binding contract between the parties and that therefore there could not be a binding agreement to submit disputes to arbitration. Dealing with this argument in the Irish Supreme Court, Finlay CJ held at 573 that:

> I am not satisfied that this issue can properly be made the subject matter of a defence pursuant to either s.9(2)(d) or s.9(2)(f) of the Act of 1980. S.9(2)(d) clearly, in my view, refers to a situation where there is an undoubted submission to arbitration … If, as is contended by the appellants in this case, there was no binding agreement containing an arbitration clause then, by definition, there could be no submission to arbitration and in the absence of a submission to arbitration there could be no issue as to whether an award dealt with differences not

contemplated or falling within the terms of a submission or went beyond the scope of the submission.

In Peter Cremer, no challenge was mounted on the basis of the Irish equivalent of s 31(2)(b) but it is quite clear that the court did not consider that a challenge, premised on the argument that a person was not a party to an agreement, could be made under s 31(2)(b).

68. In any event, Mr Dhillon submitted that in order to determine whether the award dealt with matters that were beyond the scope of the submission to arbitration, the law to be applied would have to be the governing law of the arbitration agreement since that law would control the way in which the arbitration agreement was construed. Accordingly, where a Convention award is to be enforced, the foreign law of the award would be applicable. In this case, Mr Chiew had brought no evidence based on Arizona law to prove that the Award contained a decision on a matter beyond the scope of the submission to arbitration. As for Javor v Francoeur, this case was distinguishable on its facts as the arbitrator there had held that the respondent was liable without finding him to be a party to the arbitration agreement.

69. Having considered Mr Dhillon's arguments, I accept them. I agree with the assistant registrar that this ground of challenge relates to the scope of the arbitration agreement rather than to whether a particular person was a party to that agreement. Mr Chiew has not established that this ground avails him in this instance.

62. We think this judgment states the law correctly.

63. Shri Vishwanathan then pressed the ground that since the Arbitrator's Award in the present case contained reasoning which was perfunctory in nature, it would not pass muster and it would be a breach of natural

justice, ‘reasons’ being a part of natural justice as understood in this country. For this, he referred to Section 48(1)(b) of the Arbitration Act, 1996. Section 48(1)(b) does not speak of absence of reasons in an arbitral award at all. The only grounds on which a foreign award cannot be enforced under Section 48(1)(b) are natural justice grounds relatable to notice of appointment of the arbitrator or of the arbitral proceedings, or that a party was otherwise unable to present its case before the arbitral tribunal, all of which are events anterior to the making of the award. Section 48(1)(b) has in any case been narrowly construed in the case of ***Vijay Karia*** (supra) as follows:

> **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.

64. This judgment also expressly referred to arbitral awards which may be poorly reasoned as follows: -

> **24.** …. Also, it would only be in a very exceptional case of a blatant disregard of Section 48 of the Arbitration Act that the Supreme Court would interfere with a judgment which recognises and enforces a foreign award however inelegantly drafted the judgment may be. …
>
> **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 not be enforced, as was done by the Delhi High Court in *Campos Bros. Farms* v. *Matru Bhumi Supply Chain (P) Ltd.*, 2019 SCC OnLine Del 8350 : (2019) 261 DLT 201 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. ….

65. This argument also stands rejected.

66. Shri Salve argued that since damages were given in tort in the present case, they would be outside the scope of the arbitration agreement. The arbitration agreement in this case reads as follows: -

> (ii) In the event a dispute arises in connection with this Agreement such dispute shall be referred to a single arbitrator in Kansas City, Missouri, U.S.A. to be appointed by agreement between the parties hereto, or failing agreement to be appointed according to the rules of the American Arbitration, Association the same rules under which any dispute which any dispute shall be decided.
>
> (emphasis supplied)

67. As has been noticed by us earlier in this judgment, Section 44 recognises the fact that tort claims may be decided by an arbitrator provided they are disputes that arise in connection with the agreement. Thus in ***Renusagar Power Co. Ltd. v. General Electric Co.*****, (1984) 4 SCC 679,** this court held: -

> **39.** As regards the third claim of compensatory damages it is true that Renusagar is being saddled with this liability as tortfeasor, a stake-holder and/or a constructive trustee, but, in our view, that aspect by itself will not justify a conclusion that the same is not covered by the arbitration clause because the question is not whether the claim lies in tort but the question is whether even though it has lain in tort it "arises out of" or is "related to" the contract, that is to say, whether it arises out of the terms of the contract or is consequential upon any breach thereof. As explained earlier, this claim is based on and is consequential upon and by way of corollary to the non-payment of the two detained amounts by

Renusagar to G.E.C. in breach of the terms of the contract. In other words, it is clear that before adjudicating upon this claim the adjudicating authority will have first necessarily to adjudicate upon first two claims preferred by G.E.C. and only if it is found that G.E.C. is entitled to receive the first two amounts which ought to have been paid by Renusagar under the terms of the contract but which Renusagar had failed to pay that this third claim could, if at all, be allowed to G.E.C. In the real sense, therefore, this claim is directly, closely and inextricably connected with the terms and conditions of the contract, the payments to be made thereunder and the breaches thereof and as such will have to be regarded as a claim "arising out of" or "related to" the contract. As we shall point out presently this Court in one of its decisions has laid down the test for determining the question in such cases and the test is whether recourse to the contract, by which both the parties are bound, would be necessary for the purpose of determining whether the claim in question was justified or otherwise and this test, as indicated above, is clearly satisfied with regard to the third claim in the instant case.

40. We may, at this stage, refer to a passage in ***Russell on Arbitration*** and a few decided cases which fortify our aforesaid conclusion. In *Russell on Arbitration* (Twentieth Edn.) the following statement of law occurs at p. 90:

> "Claims in tort may be so intimately connected with a contract that a clause of appropriate width designed primarily to make contractual disputes arbitrable will nevertheless render such claims in tort arbitrable as well."

41. In ***Woolf* v. *Collis Removal Service*** [(1947) 2 All ER 260 : (1948) 1 KB 11 : 177 LT 405 (CA)] the defendants had contracted to remove plaintiff's furniture and effects from London to their store in Marlow and there safely to keep and take care of them, but, according to the plaintiff, the defendants had, in breach of the contract, removed the goods to a different destination where some were lost and others damaged. Alternatively the plaintiff claimed that the goods

were lost and damaged owing to the negligence of the defendants in using an unsuitable place in which to store them and guarding them inefficiently. The clause providing for arbitration ran: “If the customer makes any claims upon or counter-claim to any claim made by the contractors” the same shall be referred to the decision of the two arbitrators. The question was whether the claim for damages was covered by this clause. The Court of Appeal held that even if the claim in negligence was a claim in tort and not under the contract yet there was a sufficient close connection between that claim and the transaction to bring the claim within the arbitration clause. This authority clearly shows that even though a claim may not directly arise under the contract which contains an arbitration clause, if there was sufficient close connection between that claim and the transaction under the contract it will be covered by the arbitration clause.

42. In ***Astro Vencedor Compania Naviera SA of Panama* v. *Mabanaft GmbH*** [(1971) 2 All ER 1301 (QBD & CA)] the arbitration clause contained in a contract of charter-party ran: “any dispute arising during the execution of this charter-party” shall be settled by two arbitrators, one to be appointed by the owners and the other by the charterers. The relevant charterers ordered the vessel to a Dutch port not named in the bill of lading whereby satisfactory bills of lading were not available in time and disputes arose as to unloading. By action of the relevant charterers the vessel was arrested and released on a bank guarantee. Later, under a charter quite unconnected with the relevant charterers the vessel happened to be again in a Dutch port and was arrested again as a result of disputes as to the satisfactory nature of the original bank guarantee. The owners arbitrated a claim for damages in respect of each of the two arrests of the vessel. The charterers argued that these were claims in tort and outside the arbitrator's jurisdiction. The Court held that arbitrator had jurisdiction (*1*) over the first arrest as it was closely connected with the dispute under the contract, and was indeed a direct consequence of a claim for damages

under the contract, and (*2*) over the second arrest as it was part and parcel of the original arrest.

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44. In ***Alliance Jute Mills Co. Ltd.*** **v.** ***Lalchand Dharamchand*** [AIR 1978 Cal 19] disputes between the parties to a commercial contract were arbitrable under the bye-laws of the East India Jute & Hessian Exchange Association and the relevant bye-law ran thus: "All matters, questions, disputes, difference and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this contract shall be referred to arbitration...." Under the commercial contract Respondent 1 had sold, through a broker, certain quantities of fibre to the appellant Mill and after effecting delivery of the goods Respondent 1 had submitted bills to the appellant Mill again through the broker; the appellant Mill, however, claimed reduction in price on account of shortage in weight and submitted claims in that respect. Since the price was not paid, Respondent 1 referred the claim to the arbitration of Bengal Chamber of Commerce and Industry. The appellant Mill informed the Chamber of Commerce and Industry that it had filed a suit upon the whole of the subject-matter of the reference and served a notice under Section 35 of the Arbitration Act. In the suit so filed against Respondent 1 and the broker apart from the declaration sought that the broker had no claims against the appellant Mill in respect of the contract or in respect of the bills submitted by the broker for the price of goods sold and delivered the appellant Mill had also claimed a decree for Rs 50,000 as damages for the alleged libel published by Respondent 1 and the broker. In an application for stay of the suit under Section 34 of the Arbitration Act, 1940, one of the questions raised was whether the arbitration clause was wide enough to include the claim for damages for the alleged libel. The High Court held that the claim in damages for defamation arose "out of" and "in connection with" the non-payment of the bills of

Respondent 1 and in going into the question of tort the Court would necessarily have to go into the terms and conditions of the contract relating to payment and that the claim in tort was directly and inextricably connected with the terms and conditions of the contract and as such came within the scope of the arbitration clause which was wide enough to cover the same. In this view of the matter Court stayed the suit under Section 34 of the Arbitration Act.

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46. As stated earlier since this third claim for compensatory damages is directly, closely and inextricably connected with the terms and conditions of the contract, the payments to be made thereunder and the breaches thereof and since for adjudication thereof recourse to the contract would be necessary it will have to be held that it is a claim “arising out of” and in any event “related to” the contract.

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48. Having regard to the aforesaid discussion we are clearly of the view that all the three claims referred by G.E.C. to the Court of Arbitration of I.C.C. do “arise out of” and are “related to” the commercial contract in fact the first two claims arise “under the contract”) and squarely fall within the widely worded Arbitration clause being Article XVII contained in the commercial contract. It is also clear that the Arbitration clause embraces even the question of its effect (scope), that is to say, it embraces the issue of the arbitrability of the three claims Questions whether in law, namely, the law of the Forum, the arbitrators will have jurisdiction and power to decide the arbitrability of the claims or not and whether Renusagar's suit is liable to be stayed or not will be considered by us next but at this stage we are categorically negativing the contentions of counsel for Renusagar that on merits the three claims are beyond the scope or purview of the Arbitration clause or that the Arbitration clause on its own

language does not embrace the issue of arbitrability of the three claims.

68. In ***Tarapore & Co. v. Cochin Shipyard Ltd.*****, (1984) 2 SCC 680**, this Court held:

> **39.** Phrases such as "claim arising out of contract" or "relating to the contract" or "concerning the contract" on proper construction would mean that if while entertaining or rejecting the claim or the dispute in relation to claim may be entertained or rejected after reference to the contract, it is a claim arising out of contract. Again the language of clause 40 shows that any claim arising out of the contract in relation to estimates made in the contract would be covered by the arbitration clause. If it becomes necessary to have recourse to the contract to settle the dispute one way or the other then certainly it can be said that it is a dispute arising out of the contract. And in this case the arbitration clause so widely worded as disputes arising out of the contract or in relation to the contract or execution of the works would comprehend within its compass a claim for compensation related to estimates and arising out of the contract. The test is whether it is necessary to have recourse to the contract to settle the dispute that has arisen. [(See Russel on Arbitration, Twentieth Ed., page 85)]

69. It then specifically referred to ***Astro Vencedor Compania Naviera S.A. of Panama*** **v.** ***Mabanaft GmbH*** **[(1971) 2 QB 588** as follows:

> **42.** In *Astro Vencedor Compania Naviera S.A. of Panama v. Mabanaft GmbH* [(1971) 2 QB 588 : (1971) 2 All ER 1301 : (1971) 3 WLR 24] a question arose whether a claim in tort would be covered by the arbitration clause? It was admitted that the claim for wrongful arrest is a claim in tort. And it was contended that a claim in tort cannot come within the arbitration clause. The Court of Appeal speaking through

> Lord Denning held that the claim in tort would be covered by the arbitration clause, if the claim or the issue has a sufficiently close connection with the claim under the contract.

70. As a result, this contention has no legs on which to stand.

71. Shri Salve argued relying upon three judgments of this Court, namely, ***Indowind Energy Ltd.*** **v.** ***Wescare (India) Ltd.*****, (2010) 5 SCC 306,** ***Chloro Controls India (P) Ltd.*** **v.** ***Severn Trent Water Purification Inc.*****, (2013) 1 SCC 641,** ***Cheran Properties Ltd. v. Kasturi & Sons Ltd.*****, (2018) 16 SCC 413** that a comparison between Sections 35 and 46 of the Arbitration Act, 1996 would show that the legislature circumscribed the power of the enforcing court under Section 46 to persons who are bound by a foreign award as opposed to persons which would include 'persons claiming under them' and that, therefore, a foreign award would be binding on parties alone and not on others. First and foremost, Section 46 does not speak of "parties" at all, but of "persons" who may, therefore, be non-signatories to the arbitration agreement. Also, Section 35 of the Act speaks of "persons" in the context of an arbitral award being final and binding on the "parties" and "persons claiming under them", respectively. Section 35 would, therefore, refer to only persons claiming under parties and is, therefore,

more restrictive in its application than Section 46 which speaks of "persons" without any restriction. Quite apart from this, another important conundrum arises from the Division Bench judgment in the present case. The Division Bench judgment applied Delaware law to satisfy itself that such law had indeed been followed to apply the *alter ego* doctrine correctly, as a result of which the foreign award would have to be upheld. We wish to indicate that this approach is completely erroneous. First and foremost, Section 48 does not contain any ground for resisting enforcement of a foreign award based upon the foreign award being contrary to the substantive law agreed to by the parties and which it is to apply in reaching its conclusion. As a matter of fact, whether the award is correct in law (applying Delaware law), would be relevant if at all such award were to be set aside in the State in which it was made and that too if such law permitted interference on the ground that the arbitral award had infracted the substantive law of the agreement. As has been pointed out hereinabove, the arbitral award in this case was not challenged in the State of Missouri. Hence, the Division Bench's foray into this line of reasoning is wholly incorrect.

72. As a matter of fact, if an international commercial arbitration were to be held in India, Section 28(1)(b) recognises that an arbitral tribunal can decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute which, in turn, has a direct nexus to the substantive law of the country whose laws are said to apply. There is no ground in the *pari materia* provisions of Section 34 to set aside such award on the ground that the substantive law of that country has been infracted. Indeed, the only ground on which such award could possibly be interfered with is if such award, valid under the law which it applied, could be held to be contrary to the public policy of India. ***Gary Born*** (supra) has this to say on this aspect:

> Despite the potentially expansive and unruly character of "public policy," courts in most jurisdictions have been very reluctant to invoke the exception to deny recognition to foreign awards. Rather, they have underscored the narrow, exceptional character of the public policy defense in recognition proceedings, emphasizing that the exception is not satisfied merely because foreign law or foreign tribunal reached a different result, or even an entirely opposite reslt, from that provided by domestic law. One leading Swiss judicial decision sums up this approach as follows:
>
> > "The appellant forgets that the enforcement court does not decide on the arbitral award as an appellate instance; the merits of the award cannot be reviewed under the cover of public policy." [Judgment of 9 January 1995, Inter

> Maritime Mgmt SA v. Russin & Vecchi, XXII Y.B. Comm. Arb. 789,796 (Swiss Federal Tribunal)]

Other courts have also repeatedly made clear that "erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention. That result has been repeatedly and squarely affirmed by decisions in U.S., Swiss, French, English, German, Austrian, Singaporean, Hong Kong, Indian, Korean and other courts. Thus, the fact that an arbitral tribunal applies a law that is different from that of the recognition forum's law, or wrongly applies the recognition forum's laws, or reaches a result that is contrary to that which the recognition forum's courts would reach when applying their own (or a foreign) law, is not a basis for finding a violation of public policy under Article V (2) (b).

The same principle is even more clearly applicable with regard to factual findings by an arbitral tribunal …

(at pages 3667-3669)

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It is frequently said that conduct involving violations of certain types of criminal prohibitions implicates national and international public policies, crimes of terrorism, piracy, slave-trading, drug smuggling, torture, murder, kidnapping and robbery are all typically identified as examples of public policy. As discussed above, in the context of arbitration agreements:

> "The English court would not recognise an agreement between … highwaymen to arbitrate their differences any more than it would recognise the original agreement to split the proceeds." [Soleimany v. Soleimany [1999] QB 785, 797 (English Ct. Appl)]

Equally, neither an English court nor courts of most other states would recognize awards that split the proceeds of a criminal enterprise or that otherwise facilitated serious

> criminal activities, whether highway robbery, terrorism, drug smuggling, slave- trading, human-trafficking, or similar crimes. In practice, however, it is highly unusual for criminals involved in such enterprises to come anywhere close to either lawyers or arbitrators; other forms of alternative dispute resolution are used in almost all such settings. As a consequence, there are very few national court decisions involving the text-book cases of serious criminal activities.
>
> (at pages 3672-3693)

73. Thus, if in a given case the substantive law of a foreign country were to recognise a narcotic drug as being legal based upon which an award for the supply of such drug is then ordered, such award may possibly be resisted in India on the ground that it would be contrary to the fundamental policy of Indian law to give effect to such agreement in a case in which the Narcotic Drugs and Psychotropic Substances Act, 1985 prohibits import of such a drug. A foreign award cannot be set at naught under Section 48 on the ground that it has infracted the substantive law of the agreement.

74. The final argument that the damages that have been awarded have been awarded on no basis whatsoever would again not fall within any of the exceptions contained in Section 48(1). In order to attract Section 48(2) read with Explanation 1(iii), this Court in ***Ssangyong*** (supra) has held that it is only in exceptional cases which involve some basic

infraction of justice which shocks the conscience of the court that such a plea can be entertained. This Court held:

> **70.** The expression "most basic notions of … justice" finds mention in Explanation 1 to sub-clause (*iii*) of Section 34(2)(*b*). Here again, what is referred to is, substantively or procedurally, some fundamental principle of justice which has been breached, and which shocks the conscience of the Court. ….
>
> xxx xxx xxx
>
> **76.** However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. ….

75. The Arbitrator correctly held that as nothing was forthcoming from any of the appellants, he would have to make a best judgment assessment for damages. In making that assessment, he took into account the commission that was being earned by GBT from the two clients of DMC and arrived at a figure of 100,000 USD per month and then found, on a reasonable estimate, that they would continue to be clients for a period of four years, as a result of which the figure of 6,948,100 USD was reached.

76. That such 'guesstimates' are not a stranger to the law of damages in the U.S. and other common law tradition nations has been established

very early on in a judgment of Asutosh Mookerjee, J. reported as ***Frederick Thomas Kingsley v. The Secretary of State for India*** **AIR 1923 Cal 49**. In this judgment, a learned Division Bench of the Calcutta High Court put it thus: -

> It may be conceded that though every breach of duty arising out of a contract gives rise to an action for damages, without proof of actual damage, *Marzetti v. Williams* [(1830) I B & Ad. 415 : 35 R.R. 329.], *Embery v. Owen* [(1851) 6 Exch. 353 : 86 R.R. 331], the amount of damages recoverable is, as general rule, governed by the extent of the actual damage sustained in the consequence of the defendant's act, *Hiort v. L.N.W. Ry. Co.* [(1879) 4 Exch. Div. 188.]. In cases admitting proof of such damage, the amount must be established with reasonable certainty, *The Commerce* [(1850) 3 W. Rob. 283.]. But this does not mean that absolute certainty is required, nor in all cases, is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. As Harlan J. observed in delivering the judgment of the Supreme Court of the United States in *Heztel v. Baltimore and O.R. Co.* [(1897) 169 U.S. 26 (38)], certainty to reasonable extent is necessary, and the meaning of that language is that the loss of damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it is most likely to follow from the breach of the contract and was a probable and direct result thereof. To the same effect is the decision in *Morris v. U.S.* [174 U.S. 291.] that where absolute certainty is impossible, judgment of fair men as to damages directly resulting governs.
>
> (at pages 50,51)

77. Significantly, this judgment referred to and relied upon U.S. Supreme Court judgments to arrive at this conclusion.

78. However, Shri Viswanathan relied upon ***Agritrade International (P) Ltd. v. National Agricultural Coop. Mktg. Federation of India Ltd.,*** (supra) and para 24 in particular, which states: -

> **24.** There is also merit in the submissions made on behalf of NAFED that there was no material produced before the Arbitral Tribunal by Agritrade to show that it had, in fact, suffered any loss as a result of NAFED not opening an L/C for the quantity of 5000 MT of CPO. In its final Award dated 14th January 2008, the Arbitral. Tribunal merely accepted the default date as 7th October 2004 and proceeded to determine the "close out price" to assess the damage. Unless there was actual proof of loss suffered by Agritrade, awarding of any differential between the contracted price and close out price must also be held to be based on no evidence.

79. The facts in this case are far removed from the facts in the aforesaid High Court Judgment. There can be no doubt whatsoever that as a result of the machinations of Upadhyaya and Pathak, as found by the arbitral tribunal, ISS was deprived of commission legitimately due to it under the representation agreement. This being so, there can be no doubt that, on facts as proved before the arbitral tribunal, actual loss can be said to have been occasioned to ISS.

80. In any case, the damages so awarded in the facts of this case cannot even remotely be said to shock the conscience of this Court so as to clutch at “the basic notion of justice” ground contained in Section 48(2) Explanation (1)(iii).

81. The result is that the appeals are dismissed for the reasons given by us without any order as to costs.

…….....J.
[ROHINTON FALI NARIMAN]

…….....J.
[B.R. GAVAI]

New Delhi;
August 10th, 2021.