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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.47 OF 2015

M/s.Louis Dreyfus Commodities
Suisse S.A., 29 Route De L'aeroport
Case Postale 236 Suisse SA
1215 Geneva, 15, Switzerland.

....Petitioner

....Versus....

Sakuma Exports Limited,
A company registered under
Companies Act, 1956, having
its registered office at 301, Arun
Chamber, Near Mahindra Tower,
S.S. Amrutwar Lane, 3rd Floor,
Worli,Mumbai – 400 013.

...Respondent

WITH
EXECUTION APPLICATION NO.554 OF 2011
ARISING OUT OF
CASE REFERENCE NO.2262 DATED 25TH MARCH, 2011

UNDER THE RULES OF THE REFINED SUGAR ASSOCIATION
(Execution Application under Order XXI Rule 11(2) of the Civil
Procedure Code, 1908)

M/s.Louis Dreyfus Commodities
Suisse S.A., 29 Route De L'aeroport
Case Postale 236 Suisse SA
1215 Geneva, 15, Switzerland.

....Applicant

....Versus....

Sakuma Exports Limited,
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Companies Act, 1956, having
its registered office at 301, Arun
Chamber, Near Mahindra Tower,

S.S. Amrutwar Lane, 3rd Floor,
Worli,Mumbai – 400 013.

...Respondent

WITH
NOTICE OF MOTION NO.1318 OF 2015
IN
ARBITRATION PETITION NO.47 OF 2015

M/s.Louis Dreyfus Commodities
Suisse S.A., 29 Route De L'aeroport
Case Postale 236 Suisse SA
1215 Geneva, 15, Switzerland.

....Applicant

IN THE MATTER BETWEEN :

M/s.Louis Dreyfus Commodities
Suisse S.A., 29 Route De L'aeroport
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Sakuma Exports Limited,
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Chamber, Near Mahindra Tower,
S.S. Amrutwar Lane, 3rd Floor,
Worli,Mumbai – 400 013.

...Respondent

Mr.Hiroo Advani with Mr.Asif Lampwala and Mr.Sheith Yusufali i/b
M/s.Advani & Co. for the Petitioner.

Mr.G.R. Joshi, Senior Counsel with Mr.Chirag Modi, Mr.Kazon Shroff,
Mr.Karthik Samsundram and Ms.Oendri Neogi i/b Krishnamurthy &
Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 20TH AUGUST, 2015
PRONOUNCED ON : 6TH OCTOBER, 2015.

JUDGMENT :-

1. The petitioner has filed these proceedings arising out of the foreign award dated 25th March, 2011 passed by Refined Sugar Association allowing some of the claims made by the petitioner. Arbitration Petition (No.47 of 2015) is filed for an order that the foreign award dated 25th March, 2011 be deemed to be decree of this Court, for a direction to enforce and execute the said foreign award as a decree in favour of the petitioner and as against the respondent. Execution Application (No.554 of 2011) is filed by the petitioner for execution of the said foreign award dated 25th March, 2011. Notice of Motion (No.1318 of 2015) has been filed by the petitioner in Arbitration Petition No.47 of 2015 *inter-alia* praying for condonation of delay of 273 days in filing the said petition.

2. By consent of the parties, all the aforesaid four proceedings were heard together and are being disposed of by a common order and judgment. Some of the relevant facts for the purpose of deciding the aforesaid proceedings are as under :

3. The petitioner herein was the original claimant, whereas the respondent was the original respondent in the arbitral proceedings. The petitioner is a company having its registered office at Switzerland. The respondent is a public limited company registered under the provisions of the Indian Companies Act, 1956 and is carrying on business of import and export commodities, including sugar from its office at Mumbai.

4. On 12th January, 2010 and 18th January, 2010, the petitioner agreed to sell and the respondent agreed to purchase 2700 M.T. of Brazilian white sugar on the terms and conditions set out in the said Purchase Contract. The said Purchase Contract was duly

signed by both the parties. The said Purchase Contract provided for arbitration in case of dispute between the parties.

5. It was the case of the petitioner that in breach of the Purchase Contract, the respondent failed to make payment to the petitioner by the contractual dates despite letters and reminders sent by the petitioner. It is the case of the petitioner that as per the terms of the Purchase Contract, the petitioner was entitled to terminate the contract, sell a cargo to a third party and claim damages from the respondent.

6. On 3rd May, 2010, the petitioner submitted a written request for arbitration to the Refined Sugar Association. The petitioner also filed statement of case. On 3rd June, 2010, the Refined Sugar Association forwarded a copy of the said statement of case to the respondent and called upon the respondent to file its defence and submission by 5th July, 2010.

7. On 15th September, 2010, the Refined Sugar Association passed a final partial arbitral award on jurisdiction and rejected the plea of jurisdiction raised by the respondent. The Refined Sugar Association also directed the respondent to pay the amount towards the costs.

8. It is the case of the petitioner that in order to fulfill the contract with respondent of 2700 M.T. of Brazilian white sugar, the petitioner entered into a contract with Cargill BV dated 12th January, 2009 for only 1290 M.T. Of Brazilian white sugar with a minimum polarisation of 99.7 and a maximum color 150 ICUSM, 2009-2010 crop. The said quantity of 1620 M.T. was shipped on a vessel named

USAC Jubail. It is the case of the respondent that the petitioner therefore, shipped to the respondent balance quantity of 1009 M.T. from its existing stock of Brazilian white refined sugar of 2009 crop having a maximum colour 45 ICUSM, which they had purchased under another contract dated 31st October, 2008 from a different seller.

9. It was the case of the respondent that the petitioner fraudulently described two different products in invoice and purported to ship two different products as one commodity. It is the case of the respondent that the raw material, manufacturing process and market for the said two products were different. It was urged by the respondent that in India 92% to 95% of the demand was only for white crystal sugar. The respondent filed five bill of entries during the period between 15th March, 2010 and 25th March, 2010 and described the sugar as "white sugar". The Custom Authorities had alleged to have orally informed that there was mis-declaration in the bill of entries as a wrong description of the goods had been given therein and that the description of the goods did not match the goods actually shipped. The respondent informed the petitioner about this oral communication of the Custom Authorities.

10. The parties exchanged further correspondence. It is the case of the respondent that the petitioner had orally offered discount of US \$ 50,000 to the respondent on 15th April, 2010. The respondent proceeded to clear the consigned sugar. It was the case of the respondent that the respondent was under the *bona-fide* belief that the issue could be resolved. On 16th April, 2010, the petitioner demanded the entire contractual value of the goods. The respondent however, alleged that the discount of US \$ 50,000 was offered by the

petitioner. The respondent requested for a refund of the advance US \$ 2,10,600. On 22nd April, 2010, the petitioner withdrew its offer for amicable settlement and intended to start arbitration.

11. The respondent vide its letter dated 29th April, 2010, alleged that the petitioner had committed breach of the contract and denied the allegation that the respondent did not intend to perform the contract. The Custom Authorities issued a query memo to the respondent to explain mis-match / mis-declaration of goods. It was the case of the petitioner that the respondent had refused to file NOC and thus the detention cost could be stopped only after the respondent would have filed NOC.

12. On 8th July, 2010, the respondent filed its statement of defence. On 30th August, 2010, the respondent filed an application on the issue of jurisdiction. On 15th September, 2010, the arbitral tribunal recorded the final award on the issue of jurisdiction. On 13th November, 2010, the respondent filed written submissions before the arbitral tribunal. On 9th December, 2010, the petitioner filed its written submissions before the arbitral tribunal. On 2nd February, 2011, the respondent filed its written further submissions before the arbitral tribunal.

13. On 25th March, 2011, the arbitral tribunal passed a final award directing the respondent to pay to the petitioner US \$ 1123424.97 and US \$ 6043987.64 with simple interest at the rate of 8% on the said sum on the date of the award till payment.

14. Being aggrieved by the arbitral award dated 25th March, 2011, the respondent filed a petition under section 34 of the Arbitration and Conciliation Act, 1996 in this court being Arbitration

Petition No.636 of 2011. By an order dated 15th November, 2011, the said petition was disposed of as not maintainable. The respondent preferred an appeal against the said order dated 15th November, 2011 before the Division Bench of this court being Appeal No.337 of 2013. The said appeal was also disposed of by the Division Bench of this court on 6th August, 2013. The Division Bench did not interfere with the order passed by the learned Single Judge on 15th November, 2011. The Special Leave Petition (27404 of 2013) filed by the respondent in the Supreme Court came to be dismissed on 28th March, 2014. The petitioner was contesting all the three proceedings filed by the respondent.

15. In the meanwhile, the petitioner filed an Execution application (554 of 2011) in this court and applied for execution of the said foreign award dated 25th March, 2011. There was no reply filed by the respondent to the said execution application. On 28th November, 2014, the learned Single Judge of this court recorded that though the time was granted to the respondent to file an affidavit in reply by an order dated 13th June, 2014 with a clarification that no further extension would be granted, the respondent had not filed any affidavit in reply. This court accordingly passed an order on 28th November, 2014 allowing the said execution application in terms of prayers (a), (b) and (c).

16. Being aggrieved by the said order dated 28th November, 2014, the respondent herein preferred an appeal (701 of 2014) before the Division Bench of this court. The said appeal filed by the respondent came to be allowed by the Division Bench by an order dated 12th December, 2014. The Division Bench recorded the submission of the respondent that in the absence of an application for

enforcement of the foreign award under section 47 of the Arbitration and Conciliation Act, 1996, the execution application could not have been filed and no order could have been passed thereon. The Division Bench also recorded the statement of the petitioner herein that in view of the provisions of Section 47 of the Arbitration and Conciliation Act, 1996, the petitioner herein was ready to file an application for enforcement of the award.

17. In view of the consensus between the parties, the Division Bench by the said order dated 12th December, 2014 has set aside the order dated 28th November, 2014 passed by the learned Single Judge and restored the said Execution Application No.554 of 2011 to the file and directed that the same shall be taken up along with the application for enforcement under section 47 of the Act which the petitioner herein proposed to file within two weeks from the date of the said order. The Division Bench directed the respondent herein to file affidavit in reply within two weeks from the date of the service of the application under section 47 of the Arbitration Act by the petitioner. The Division Bench directed that the application under section 47 of the Act for enforcement of the foreign award and Execution Application No.554 of 2011 shall be heard together.

18. The petitioner accordingly lodged Arbitration Petition (47 of 2015) on 23rd December, 2014 under sections 47 and 48 of the Arbitration Act in this court inter alia praying for an order that the foreign award dated 25th March, 2011 be deemed to be a decree of this court and for a direction to enforce and execute the said award as decree in favour of the petitioner and as against the respondent. The petitioner has also prayed for various interim reliefs in this petition.

19. The respondent has filed an affidavit in reply opposing the Arbitration Petition No.47 of 2015 on various grounds including on the ground of limitation. At the stage of oral submissions made by the learned counsel for the petitioner in the Arbitration Petition No.47 of 2015, the learned senior counsel for the respondent raised an issue of limitation. In view of the plea of limitation pressed by the learned senior counsel for the respondent at the stage of hearing, on 27th July, 2015, the petitioner through its learned counsel sought time to file an application for condonation of delay in filing Arbitration Petition No.47 of 2015 without prejudice to the rights and contentions of the petitioner. Learned senior counsel representing the respondent made a statement that the respondent had no objection if any such application for condonation of delay was filed at this stage, however sought an opportunity to file affidavit in reply if any such application for condonation of delay was filed by the petitioner. Hearing of the arbitration petition along with execution application was thus postponed to 20th August, 2015 to enable the petitioner to file a notice of motion for condonation of delay.

20. The petitioner thereafter filed a Notice of Motion on 4th August, 2015 (1318 of 2015 in Arbitration Petition No.47 of 2015) inter alia praying for condonation of delay of 273 days in filing the Arbitration Petition No.47 of 2015. The respondent filed an affidavit opposing this Notice of Motion. In view of the plea of the limitation raised by the respondent, I have heard, the learned counsel for the parties on the plea of limitation first followed by the arguments on the merits of the Arbitration Petition No.47 of 2015 and the execution application.

21. Mr.Joshi, learned senior counsel for the respondent

submits that though the petitioner has admitted delay of 273 days in filing Arbitration Petition No.47 of 2015 for enforcement of the award dated 25th March, 2011, the petitioner has failed to disclose any reasons for each day of delay while seeking condonation of delay in filing arbitration petition and since no sufficient cause is shown by the petitioner for condonation of delay, this court shall not condone the delay and shall dismiss the Notice of Motion.

22. It is submitted by the learned senior counsel that the petitioner could not have filed the execution application simplicitor to execute a foreign award. The petitioner ought to have filed a petition under sections 47 and 48 of the Arbitration and Conciliation Act, 1996 for seeking the enforcement of the foreign award. It is submitted that the execution application could not be made absolute without the award being enforced and thus the Division Bench had rightly set aside the order dated 12th December, 2014 passed by the learned Single Judge. He submits that mere filing of the execution application was not sufficient and filing of execution application alone did not amount to and could not be concluded as sufficient compliance of the mandatory requirements under section 47 of the Act.

23. It is submitted that the petitioner had accepted the position before the Division Bench when the order dated 12th December, 2014 was passed and had made a statement that the petitioner would file a petition for enforcement of award as required under section 47 of the Arbitration Act before the foreign award could be executed. He submits that though the petitioner was aware that the petitioner ought to have filed the petition under section 47 of the Arbitration Act for seeking enforcement of the foreign award dated 25th March, 2011, the petitioner chose to file execution application without filing a petition

under section 47 of the Arbitration Act. The petitioner did not choose to file an application for condonation of delay though there was gross delay on the part of the petitioner in filing the arbitration petition.

24. Learned senior counsel for the respondent distinguishes the judgment of the Supreme Court in case of **M/s.Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd. (2001) 3 SCR 479** and judgment in case of **Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd. AIR 1999 SC 3923** and would submit that both these judgments of the Supreme Court have been duly considered by the learned Single Judge of this court in case of **Noy Vallesina Engineering Spa vs. Jindal Drugs Limited 2006(5) Bom.C.R.155.** It is submitted that this court has already taken a view that if the person in whose favour a foreign award is made desires to make an application for execution of the award when the court is yet to record its satisfaction that award is enforceable, the period for limitation for making such an application would be governed by Article 137 of the Schedule of the Limitation Act i.e. three years from the date when the right to apply accrues. He submits that the petitioner had filed an execution application within time, the petitioner however did not file any petition for enforcement of the said foreign award within three years from the date of the cause of action i.e. the date of the foreign award under Article 137 of the schedule of the Limitation Act.

25. It is submitted that the petitioner cannot be allowed to raise the plea of section 14 of the Limitation Act while computing the time spent in another civil proceedings i.e. Execution Application No.554 of 2011 which was filed on 6th July, 2011 and was disposed of on 28th November, 2014. He submits that the petitioner was not prosecuting the said execution application with due diligence and in good faith in a

court without jurisdiction. He submits that the petitioner had correctly filed the execution application No.554 of 2011 in a court of competent jurisdiction but had not filed an application for enforcement of the foreign award under section 47 within the time. He submits that section 14 of the Limitation Act in these circumstances would not be applicable. It is submitted that since section 14 of the Limitation Act is not applicable, the time in pursuing the Execution Application No.554 of 2011 cannot be considered while computing the limitation in filing of Arbitration Petition No.47 of 2015.

26. Mr.Joshi, learned senior counsel appearing for the respondent submits that under Rule 803 (g) to 803 (k) of the Bombay High Court (Original Side) Rules, the petitioner could have filed an application for execution only with the application for enforcement under section 47 read with section 48 of the Arbitration & Conciliation Act, 1996 (for short "Arbitration Act"). He submits that on 25th March, 1994, three years period had already expired from the date of publication of the foreign award. The petitioner has however, filed the petition under section 48 of the Arbitration Act on 23rd December, 2014. He submits that the Division Bench while granting permission to the petitioner to file an application for execution under section 48 of the Arbitration Act did not condone delay. The petitioner had not filed any application for condonation of delay before the Division Bench. He submits that though section 5 of the Limitation Act apply to the application filed under section 48 read with Article 137 of the Schedule to the Limitation Act, 1963, the petitioner has not made out any sufficient cause for condonation of delay.

27. It is submitted that though the respondent had given its consent in the petitioner filing an application for enforcement of the

award, the respondent did not give any consent for condonation of delay. He submits that it was not the case of the petitioner that the petitioner had filed a proceeding before the Court having no jurisdiction. He submits that since the petitioner had not filed appropriate application at the first instance within time, section 14 of the Limitation act does not apply to the present petition filed under section 48 of the Arbitration Act.

28. Mr.Advani, learned counsel for the petitioner on the other hand heavily placed reliance on the judgment of Supreme Court in case of **M/s.Fuerst Day Lawson Ltd.** (supra) and in particular paragraph 29 and also the judgment of Supreme Court in case of **Thyssen Stahlunion GMBH** (supra) and submits that the Supreme Court has held that there was no need to take two separate proceedings resulting in multiplicity of litigation if the object and purpose can be served in the same proceedings. It is held that in the first stage, the court has to decide the enforcement of the award having regard to the requirements of the provisions under sections 47 to 49 and once the court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same. It is held that in one proceeding, the court enforcing the foreign award can deal with the entire matter. He submits that the Supreme Court has adverted to its judgment in case of **Thyssen Stahlunion GMBH** (supra) in the said judgment of **M/s.Fuerst Day Lawson Ltd.** (supra) and the said judgment squarely applies to the fact of this case.

29. It is submitted that the petitioner was thus not required to file a separate petition under section 47 along with the execution application and thus this court could pass the order for enforceable of

the petition in the said execution application itself. Learned counsel distinguished the judgment of this court in case of **Noy Vallesina Engineering Spa** (supra) decided by the learned Single Judge.

30. It is submitted by the learned counsel for the petitioner that the respondent did not file any affidavit in reply to the execution application for about four years and did not raise any plea of maintainability of the said execution application which was filed by the petitioner. Even when the said matter was heard by the learned Single Judge, no such plea was raised. He submits that only before the Appeal Court, the respondent raised the plea of maintainability of execution application on the ground that the petitioner ought to file an application under section 47 of the Arbitration Act along with the said execution application and not the execution application in isolation. He submits that in any event the Division Bench has granted liberty to the petitioner to file the arbitration petition under section 47 of the Arbitration Act and has directed the learned Single Judge to hear the said arbitration petition along with the execution application filed by the petitioner and submits that no prejudice is thus caused to the respondent.

31. It is submitted that without prejudice to the rights and contentions of the petitioner that the petitioner was not required to file any separate application for execution under section 47 of the Arbitration Act and thus there was no delay in filing the arbitration petition (47 of 2015), the time taken by the petitioner in prosecuting the execution application has to be excluded while computing the period of limitation in view of section 14 of the schedule to the Limitation Act and thus the present petition is not barred on limitation on that ground. He submits that the petitioner was prosecuting all the

proceedings with due diligence and in good faith.

32. Without prejudice to the aforesaid submissions, the learned counsel appearing for the petitioner submits that in view of the pendency of the proceedings in this court for the reasons stated aforesaid and for the reasons disclosed in the affidavit in support of the Notice of Motion, the petitioner has made out a case for condonation of delay and the same shall be condoned.

33. After hearing the learned counsel for the parties on the issue of limitation, I have heard the learned counsel on merits of the arbitration petition filed under sections 47 and 48 of the Arbitration Act.

34. Mr. Joshi, learned senior counsel for the respondent invited my attention to some of the objections raised by the respondent in the affidavit in reply to the enforcement of the foreign award. He submits that though the respondent had requested for oral hearing before the arbitral tribunal, the respondent was not given any oral hearing. He submits that the arbitral tribunal had imposed a condition of deposit of 30,000 pounds as a condition precedent for rendering any oral hearing which was very harsh and unreasonable and thus the respondent could not comply with the said unreasonable and arbitrary direction issued by the arbitral tribunal. He submits that no provision of law empowers the arbitral tribunal to ask for deposit of the fees as a pre-condition for grant of oral hearing. He submits that the said award thus being in violation of the principles of natural justice and in violation of the public policy thus cannot be enforced under section 47 read with section 48 of the Arbitration Act.

35. Learned senior counsel submits that the arbitral tribunal had permitted the petitioner to file additional documents along with written argument and considered the said additional documents without rendering any opportunity to the respondent to deal with such documents. He submits that the said award cannot be enforced being in violation of the principles of natural justice on this ground also. He submits that though the arbitral tribunal has rendered a finding that there was no evidence and/or insufficient evidence on the part of the petitioner to prove the claim for damages, the arbitral tribunal has allowed the claim for damages contrary to the finding rendered by the arbitral tribunal. He submits that if the arbitral tribunal would have rendered oral hearing to the respondent, the respondent could have pressed for dismissal of the claim for want of evidence / sufficient evidence. My attention is invited to paragraph 155 of the said award in support of the submission that the arbitral tribunal had rendered a finding of fact that the petitioner had not led any evidence or that the evidence led was not sufficient.

36. Learned senior counsel also invited my attention to paragraphs 159 and 166 of the said award and would submit that though the arbitral tribunal has observed that the factual position on the market price of the goods was not entirely clear, the arbitral tribunal contrary to such observation has allowed the claim for damages on the ground that the market price, CIF Calcutta US \$ 550 on 13th April, 2010 was reasonable. It is submitted by learned senior counsel that since the award was based on no evidence and the arbitral tribunal has considered irrelevant material and the material evidence has not been considered, the award shows perversity and thus is in conflict with the fundamental policy of the Indian Law.

37. It is submitted by learned senior counsel that though the respondent had filed expert evidence on the nature and quality of sugar, the arbitral tribunal did not consider such expert evidence and based their award on their alleged personal experience. He submits that the respondent had produced the documents in support of the submission that crystal sugar was different from refined sugar, which has not been considered by the arbitral tribunal. He submits that the alleged experience of the arbitral tribunal was not disclosed to the parties before relying upon it by the arbitral tribunal in the said award which shows perversity in the impugned award and thus the said award cannot be enforced on this ground also.

38. It is submitted by learned senior counsel that since the respondent had demonstrated that the petitioner had no Indian buyer to purchase the item agreed to be supplied by the respondent, the onus was on the petitioner to prove that the petitioner had suffered damages. He submits that though the petitioner failed to discharge its onus to prove breaches as well as damages suffered by the petitioner, the arbitral tribunal has allowed the claim for damages. In support of this submission, learned senior counsel placed reliance on the judgment of this Court in case of **Ajay Singh (Sunny) Deol vs. Suneel Darshan** in Arbitration Petition No.819 of 2008, delivered on 16th April, 2015 and more particularly paragraphs 82 to 89.

39. It is submitted by learned senior counsel that though the contract was terminated on 13th April, 2010, the arbitral tribunal has allowed detention charges upto December, 2010, which shows perversity on the face of award and thus the award cannot be enforced on that ground also.

40. Learned senior counsel for the respondent submits that the party who claims damages has to mitigate losses. The petitioner had not mitigated losses alleged to have been suffered by the petitioner. The entire award is based on conjecture and surmises. There was no judicial approach on the part of the arbitral tribunal to the entire matter at all.

41. Learned senior counsel placed reliance on the judgment of the Supreme Court in the case of **Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49** and in particular paragraphs 27 to 29 and would submit that the principles laid down by the Supreme Court in the said judgment on the concept of fundamental policy of the Indian Law would apply also when the Court considers the objection to enforce a foreign award and would stand attracted also to the petition filed under section 48 of the Arbitration Act. He submits that thus if any arbitral award shows perversity and is in violation of principles of natural justice, it would be in violation of fundamental policy of the Indian Law and thus such award cannot be enforced under section 47 read with section 48 of the Arbitration Act. He submits that the principles laid down by the Supreme Court in the case of **Associate Builders** (supra) thus shall apply to the objection under section 48 of the Arbitration Act.

42. It is submitted by learned senior counsel that the Supreme Court in the case of **Shri Lal Mahal Limited vs. Progetto Grano SPA, (2014) 2 SCC 433**, has not dealt with the issue of fundamental policy of Indian Law and the ground of perversity in the foreign award and the said judgment is thus distinguishable in the facts of this case.

43. Mr.Advani, learned counsel for the petitioner responded to

the objections raised by the respondent to the enforcement of the foreign award and would submit that the petitioner has raised various objections on merits of the said foreign award which cannot be adjudicated upon by this Court. He submits that the governing law was English law. The petition filed by the respondent for impugning the said foreign award under section 34 of the Arbitration Act has been rejected by the learned single Judge of this Court, which order has been upheld by the Division Bench of this Court and also by the Supreme Court. The said award has thus achieved finality. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Shri Lal Mahal Limited vs. Progetto Grano SPA, (2014) 2 SCC 433**, and in particular paragraphs 19, 45 and 47 and would submit that this Court while hearing a petition for enforcement of the foreign award and while considering the objection to the enforcement of the foreign award cannot go into the merits of the arbitral award. He submits that even if the arbitral tribunal has committed error which touches the merits of the case, this Court cannot refuse enforcement of the foreign award under section 48 of the Arbitration Act on that ground.

REASONS AND CONCLUSIONS :

44. Insofar as the prayer in the Notice of Motion No.1318 of 2015, filed by the petitioner for condonation of delay in filing Arbitration Petition No.47 of 2015 is concerned, it is not in dispute that the petitioner had filed Execution Application (No.554 of 2011) on 6th July, 2011, seeking execution of the said foreign award dated 25th March, 2011. The respondent did not file any reply to the execution application. The said execution application was made absolute by the learned single Judge of this Court on 28th November, 2014. The said order was impugned by the respondent before the Division Bench of this Court. Before the Division Bench, the respondent contended that

in absence of the application for enforcement of the foreign award under section 47 of the Arbitration Act, the execution application could not have been filed and no orders could have been passed therein. The petitioner accordingly made a statement before the Division Bench that in view of the provisions of section 47 of the Arbitration Act, the petitioner was ready to file an application for enforcement of the said foreign award. In view of this consensus between the parties, the Division Bench has set aside the order dated 28th November, 2014 passed by the learned single Judge and restored the execution application to the file.

45. The Division Bench also directed that the said execution application shall be taken up along with the application for enforcement under section 47 of the Arbitration Act which the petitioner had proposed to file within two weeks from the date of the said order. The Division Bench directed that both the proceedings shall be heard together. The Division Bench did not take a view that the said execution application filed by the petitioner on 6th July, 2011 was not maintainable or had rejected the same. Pursuant to the said order dated 12th December, 2014, passed by the Division Bench, the petitioner filed Arbitration Petition No.47 of 2015 *inter-alia* praying for enforcement of the said foreign award dated 25th March, 2011 and applied for various reliefs. The respondent raised an issue of limitation in the affidavit in reply to the said Arbitration Petition (No.47 of 2015) and also at the stage of hearing of the said arbitration petition. Learned senior counsel for the respondent made a statement that the respondent has no objection even if the petitioner files a notice of motion for condonation of delay even at that stage. The petitioner accordingly filed this Notice of Motion (No.1138 of 2015) *inter-alia* praying for condonation of delay.

46. The Supreme Court in the case of **M/s.Fuerst Day Lawson Ltd.** (supra) has held that there is no need to take two separate proceedings resulting in multiplicity of proceedings. It is also clear from objectives contained in the statement of objects and reasons that in view of sections 47 to 49 and the scheme of Arbitration Act, every final arbitral award is to be enforced as if it were a decree of the court. The Supreme Court held the submission that the execution petition could not be permitted to convert as an application under section 47 is technical and was of no consequence in the view the Supreme Court had taken in the said judgment. It is held that in one proceedings, the court enforcing a foreign award can deal with the entire matter and that the procedure does not prejudice a party. It is not in dispute that the said execution application filed by the petitioner was pending for quite some time. No objection was raised by the respondent by filing reply.

47. Insofar as the judgment of this Court in the case of **Noy Vallesina Engineering Spa** (supra) relied upon by learned senior counsel for the respondent is concerned, this Court has held that the foreign award is only deemed to be a decree under section 49 after the stages contemplated in sections 47 and 48 are completed and the Court is satisfied that the foreign award is enforceable, till then, it cannot be considered to be a decree. This Court held that Article 136 of the Schedule to Limitation Act is not attracted until the stage contemplated under section 49 is reached. An application filed under section 47 read with Rule 803 (c) will be governed by Article 137 of Schedule to Limitation Act. It is held that the foreign award is deemed to be a decree of Civil Court only after the finding is recorded by the Court that it is enforceable and therefore to the execution of that

ground, Article 136 of the Limitation Act would become applicable only after that award is deemed to be a decree of the Court which records the finding that it is enforceable by virtue of the provision of section 49 and at no earlier point of time.

48. In the said judgment, this Court held that such an application for enforcement of the foreign award would attract Article 137 and according to that Article, the period of limitation is three years and would commence from the date when right to apply occurs. This Court has also observed that the least that could be said is that the question as to whether any period of limitation is prescribed for making an application for enforcement of the foreign award and if there is period of limitation prescribed, what would be that period of limitation, was not a question free from doubt and this Court accordingly, condoned the delay filed by the petitioner. In my view, the petitioner has filed the execution application which was within four months from the date of the said foreign award and was prosecuting the same in good faith and with due diligence. The respondent raised an objection about the maintainability of the said application for the first time before the Division Bench and not earlier. In my view, the petitioner has thus made out a case for condonation of delay in filing the petition under section 47 of the Arbitration Act. The judgment of this Court in case of **Noy Vallesina Engineering Spa** (supra) assist the case of the petitioner and not the respondent.

49. I am not inclined to accept the submission made by learned senior counsel for the respondent that section 14 of the Limitation Act, 1963 would not be attracted to Arbitration Petition (No.47 of 2015) filed by the petitioner. The petitioner filed the said application based on the interpretation of the judgment of the

Supreme Court in **M/s.Fuerst Day Lawson Ltd.** (supra) and the said proceedings were pending. The Division Bench of this Court did not find the said execution application not maintainable but on the contrary directed that if any application is filed under section 47 by the petitioner, the same shall be heard along with the said execution application. In my view, there is thus no substance in the submission of learned senior counsel that section 14 would not be applicable to the facts of this case. I am therefore of the view that the delay in filing the arbitration petition deserves to be condoned. I shall now deal with the submissions made by both the learned counsel on enforceability of the foreign award.

50. Insofar as the submission of learned senior counsel for the respondent that the respondent was deprived of oral hearing by the arbitral tribunal and that the deposit asked by the arbitral tribunal as a condition precedent for grant of oral hearing was totally arbitrary and unreasonable is concerned, a perusal of the award indicates that the arbitral tribunal was not convinced on the basis of the submissions and the documents which it had seen, that an oral hearing was required. The arbitral tribunal however, considered the request of the respondent for oral hearing on the clear understanding that it has given rise to the consequences in terms of cost as per the directions of the Association to allow oral hearing. The arbitral tribunal accordingly imposed a condition that the respondent shall make an advance payment on account of Association fees, costs and expenses and asked the respondent to deposit which was subject to the outcome of the arbitral proceedings.

51. It is not in dispute that the respondent however, declined to make any deposit as directed by the arbitral tribunal for the purpose

of grant of oral hearing. Mr.Joshi, learned senior counsel for the respondent could not dispute that the respondent had not made any request to the arbitral tribunal to waive or reduce the said amount of deposit. There was no response to the said direction issued by the arbitral tribunal. Learned senior counsel also could not point out any provision by which the parties were governed which made it mandatory for grant of an oral hearing by the arbitral tribunal. I am thus not inclined to accept the contention of the learned senior counsel that the said direction to deposit the amount was in violation of the principles of natural justice.

52. Insofar as the submission of learned senior counsel for the respondent that the arbitral tribunal did not give an opportunity to the respondent to deal with the additional documents filed by the petitioner along with written arguments and thus the award is in violation of the principles of natural justice is concerned, the Supreme Court in the case of **Shri Lal Mahal Limited** (supra) has held that section 48 of the Arbitration Act does not give an opportunity to have a second look on the foreign award in the award - enforcement stage. It is held that the scope of enquiry under section 48 does not permit review of the foreign award on merits. The procedural defects like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

53. In my view, there is thus no merit in the submission of learned senior counsel for the respondent that the arbitral tribunal considered any documents in the said award relied upon by the petitioner without giving an opportunity to the respondent to deal with

the same. In my view even if the arbitral tribunal has considered any document submitted along with written arguments that itself would not be a ground for refusal to enforce the said foreign award under section 48 of the Arbitration Act.

54. Insofar as the submission of learned senior counsel that the arbitral tribunal did not consider the expert reports submitted by the respondent on the issue of nature and quality of sugar is concerned, in my view this issue also raised by the respondent would be touching the merits of the claim made by the petitioner on which the arbitral tribunal has rendered a finding of fact and thus cannot be a ground of objection under section 47 read with section 48 of the Arbitration Act.

55. Be that as it may, a perusal of the award indicates that the arbitral tribunal has recorded a finding that there was no dispute that the sugar was of Brazilian origin of the 2009-2010 crop and that it had met the specifications for polarisation, moisture and colour. It is held that there was no universal definition of what is meant by "white sugar". There is a clear distinction between raw material and white sugar but according to the experience of the arbitral tribunal as active members of the sugar trade, "white sugar" is wide term, encompassing for example plantation white sugar, white crystal sugar and white refined sugar. It is held that it is for the parties to define what type of sugar is capable of being tendered for delivery under the contract. The arbitral tribunal has rendered a finding that the respondent herein is not entitled to reject the tender of refined granulated sugar and was therefore, obliged to pay the balance of the price payable under the contract, which was due in respect of 41 containers shipped on 9th March, 2010 and 60 containers shipped on

10th March, 2010 to the petitioner. In my view, this Court cannot refuse to enforce the foreign award by entertaining any objection on merits of the award as canvassed by learned senior counsel for the respondent.

56. A perusal of the award indicates that the members of the arbitral tribunal had wide experience as active members of the sugar trade and have dealt with the issue whether the respondent had rightly rejected the tender of the petitioner of refined granulated sugar or not. The arbitral tribunal thus, in my view, were not required to disclose anything about their experience as the members of the sugar trade as canvassed by learned senior counsel for the respondent.

57. Insofar as the allegations of fraud made by the respondent is concerned, the arbitral tribunal has rejected the said allegation of fraud made by the respondent against the petitioner after considering the evidence produced by both the parties and has rendered a finding that the goods shipped did fall within the terms of the contract. This Court cannot refuse to enforce the said foreign award thus on this ground.

58. Insofar as the submission of learned senior counsel that though the petitioner had not proved loss of profit and had not discharged the burden of proof and though the arbitral tribunal had observed that the evidence on the said issue was unsatisfactory, the arbitral tribunal has awarded the claim for loss of profit and the award thus shows perversity and being in violation of the public policy of Indian law is concerned, in my view whether there was sufficient evidence before the arbitral tribunal or not for awarding the claim for loss of profit, would be the question on merits of the impugned award

which cannot be considered by this Court while considering the petition for enforcement of the foreign award. The enquiry under section 48 does not permit review of the foreign award on merits. The Supreme Court in the case of **Shri Lal Mahal Limited** (supra) has taken a view that section 48 of the Arbitration Act does not give an opportunity to have a second look of the foreign award at the award enforcement stage. The said judgment clearly applies to the facts of this Court. I am respectfully bound by the said judgment of the Supreme Court.

59. Be that as it may, a perusal of the said award indicates that the arbitral tribunal has rendered a finding that the arbitral tribunal was not provided with any information or expert evidence as to the market price at that time. The arbitral tribunal has recorded the submission of the respondent that as on 24th December, 2010, the FOB Kolkatta price was US \$ 865 per MT and the petitioner could therefore have sold the goods at that time for more than the original contract price and suffered no loss of profit. The arbitral tribunal rejected the contention of the respondent that the market price should be assessed in December, 2010. The arbitral tribunal rendered a finding that the prices in the sugar market generally fell substantially between January and April 2010 and therefore, considered that the market price CIF Kolkata of US\$ 550 on 13th April, 2010 was reasonable. It is held that the respondent did not produce any evidence to challenge the market price and accordingly held that the contract was terminated by the petitioner on 13th April, 2010 and on that date the market price was US\$ 550 per MT. In my view, all these findings of fact cannot be interfered with at the stage of enforcement of the foreign award under section 48 of the Arbitration Act. The said foreign award is final insofar as the merits of the claim

awarded by the arbitral tribunal is concerned.

60. Insofar as the submission of learned senior counsel for the respondent that the arbitral tribunal could not have awarded the claim for payment of ground rent beyond the date of termination of the contract is concerned, in my view even this issue cannot be allowed to be raised as an objection to the enforcement of the foreign award under section 47 read with section 48 of the Arbitration Act.

61. Insofar as the judgment of the Supreme Court in the case of **Associate Builders** (supra) relied upon by Mr. Joshi, learned senior counsel for the respondent in support of his submission that the expression “fundamental policy of the Indian Law” as considered by the Supreme Court in the said judgment of **Associate Builders** (supra) and the ground of perversity in the impugned award shall stand attracted also when an approach to the enforcement of a foreign award is concerned, a perusal of the judgment of the Supreme Court in case of **Associate Builders** (supra) clearly indicates that the said judgment was delivered by the Supreme Court while considering a domestic award and the powers of the Court under section 34 of the Arbitration Act to interfere with such domestic arbitral award under various heads of the public policy. While dealing with the provisions of section 34 of the Arbitration Act, the Supreme Court in the said judgment adopted the principles laid down by it in the case of **ONGC Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705**, which also had dealt with the powers of the Court under section 34 to deal with a domestic arbitral award.

62. The Supreme Court in the case of **Associate Builders** (supra) also considered the principles laid down by it in the case

O.N.G.C. Ltd. vs. Western Geco International Ltd. (2014) 9 SCC 263 which also has dealt with a domestic arbitral award and the provisions of Part-I of the Arbitration Act and has held that the arbitrator must have judicial approach and he must not act perversely which two principles form part of the fundamental policy of the Indian Law.

63. The Supreme Court in the said judgment in the case of **Associate Builders** (supra) has after considering the provisions of section 28(1)(a) of the Arbitration Act held that the contravention of the Arbitration Act thus would be regarded as patent illegality. The Supreme Court in case of **O.N.G.C. Ltd. vs. Western Geco International Ltd.** has held that the perversity or irrationality of decisions is tested on the touch stone of wednesbury principles of reasonableness. It is held that the decisions that fall short of standard of reasonableness are open to challenge in a Court of law after in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

64. The Supreme Court in the case of **Shri Lal Mahal Limited** (supra) considered the expression “public policy of India” in section 48(2)(b) and whether it must receive narrow meaning than section 34. A perusal of the said judgment clearly indicates that the Supreme Court had examined as to what would be the scope of enquiry before the Court in which foreign award as defined in section 44 was sought to be enforced in view of two decisions of the Supreme Court i.e. in the case of **ONGC Ltd. vs. Saw Pipes Ltd.** (supra) and **Phulchand Exports Limited vs. O.O.O. Patriot (2011) 10 SCC 300**, in which it was held that whether the Court can refuse to enforce the foreign award if it was contrary to the contract between the parties and/or

was patently illegal.

65. It was urged by the petitioner before the Supreme Court that expansive construction given by the Supreme Court to the term “public policy of India” in the case of **ONGC Ltd. vs. Saw Pipes Ltd.** (supra) must also apply to the use of the same term “public policy of India” in section 48(2)(b) of the Arbitration Act. On the other hand, it was canvassed by the respondent before the Supreme Court that the principles laid down by the Supreme Court in the case of **Renusagar Power Co. Ltd. vs. General Electric Co. 1994 Supp. (1) SCC 644** while interpreting section 7(1)(b)(ii) of the Foreign Awards Act was equally applicable to section 48(2)(b) of the Arbitration & Conciliation Act, 1996 and the expression “public policy of India” in section 48(2) (b) must receive narrow meaning than section 34 of the Arbitration Act. It was urged that the judgment of the Supreme Court in the case of **O.N.G.C. Ltd. vs. Saw Pipes Ltd.** (supra) never meant to give wider meaning to expression “public policy of India” insofar as section 48 of the Arbitration Act was concerned.

66. The Supreme Court in the case of **Shri Lal Mahal Ltd.** (supra) has adverted to its judgment in the case of **Renusagar Power Co. Ltd.** (supra) in which it was held that the words “public policy” used in section 7(1)(b)(ii) of the Foreign Awards Act meant public policy of India. The Supreme Court has negated the argument that the recognition and enforcement of the award of the arbitral tribunal, GAFTA could be questioned on the ground that it was contrary to the public policy of the State of New York. The Supreme Court drew a clear and fine distinction while applying the rule of public policy between a matter governed by domestic laws and the matter involving the conflict of laws. It has been held that the application of

the doctrine of “public policy” in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in case involving a foreign element than when purely municipal legal issues are involved.

67. The Supreme Court in the said judgment of **Renusagar Power Co. Ltd.** (supra) held that the defence of “public policy” which was permissible under section 7(1)(b)(ii) should be construed narrowly. It is held that the provision in section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which required that the enforcement of the foreign award must not be contrary to the public policy or the law of India. It is held that 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. The Supreme Court held that the expression “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.

68. The Supreme Court held that 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”.

69. The Supreme Court in the case of **Shri Lal Mahal Ltd.** (supra) has also interpreted its judgment in the case of **O.N.G.C. Ltd. vs. Saw Pipes Ltd.** (supra) which had considered the ambit and scope of jurisdiction of Court under section 34 of the Arbitration & Conciliation Act, 1996 and has held in the said judgment with regard to section 34 of the Arbitration Act that the expression “public policy of India” was required to be given a wider meaning and for that purpose had added a new category “patent illegality” for setting aside the domestic award. The Supreme Court after interpreting its judgment in the case of **O.N.G.C. Ltd. vs. Saw Pipes Ltd.** (supra) held that it could be safely observed that while accepting the narrow meaning given to the expression “public policy” in the case of **Renusagar Power Co. Ltd.** (supra) in the matters of enforcement of the foreign award, there was departure from the said meaning for the purpose of jurisdiction of the Court in setting aside award under section 34 of the Arbitration Act.

70. The Supreme Court accordingly held that what was stated by it in the case of **Renusagar Power Co. Ltd.** (supra) with reference to section 7(1)(b)(ii) of the Foreign Awards Act must equally apply to the ambit and scope of section 48(2)(b) of Arbitration Act. The Supreme Court held that a distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws had been noticed by the Supreme Court in the case of **Renusagar Power Co. Ltd.** (supra) and accordingly held that the principles laid down by the Supreme Court in the case of **Renusagar Power Co. Ltd.** (supra) should apply as regards the scope of enquiry under section 48((2)(b) and thus for the purpose of

section 48(2)(b) the expression “public policy of India” must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in **Renusagar Power Co. Ltd.** (supra). The Supreme Court has held that although same expression “public policy of India” is used in both in section 34(2)(b)(ii) and section 48(2)(b) and the concept of “public policy of India” is same in nature in both the sections but its application differs in degree insofar as these two sections are concerned. It is held that the application of “public policy of India” doctrine for the purposes of section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

71. The Supreme Court clarified that the principles in the case of **Renusagar Power Co. Ltd.** (supra) must apply for the purpose of section 48(2)(b) of the Arbitration & Conciliation Act, 1996 and insofar as the proceedings for setting aside the award under section 34 of the Arbitration Act is concerned, the principles laid down in the case of **O.N.G.C. Ltd. vs. Saw Pipes Ltd.** (supra) governed the said proceedings. The Supreme Court accordingly held that the enforcement of the award would be refused under section 48(2)(b) in which if such enforcement would be contrary to (i) fundamental policy of Indian law or (ii) the interest of India ; or (iii) justice or morality. The Supreme Court clarified that the wider meaning given to the expression “public policy of India” occurring in section 2(b)(ii) in the case of **O.N.G.C. Ltd. vs. Saw Pipes Ltd.** (supra) is not applicable where the objection is raised to the enforcement of foreign award under section 48(2)(b).

72. In the case of **Phulchand Exports Ltd.** (supra), a two Judge bench of the Supreme Court had accepted the submission that the meaning given to the expression “public policy of India” in section 34 of the Arbitration Act decided in the case of **O.N.G.C. Ltd. vs. Saw Pipes Ltd.** (supra) must be applied to the same expression occurring in section 48(2)(b) of the Arbitration & Conciliation Act, 1996. The Supreme Court however, in the case of **Shri Lal Mahal Ltd.** (supra) has held that the view of the Supreme Court in the case of **Phulchand Exports Ltd.** (supra) that the expression “public policy of India” used in section 48(2)(b) had to be given a wider meaning and the award could be set aside, if it is patently illegal does not lay down the correct law and accordingly overruled the said judgment. In my view though a domestic award can be set aside if it is in violation of fundamental policy of Indian Law and enforcement of a foreign award can be refused on the ground that such foreign award is contrary to fundamental policy of Indian Law, the powers of Court exercise powers under sections 34 and 48 differs in degree and are not identical.

73. The Supreme Court in the said judgment in the case of **Shri Lal Mahal Ltd.** (supra) held that while considering the enforceability of the foreign awards, the Court does not exercise the appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, the some error has been committed . In my view none of the objections raised by the respondent fall under any of the categories i.e. (i) the award is contrary to the fundamental policy of Indian law or (ii) the interest of India ; or (iii) justice or morality.

74. The Supreme Court has in the case of **Associate**

Builders (supra) and in case of **O.N.G.C. Ltd. vs. Western Geco International Ltd.** (supra) has held that the domestic award can be set aside if it is contrary to and in violation of the fundamental policy of the Indian Law. Though the Supreme Court in the case of **Shri Lal Mahal Ltd.** (supra) has used the same expression i.e. contrary to fundamental policy of Indian Law while dealing with the enforcement of the foreign award under section 48(2)(b), in my view, the power of a Court while applying the said expression in the case of enforcement of the foreign award is very narrow and limited and is not wider than while dealing with a domestic award. In my view, the Court while dealing with a foreign award is governed by the principles of private international law and thus the expression “fundamental policy of Indian law” must be necessarily construed in the sense of doctrine of public policy as applied in the field of private international law.

75. In my view, the principles laid down by the Supreme Court in the case of **Shri Lal Mahal Ltd.** (supra) differentiating the powers of the court being very narrow in case the enforcement of the foreign award than that while dealing with a challenge to the domestic award squarely applies to the facts of this case. In my view, the submission made by learned senior counsel for the respondent that the expression “fundamental policy of Indian law” as interpreted by the Supreme Court in the case of **Associate Builders** (supra) and in the case of **O.N.G.C. vs. Western Geco International Ltd.** (supra) shall apply to the foreign award with same force is contrary to the principles laid down by the Supreme Court in the case of **Shri Lal Mahal Ltd.** (supra) and is also contrary to sections 47 and 48 of the Arbitration & Conciliation Act, 1996 and is thus rejected.

76. In my view the Supreme Court in the case of **Associate**

Builders (supra) and in the case of **O.N.G.C. vs. Western Geco International Ltd.** (supra) has affirmed the views of the Supreme Court in the case of **O.N.G.C. Ltd. vs. Saw Pipes Ltd.** (supra) which was decided admittedly dealing with a domestic award under section 34 of the Arbitration Act which principles, in my view, cannot be extended to the foreign award under section 48(2)(b) of the Arbitration Act. The principles laid down by the Supreme Court in the case of **Phulchand Exports Ltd.** (supra) thereby applying the expression “public policy” as interpreted by the Supreme Court in the case of **O.N.G.C. Ltd. vs. Saw Pipes Ltd.** to the foreign award under section 48(2)(b) has been overruled out by the Supreme Court in the case of **Shri Lal Mahal Ltd.** (supra). In my view, the reliance thus placed by learned senior counsel on the judgment of the Supreme Court in the case of **Associate Builders** (supra) in support of his submission that the expression “fundamental policy of the Indian law” as interpreted by the Supreme court in the case of **Associate Builders** (supra) shall apply to enforcement of the foreign award under section 48(2)(b) of the Arbitration Act being the similar expression is totally misplaced.

77. This Court in the case of **POL India Projects Limited vs. Aurelia Reederei Eugen Friederich GmbH & Anr.** decided on 8th April, 2015 in Arbitration Petition No.76 of 2012 has after adverting to various judgments of the Supreme Court, including the judgment in the case of **Shri Lal Mahal Ltd.** (supra) and also the judgment of the Delhi High Court in the case of **Penn Racquet Sports vs. Mayor International Limited, ILR (2011) Delhi, 181** has held as under :-

“156. Supreme Court in case of **Shri Lal Mahal Limited (supra)** has after adverting to the principles laid down by the Supreme Court in case of **Renusagar Power Co. Ltd. (supra)** has held that the principles

laid down in the judgment of **Renusagar Power Co. Ltd. (supra)** must apply for the purpose of section 48(2) (b) of the Arbitration and Conciliation Act, 1996. It is held that although the same expression 'public policy of India' is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the Sections but, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award. Supreme Court has held that section 48 of the Arbitration and Conciliation Act, 1996 does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. It is held that under section under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. In my view the principles laid down by the Supreme Court in case of **Shri Lal Mahal Limited (supra)** squarely applies to the facts of this case. I am respectfully bound by the principles laid down in the said judgment.

157. In case of **Penn Racquet Sports (supra)** Delhi High Court has held that the recognition and enforcement of a foreign award cannot be denied merely because the award was in contravention of the law of India. The award should be contrary to the fundamental policy of Indian law, for the Courts in India to deny recognition and enforcement of a foreign award. It is held that merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality. In my view the said judgment in case of **Penn Racquet Sports (supra)** squarely applies to the facts of this case. I am in agreement with the views expressed by the Delhi High Court.

158. Supreme Court in case of **Renusagar Power Co. Ltd. (supra)** has held that since the

Foreign Awards Act was 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. This principle of the Supreme Court in case of **Renusagar Power Co. Ltd. (supra)** has been reiterated by the Supreme Court in case of **Shri Lal Mahal Limited (supra)**. It is also held by the Supreme Court that 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. In my view even if such letter of guarantee could not have been issued at all in favour of the respondent under any of the provisions of the said Foreign Exchange Management (Guarantees) Regulation, 2000 which was acted upon by the parties simplicitor violation of the provisions of the said regulation, in my view would not be contrary to the fundamental policy of Indian law as interpreted by the Supreme Court in case of **Renusagar Power Co. Ltd. (supra).**"

78. I am respectfully bound by the judgment of this Court in the case of **POL India Projects Limited** (supra). In my view, the respondent has not furnished any proof before this Court as to why enforcement of the foreign award may be refused. The said foreign award dated 25th March, 2011 is enforceable under Part-II and is binding on all the parties and under section 46 of the Arbitration Act. I am therefore, of the view that the foreign award already stands as a decree and the petitioner holding the said foreign award has become entitled for enforcement of the said foreign award having taken

effective steps for execution of the said award. In my view, the petition for enforcement of the foreign award is in accordance with law and in compliance with section 47 of the Arbitration Act. As this Court has taken a view that the said foreign award is enforceable, the petitioner can proceed to take further effective steps for execution of the same. In the circumstances, the petitioner is directed to put the award in execution in accordance with the rules of this Court. I therefore pass the following order :-

a). Notice of Motion No.1318 of 2015 is made absolute in terms of prayer clause (i) and (ii). The delay in filing Arbitration Petition No.47 of 2015 is condoned.

b). Arbitration Petition No.47 of 2015 is made absolute in terms of prayer clauses (a) to (c).

c). Execution Application No.554 of 2011 is allowed.

No order as to costs.

(R.D. DHANUKA, J.)

“Certified to be true and correct copy of original signed Judgment.”