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

ARBITRATION PETITION NO.59 OF 2015

Richmond Mercantile Limited FZC,)
registered under the Laws of)
United Arab Emirates C-3-012 PO Box 8412)
Sharjah Airport International Free Zone,)
Sharjah, Inted Arab Emirates) ...Petitioner

....Versus....

Vinergy International Private Limited)
a Company incorporated under the)
provisions of the Companies Act, 1956)
and having its Registered Office at)
501-A, Peninsula Business Park,)
Lower Parel, Mumbai – 400 013) ...Respondent

Mr.D.J. Khambatta, Senior Counsel with Mr.Chirag Balsara,
Ms.Pratiksha Mody, Ms.Yashi Panchal and Ms.Kinjal Patel i/b
K.Ashar & Co. for the Petitioner.

Mr.Mustafa Doctor, Senior Counsel with Mr.V.P. Singh, Ms.Gathi
Prakash and Ms.Manasa Sundaraman i/b Cyril Amarchand
Mangaldas for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 17TH JUNE, 2016
PRONOUNCED ON : 1ST JULY, 2016

JUDGMENT :-

1. By this petition filed under sections 46 and 47 of the Arbitration & Conciliation Act, 1996 (for short 'the Arbitration Act'), the petitioner seeks a declaration that the arbitral award dated 25th September, 2014 passed by the arbitral tribunal is enforceable as a

decree of this Court and be executed accordingly. The petitioner also seeks various interim reliefs in this arbitration petition. Some of the relevant facts for the purpose of deciding this arbitration petition are as under :

2. The petitioner company is incorporated in Sharjah and carries on its business of trading in bulk bitumen. The respondent company is incorporated under the provisions of the Companies Act, 1956.

3. On 15th August, 2008, the petitioner and the respondent entered into a master supply agreement (hereinafter referred to as the “said agreement”) in writing for supply of bulk bitumen for extendable term from 25th June, 2008. Under clause 19 of the said agreement, it was provided that the said agreement would be governed by and construed according to English Law and any dispute arising out of the said agreement shall be referred to arbitration in London in accordance with the LMAA Rules of Arbitration and subject to the Arbitration Act, 1996 or any statutory modification or re-enactment thereof for the time being in force. Under clause 19.2 of the said agreement, the application of Part I of the Indian Arbitration and Conciliation Act, 1996 was specifically excluded.

4. Under the said agreement “Initial Term” was defined which would mean that a period of ten consecutive years from the Commencement Date unless terminated earlier by mutual agreement of the parties or as otherwise provided for in the said agreement. It was provided that during the said period of 10 years, the petitioner would source, supply and ship bulk bitumen to the respondent in

India exclusively and the respondent will source the bulk bitumen exclusively from the petitioner. It is the case of the petitioner that in the said agreement, it was emphasized that it had given up the established business in India in exchange for the exclusivity deal. The petitioner would sell the bulk bitumen on cost basis taking US \$ 10 per MT on all purchases. The said agreement provided for minimum purchase in India for the respondent in each year but allowed existing Minimum Purchase Quantity (MPQ) to be raised over in the following year. The respondent was required to pay for any Short Purchase Quantity (SPQ) based on the table provided in the said agreement setting up Minimum Purchase Quantity for each of 10 years of the agreement. Clause 17 of the said agreement provides for termination.

5. The said agreement operated for a period of four years. The petitioner through its advocate's letter dated 20th July, 2012 to the respondent contended that the respondent had committed repudiation breach of the said agreement which the respondent was compelled to accept. It was mentioned in the said notice that the said agreement will no longer be binding on the petitioner and that the petitioner will claim damages from the respondent for the alleged repudiation. On 15th August, 2012 the arbitration commenced. The first partial award holding that the arbitral tribunal had jurisdiction to hear and determine the claims of the petitioner for demurrage came to be published. The matter thereafter progressed for hearing the issue on liability and damages. The arbitration proceedings were held in London.

6. On 22nd April, 2014, the petitioner filed its amended

statement of claim and made a claim for damages for six remaining years of the agreement. The respondent filed its amended statement of defence on 27th May, 2014 denying the said said. Both the parties led oral evidence as well as documentary evidence before the arbitral tribunal. On 25th September, 2014, the arbitral tribunal made and published second final partial award and directed the respondent to pay to the petitioner a sum of US \$ 289,449.30 in respect of short purchase quantity (SPQ) for third year of trading under the said agreement from 1st July, 2010 to 30th June, 2011 together with interest thereon from 9th August, 2011 at the rate of 4.5% p.a. compounded at three monthly rests.

7. The arbitral tribunal also directed the respondent to pay to the petitioner US \$ 705,927.00 in respect of short purchase quantity for the 4th year of trading. The arbitral tribunal awarded separate amounts of damages also for 5th, 6th, 7th, 8th, 9th and 10th years of trading. The arbitral tribunal directed the petitioner to pay to the respondent a sum of US \$ 116,905.09 in respect of volume rebate received from Pasargad during the period of the said agreement together with interest on the said amount from 27th May, 2014 to the date of payment at the rate of 4.5% p.a. compounded at three monthly rests. The arbitral tribunal directed that the amount payable by the petitioner to the respondent in the said award shall be offset against the amount payable by the respondent to the petitioner in accordance with the said award. Except the said claim of US \$ 116,905.09, the arbitral tribunal rejected the counter claim made by the respondent.

8. The arbitral tribunal in the said award declared that the

arbitration matter was final as to the matters determined therein however, reserved to themselves the jurisdiction to make a further award or awards to deal with the matters referred to it but not finally determined therein including but not limited to the calculation of interest and assessment of costs, if requested by the parties to do so.

9. Being aggrieved by the said arbitral award dated 25th September, 2014, the respondent herein impugned the said award before the Queen's Bench Division. By an order dated 25th March, 2016, the Queen's Bench Division rejected the appeal filed by the respondent against the said award dated 25th September, 2014. The Appeal Court at Queen's Bench Division, Commercial Court, rejected the appeal filed by the respondent against the order dated 25th March, 2016 on 15th April, 2016. On 16th December, 2014, the petitioner filed the present petition for various reliefs.

10. On 4th May, 2016, this Court granted *ad-interim* relief in terms of prayer clause (d) of this arbitration petition thereby restraining the respondent by itself, its servants and/or agents from in any manner selling, transferring, creating any third party right, charge or encumbrance / further encumbrance or dealing with any of the assets more particularly set out in Exhibit "E" to the petition.

11. The respondent thereafter filed a Notice of Motion (Lodging) No.1589 of 2016 *inter-alia* praying for modification of the ad-interim order dated 4th May, 2016 to the effect that the said ad-interim order to operate in respect of the assets described at serial nos.1 to 7 of Exhibit "E" and to exclude the assets at serial no.8 of Exhibit "E" to the arbitration petition. The respondent also in the

alternate prayer prayed for substitution of the assets described at serial no.8 to Exhibit "E" to the arbitration petition. The respondent also prayed in the alternate for liberty to substitute the assets described at serial no.8 i.e. certain quantity of bitumen with the alleged un-encumbered industrial leasehold land of the respondent situated at Rohit, District Pali (Rajasthan). By an order dated 6th May, 2016, passed by this Court, the said Notice of Motion (Lodging) No.1589 of 2016 came to be dismissed by this Court with costs quantified at Rs.30,000/-. This Court made various observations in the said order against the respondent.

12. The petitioner thereafter filed Notice of Motion (Lodging) No.1658 of 2016 in this petition, praying for a direction against the respondent to furnish security to the extent of Rs.50.00 crores and in the event of the respondent failing to provide the said security, prayed for an injunction restraining the respondent from selling, transferring, parting with possession of, alienating or creating any third party rights, charge or dealing with the said immovable property described in the said prayer. By an order dated 25th May, 2016, the learned Vacation Judge recorded the statement made by the respondent insofar as the said property, situated at Rohit, District Pali (Rajasthan) is concerned, that the respondent had neither created any third party rights or interest, nor they would create any third party rights in respect of the said property till next date of hearing. In view of the said statement made by the respondent, this Court observed that no orders were necessary at this stage. The said notice of motion was adjourned to 16th June, 2016.

13. The respondent filed affidavit of disclosure on 20th May,

2016 and also additional affidavit. The petitioner thereafter filed Notice of Motion (Lodging) No.1671 of 2016 *inter-alia* praying for various reliefs, including an order and direction against the respondent to furnish to the petitioner the audited balance sheet for the financial years 2012-2013, 2013-2014 and 2014-2015 and prayed for an injunction in respect of the assets disclosed by the respondent in its affidavit of disclosure dated 20th May, 2016.

14. By an order dated 7th June, 2016, this Court directed the respondent to furnish the security of Rs.50.00 crores by furnishing a bank guarantee of a nationalized bank within four weeks from the date of the said order for a period of two years and for like period after obtaining further orders from this Court in favour of the Prothonotary & Senior Master of this Court and to furnish a copy thereof to the petitioner simultaneously. This Court made Notice of Motion (Lodging) No.1655 of 2016 absolute in terms of prayer clauses (a) and (c) and allowed Notice of Motion (Lodging) No.1671 of 2016 in terms of prayer clauses (b) and (c). This Court had made it clear that if the respondent furnishes a bank guarantee of Rs.50.00 crores within the time prescribed, injunction granted by this Court in terms of prayer clauses (b) and (c) of Notice of Motion (Lodging) No.1671 of 2016 and in terms of prayer clauses (a) and (c) of Notice of Motion (Lodging) No.1655 of 2016 shall stand vacated.

15. Being aggrieved by the said order dated 7th June, 2016, passed by this Court, the respondent filed Commercial Appeal (Lodging) Nos.7 of 2016 and 8 of 2016 before the Division Bench of this Court. By an order dated 15th June, 2016, passed by the Division Bench of this Court, the Division Bench recorded the statement made

by the respondent herein that the respondent was ready and willing to furnish the details of sundry debtors from whom the respondent has to recover substantial amount in a sealed cover to this Court and the same would be placed on record before commencement of hearing of this petition on 17th June, 2016. In view of this statement made by the respondent herein, the learned senior counsel for the petitioner herein agreed not to press the issue of non-compliance of the said order dated 7th June, 2016 in respect of receivables.

16. The respondent herein also placed on record a chart showing how freezing of the bank account would affect not only the respondent herein but also to its employees and concerned statutory departments. The Division Bench of this Court directed the petitioner to consider the same. The respondent through its learned senior counsel made a statement that the respondent would furnish the list of amount as required in pursuance to the statements so placed on record. The Division Bench in the said order made it clear that as the main matter itself was being listed on 16th June, 2016, the Division Bench did not hear the parties on merits. The matter was adjourned to 20th June, 2016.

17. Mr.Khambatta, learned senior counsel for the petitioner invited my attention to various provisions of the said agreement dated 15th August, 2008 and also to some of the annexures annexed to the petition and a copy of the arbitral award dated 25th September, 2014. My attention is also invited to the objections raised by the respondent in the additional affidavit in reply filed by the respondent opposing the present arbitration petition. He submits that the respondent has challenged the said award dated 25th September, 2014 by filing an

appeal before the Queen's Bench Division. It is submitted that the said appeal is admittedly rejected on 25th March, 2016. The Appeal Court of the Queen's Bench Division, Commercial Court has also rejected the appeal filed by the respondent against the said order dated 25th March, 2016.

18. Learned senior counsel for the petitioner also made various submissions on such objections raised by the respondent. He submits that all the objections raised by the respondent are touching the merits of the arbitral award made by the arbitral tribunal. He submits that the scope of the objections while opposing an enforcement of the foreign award is very limited. The Court cannot have second look to the foreign award under sections 46 to 48 of the Arbitration Act. I shall deal with the submissions made by the learned senior counsel for the petitioner on the objections raised by the respondent in the additional affidavit filed on behalf of the respondent and made across the bar and the submissions made by the learned senior counsel for the petitioner in rejoinder in the later part of this judgment.

19. I shall now deal with the objections raised by the respondent in opposing the enforcement of the award dated 25th September, 2014.

20. It is submitted by the learned senior counsel for the respondent that the finding of the arbitral tribunal holding that the petitioner herein was entitled to claim damages arising from the alleged breach of contract on the part of the respondent herein i.e. loss of Minimum Purchase Quantities (MPQs) for the remainder of the

term of the contract was without rendering any reasons whatsoever. He submits that the arbitral tribunal has not co-related the loss alleged to have been actually suffered which was required to be compensated in favour of the petitioner herein in the said award and thus the said award is in violation of public policy of India. He submits that out of US\$ 5,395,727.25 i.e. approximately 83% of the said amount awarded by the arbitral tribunal was for the period after 1st July, 2012 i.e. post termination period the agreement by the petitioner.

21. It is submitted by the learned senior counsel for the respondent that the arbitral tribunal did not consider the submissions made by the respondent with regard to the question of mitigation though the arbitral tribunal itself had rendered a finding that the petitioner herein was entitled to claim the damages arising from the breach for the remainder of the term of the contract subject to the arguments on mitigation. He submits that the award is totally silent on the issue of mitigation and the findings rendered by the arbitral tribunal on this issue are inconsistent and contradictory. He submits that the arbitral tribunal failed to consider that the witness examined by the petitioner had admitted in the cross examination that the petitioner had intended to import Bitumen into India and had intended to continue to look for opportunities in India which would have the effect of mitigating the loss if any suffered by the petitioner.

22. It is submitted that the petitioner though did not produce any evidence before the arbitral tribunal to prove that two shipments referred to by its witness were made at a loss, the arbitral tribunal allowed the claim for the remainder period of the contract post

termination without considering the issue of mitigation and without recording any reasons.

23. It is submitted by the learned senior counsel that on one hand the arbitral tribunal has awarded the damages for the remainder period of the contract i.e. post termination period and on the other hand, the arbitral tribunal has also allowed the petitioner to continue the business in India post termination period. He submits that the said award dated 25th September, 2014 is a totally unjust award and is opposed to public policy.

24. It is submitted that in the entire award rendered by the arbitral tribunal, it is not explained by the arbitral tribunal as to how the petitioner was entitled to claim for the Minimum Purchase Quantities (MPQs) for the remainder period of the contract. He submits that in the arbitral award, the arbitral tribunal had put the respondent to follow the various terms whereas no such conditions were imposed by the petitioner. The arbitral tribunal has applied different yardsticks to the parties.

25. It is submitted by the learned senior counsel for the respondent that the claim for damages awarded by the arbitral tribunal was without any evidence to justify such losses by the petitioner and such claim for damages which was in the nature of a penalty and in terrorem which had no co-relation to the losses that would have been suffered by the petitioner. No restriction of any nature have been imposed on the petitioner in selling Bitumen in India in the said award dated 25th September, 2014. It is submitted that the said award dated 25th September, 2014 is contrary to the law on

damages in India and opposed to the public policy.

26. It is submitted by the learned senior counsel for the respondent that the arbitral tribunal has provided for *ad-hoc* rate of discount with respect to the amounts held to be payable by way of damages for the 7th, 8th, 9th and 10th year on premise that the petitioner would receive accelerated payments of these amounts. No reasons are recorded by the arbitral tribunal while providing an *ad-hoc* rate of discount in the impugned award. He submits that there was unjust enrichment to the petitioner in view of the *ad-hoc* discount provided in the impugned award.

27. Learned senior counsel for the respondent invited my attention to a letter dated 20th July, 2012 addressed by the advocate representing the petitioner to the respondent alleging the breaches against the respondent and informing that the agreement would not be binding on the petitioner. My attention is also invited to the transcript of the hearing recorded before the arbitral tribunal in support of his submission that though no evidence was led by the petitioner virtually on the issue of mitigation, the arbitral tribunal has awarded the entire claim for damages though the petitioner.

28. It is submitted by the learned senior counsel for the respondent that the respondent has now learnt that as on 30th September 2015, 92.24% of the share of Bitumen Corporation India Private Limited, a company admittedly carrying on trade in Bulk Bitumen in India, are held by Rebco Investment Limited, a company incorporated under the laws of Republic of Mauritius. He submits that 19% of the shares of Rebco Investment Limited are held by

Mr. Salmaan Moolobhoy who is admittedly a director of the petitioner. He submits that it is thus clear that the petitioner has been carrying on business of trading in Bulk Bitumen in India with Bitumen Corporation India Private Limited after termination of the contract awarded to the respondent. He submits that the impugned award is totally unjust, unfair and is *ex-facie* opposed to public policy. He invited my attention to the findings recorded by the arbitral tribunal on this issue in paragraph 32 of the said award dated 25th September, 2014.

29. Learned senior counsel for the respondent placed reliance on the judgment of Supreme Court in case of **Murlidhar Chiranjilal vs. Harishchandra Dwarkdas and another, AIR 1962 SC 366** and in particular paragraph 9 in support of the submission that a party who has not taken all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.

30. Learned senior counsel for the respondent placed reliance on the judgment of Supreme Court in case of **Kailash Nath Associates vs. Delhi Development Authority and another, (2015) 4 SCC 136** and in particular paragraph 44 in support of his submission that the arbitral tribunal could have awarded claim for damages only if such damages or losses were suffered and proved by the petitioner (original claimant) and not otherwise.

31. Reliance is also placed on the judgment of this Court in case of **M/s.B.E. Billimoria & Co. Ltd. vs. M/s.Raheja Universal Private Ltd.** delivered on 27th October, 2015 in Arbitration Petition

No.868 of 2014 and in particular paragraph 36 in support of his submission that unless the petitioner would have pleaded and proved the actual loss suffered, the arbitral tribunal could not have awarded such claim for damages without evidence and proof.

32. Learned senior counsel for the respondent placed reliance on the judgment of Supreme Court in case of **Kranti Associates Private Limited and another vs. Masood Ahmed Khan and another (2010) 9 SCC 496** and in particular paragraphs 12, 14, 15, 44 to 47 in support of its submission that the arbitral tribunal was bound to record the reasons in support of his conclusion and ought to have disclosed the basis on which the arbitral tribunal has awarded the claims for damages made by the petitioner (original claimant). He submits that since there were no reasons recorded by the arbitral tribunal, the entire award is contrary to the public policy and deserves to be set aside.

33. It is submitted by the learned senior counsel for the respondent that there was no judicial approach on the part of the arbitral tribunal while allowing the huge claim for damages made by the petitioner and thus on this ground itself, the said award dated 25th September, 2014 cannot be enforced being opposed to public policy. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of **Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49** and in particular paragraphs 29 to 31, 36 to 48 and in case of **Oil and Natural Gas Corporation Limited vs. Western Geco International Limited, (2014) 9 SCC 263** and in particular paragraphs 34, 35 and 38. It is submitted by the learned senior counsel that since the said award

dated 25th September, 2014 was totally unjust and unreasonable and in conflict with the fundamental policy of Indian law, the principles laid down by the Supreme Court in the aforesaid two judgments would be applicable also to the petition filed for enforcement of a foreign award. He submits that this Court has ample power to refuse to enforce such foreign award based on the principles laid down by the Supreme Court in case of **Associate Builders** (supra) and **Oil and Natural Gas Corporation of India Limited** (supra).

34. Learned senior counsel for the respondent placed reliance on paragraphs 25 and 27 of the judgment in case of **Shri Lal Mahal Limited vs. Progetto Grano Spa, (2014) 2 SCC 433** and it is submitted that the Supreme Court in the said judgment has held that although the said expression 'public policy of India' is used under 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 those two sections are concerned.

35. Mr.Khambatta, learned senior counsel for the petitioner submits that all the objections to the enforcement of the said award dated 25th September 2014 raised by the respondent are on merits of the said award and as and by way of challenge to various findings of the facts recorded by the arbitral tribunal. He submits that findings of facts and adjudication of the claims on merits in the award cannot be re-opened in this petition filed for enforcement of the said foreign award.

36. It is submitted by the learned senior counsel that in the

grounds of appeal filed by the respondent before the High Court of Justice, Queen's Bench, Commercial Court, the respondent had raised eight grounds for which leave was granted by the Burton J, for four grounds under Section 69 of the English Arbitration and Conciliation Act and the other four grounds under Section 68 of the said Arbitration Act. He submits that the respondent did not pursue the four grounds of appeal under Section 68 of the English Arbitration Act. Out of the remaining four grounds of appeal under Section 69 of the English Arbitration and Conciliation Act, the point relating to the right of the petitioner to terminate the contract for repudiation was the principal ground of appeal raised by the respondent which came to be rejected by the High Court of Justice, Queen's Bench, Commercial Court.

37. In so far as the issue of mitigation raised for objecting to the enforcement of the said award by the respondent is concerned, it is submitted by the learned senior counsel that the petitioner had examined the witnesses on this issue. The arbitral tribunal has considered the issue of mitigation in paragraph 59 (n) of the said award at page 105 of the arbitration petition. He submits that the arbitral tribunal has rightly rejected the issue of mitigation raised by the respondent as the respondent did not bring any evidence before the arbitral tribunal in support of his objection. He submits that the respondent had not even agitated this ground of appeal before the High Court of Justice, Queen's Bench, Commercial Court. It is submitted that the respondent cannot be allowed to agitate the said issue on merits before this Court while objecting to the enforcement of the said award.

38. In so far as the objection of the respondent that there was an error in the decision of the arbitral tribunal granting damages for remainder of the unexpired period of the Master Supply Agreement to the petitioner and rejecting the arguments of the respondent on mitigation is concerned, it is submitted that since there had been a repudiatory breach of contract by the respondent, the petitioner who had suffered due to such repudiatory breach of contract was entitled to claim damages also for the unexpired period of contract. He submits that since the respondent did not lead any evidence in support of such allegation of mitigation, the arbitral tribunal was right in rejecting this submission made by the respondent and in allowing the claim for loss of profit for the remainder period of the contract. He submits that the respondent had failed to discharge burden of proof to show that the petitioner had an opportunity to mitigate and failed to take it or though had taken such opportunity but did not give credit to the respondent.

39. It is submitted by the learned senior counsel that on the contrary, the petitioner had examined the witnesses Mr.Allen Pinto and Mr.Aly Moloobhoy, who had deposed in respect of two shipments whose evidence remained unchallenged. The petitioner through two witnesses had proved that the petitioner had actually suffered losses on the said two shipments. It is submitted that the arbitral tribunal was right in accepting the said evidence of the two witnesses examined by the petitioner whose evidence remained uncontroverted and unchallenged. The arbitral tribunal has rendered appropriate finding of fact on this issue in paragraphs 58 and 59(n) of the said award.

40. In so far as the submission of the learned senior counsel for the respondent that the arbitral tribunal has not rendered any reasons while rendering a finding on the issue of mitigation or that some of the arguments of the respondent were not dealt with by the arbitral tribunal in the said award is concerned, learned senior counsel for the respondent invited my attention to paragraphs 57, 58 and 59 (n) of the said award and would submit that the arbitral tribunal has recorded detailed reasons in the said paragraphs of the said award and has also rendered various findings of facts on merits against the respondent after considering all the submissions of the parties. He submits that the arbitral tribunal is not under an obligation to record reasons as recorded by a Court of law in its judgment.

41. Learned senior counsel for the petitioner invited my attention to paragraphs 39 to 42 of the amended statement of claim and also the paragraphs 35 to 39 of the written statement filed by the respondent. He submits that it was the case of the respondent itself in the written statement that damages for any breach were to be assessed on the basis of the minimum performance principle i.e. it should be assumed that the respondent would have given the minimum performance it was entitled to give. It is submitted that the arbitral tribunal has accepted the method of damages on principle canvassed by the respondent in their written statement and did not allow the entire claims made by the petitioner.

42. Learned senior counsel for the petitioner placed reliance on clause 7.4 of the Master Supply Agreement dated 24th June 2008 entered into between the parties and would submit that under

the said provision, the respondent had guaranteed to buy from the petitioner a Minimum Quantity of Product (MQP) of 50,000 metric tonnes in the first year of the term which quantity was to be increased at the percentage set out therein. He submits that the total Minimum Purchase Quantity mentioned in the said clause was as 853,782.60 metric tonnes. Reliance is also placed on clause 7.6 of the said agreement and it is submitted that under the said clause, the respondent had agreed to compensate the petitioner at the rate of US\$10 per metric tonnes for any Short Purchase Quantity (SPQ) incurred in the first or any successive year of the said agreement.

43. Learned senior counsel for the petitioner placed reliance on clauses 2.5 and 2.6 of the said Master Supply Agreement and would submit that it was specifically recorded in the said provisions that the petitioner had, over recent years, been supplying the product in the Indian market to establish the customers through storage facility of the petitioner at Mundra and had provided the list of such customers in the said provisions. It was also agreed by and between the parties that in return, for agreement of the petitioner not to continue directly or indirectly to supply and/or market product to its established customers referred to in clause 2.5 of the said agreement, the respondent in turn agreed that for the first 5 years of the said agreement, the respondent was to service such customers on terms to be agreed between the petitioner and the respondent before any supplies were effected to such customers.

44. It is submitted by the learned senior counsel that it was thus clear that under the said agreement, the petitioner had given up its established customers in the Indian Market for the said

product. The respondent had repudiated the said contract and did not purchase minimum quantity mentioned in the said agreement and thus the petitioner was entitled to claim loss of profit even for the remainder period. The petitioner had accepted such repudiation of the contract by the respondent and has rightly terminated the said contract. He submits that the arbitral tribunal did not allow the higher claim made by the petitioner but allowed the claim at the same amount for the remainder period.

45. Learned senior counsel for the respondent also invited my attention to claim of loss of profit made by the respondent in the counter claim before the arbitral tribunal and would submit that the respondent had demanded the loss of profit against the petitioner much more than the claim made by the petitioner.

46. In so far as the submission of the learned senior counsel for the respondent that the discount given to the respondent @ 5% was without any basis and evidence is concerned, it is submitted by the learned senior counsel for the petitioner that though the respondent had not prayed for any such discount in the written statement or in the counter claim, the arbitral tribunal after considering the facts of the case had provided a reasonable discount to the respondent in respect of the accelerated payments. The respondent had raised this issue for the first time before this Court alleging that the arbitral tribunal did not provide any basis for arriving at the discounted rate. He submits that as a matter of record, the petitioner had conceded 5% discount which was allowed by the arbitral tribunal though not prayed by the respondent. The arbitral tribunal was not required to record any detailed reason for granting

such relief to the respondent.

47. In so far as the submission of the learned senior counsel for the respondent that the arbitral tribunal could not have allowed any claim for loss of profit for the remainder period of the contract is concerned, it is submitted by the learned senior counsel for the petitioner that the respondent had committed breach of the contract resulting in termination of the said contract by the petitioner. As a consequence of such breach committed by the respondent, the petitioner had suffered loss of profit which claim was rightly made by the petitioner in the arbitral proceedings and has been rightly allowed by the arbitral tribunal.

48. In so far as the issue raised by the respondent that on one hand, the arbitral tribunal had allowed the claim for loss of profit for the remainder period and on the other hand, has permitted the petitioner to carry on business in India or that the petitioner was admittedly carrying on trade in Bulk Bitumen in India or that the certain shares of Bitumen Corporation India Private Limited, a company incorporated under the laws of the Republic of Mauritius and that 19% of the shares of Rebco Investment Limited were held by the Director of the petitioner is concerned, it is submitted by the learned senior counsel for the petitioner that the petitioner is not carrying on any business in Bulk Bitumen in India after execution of the agreement with the respondent. He submits that Mr. Salmaan Moloobhoy is a non-resident of India. He has an interest of 10% in Rebco Investment Limited. He was neither on the board of Directors of Bitumen Corporation India Private Limited nor involved in the day to day business of Bitumen Corporation India Private Limited. It is

submitted that the said Bitumen Corporation India Private Limited is not a subsidiary of the petitioner. It is submitted that the said Bitumen Corporation India Private Limited is carrying on business in bitumen since 1988 and is known in the market. It is submitted that in any event, this Court has no jurisdiction to examine such frivolous issue raised by the respondent in these proceedings.

REASONS AND CONCLUSIONS :

49. Insofar the objection raised by the respondent that the arbitral tribunal has not recorded any reasons for the amount of damages awarded by the arbitral tribunal in favour of the petitioner and more particularly in respect of the claim for loss of profit for remainder of the term of the contract is concerned, a perusal of the arbitral award clearly indicates that the arbitral tribunal has recorded sufficient reasons in paragraphs 58 and 59(n) in the said award after considering oral evidence as well as documentary evidence and the submissions made by both the parties. The arbitral tribunal while allowing the said claim for loss of profit for remainder period of the agreement has also considered the provisions of the contract entered into between the parties. In my view, the arbitral tribunal is not expected to give reasons as are required to be given by a Court of law in a judgment. The reasons recorded by the arbitral tribunal were sufficient and clear to indicate the mind of the arbitral tribunal to arrive at the conclusion recorded in the award. In my view, there is no merit in this submission made by the learned senior counsel for the respondent.

50. Insofar as the objection of the respondent that the arbitral tribunal could not have allowed the claim for loss of profit for remainder period of the agreement and at the same time could not

have permitted the petitioner to continue business and trade in bitumen in India is concerned, this objection in my view cannot be raised while opposing enforcement of the foreign award under sections 46 to 48 of the Arbitration Act as the powers of this Court while hearing any objection to the enforceability of foreign award is very limited. This Court cannot go into the correctness of the finding recorded by the arbitral tribunal on merits in these proceedings filed under sections 46 to 48 of the Arbitration Act.

51. Be that as it may, a perusal of clause 7.4 of the Master Supply Agreement dated 24th June, 2008 entered into between the parties clearly indicates that under the said provision, the respondent had guaranteed to buy from the petitioner a minimum quantity of product (MQP) of 50,000 MT in the first year of the term and enhanced quantity in the subsequent years as set out in the said provision. There was no dispute that the total minimum quantity mentioned in the said clause was as 853,782.60 MT. There is no dispute that the said agreement arrived at between the parties was terminated by the petitioner.

52. A perusal of clauses 2.5 and 2.6 of the said agreement clearly indicates that under the said provision, it was brought to the notice of the respondent by the petitioner that the petitioner had been than supplying the products of bitumen in Indian market to establish the customers through storage facility. The list of such customers of the petitioner were clearly disclosed in the said agreement. It was also agreed that in return of the petitioner agreeing not to continue directly or indirectly to supply and/or market products towards the established customers, the respondent in turn had agreed that for the

first five years of the agreement, the respondent was to service such customers on the terms to be agreed upon between the parties. In the facts and circumstances of this case, the arbitral tribunal having come to a conclusion that the said agreement was repudiated by the respondent illegally which resulted in termination of the agreement by the petitioner, the petitioner became entitled to claim loss of profit also for the remainder period of the agreement. I am thus not inclined to accept the submission of the learned senior counsel for the petitioner that there was any inconsistency or contradiction in the said award dated 25th September, 2014 rendered by the arbitral tribunal.

53. There is no dispute that in the appeal filed by the respondent before the High Court of Justice, Queen's Bench, Commercial Court, the respondent had raised eight grounds, for which leave was granted by Burtol, J. for four grounds under section 69 of the English Arbitration Act and for other four grounds under section 68 of the English Arbitration Act. The respondent however did not pursue four grounds of appeal under section 68. Out of remaining four grounds of appeal under section 69, the point relating to the right of the petitioner to terminate the contract for repudiation was the principal ground of appeal raised by the respondent which came to be rejected by the High Court of Justice, Queen's Bench, Commercial Court. In my view, this Court cannot refuse to allow enforcement of foreign award on the ground that there was any alleged inconsistency or contradiction in the said foreign award rendered by the arbitral tribunal. The Court has to consider the entire award in toto and not few lines in the award.

54. Insofar as the objection raised by the respondent that the arbitral tribunal had not considered the issue of mitigation or that the arbitral tribunal had not considered the submissions made by the respondent or that the award was silent on the issue of mitigation is concerned, this objection also touches the merits of the said award and enforcement of the said award cannot be refused by having a second look on the merits of the said award.

55. Be that as it may, a perusal of the record clearly indicates that on the issue of mitigation, the respondent had not led any evidence. The petitioner had examined two witnesses Allen Pinto and Aly Moloobhoy, who have deposed in their evidence that certain quantity was shipped vide two shipment in respect of which there was a loss suffered by the petitioner. The evidence of the said two witnesses remained uncontroverted and unchallenged by the respondent. A perusal of the award clearly indicates that the arbitral tribunal has considered all the submissions advanced by both the parties and after considering oral evidence led by these two witnesses examined by the petitioner has rendered a finding of fact that there was loss suffered by the petitioner while taking steps to mitigate losses by effecting two shipments. In my view, this Court cannot interfere with such findings of fact rendered by the arbitral tribunal while considering the objections to the enforcement of a foreign award. Be that as it may, in my view the findings rendered by the arbitral tribunal cannot be faulted with.

56. Insofar as the submission of the learned senior counsel for the respondent that in the impugned award, the arbitral tribunal has not co-related the damages awarded in favour of the petitioner and

has not disclosed the basis on which the arbitral tribunal had come to a conclusion for awarding of a claim for loss of profit is concerned, in my view this objection raised by the respondent also relates to the merits of the award which cannot be looked into by this Court while considering an objection to the enforceability of a foreign award. In my view Mr.Khambatta, learned senior counsel for the petitioner is right in inviting my attention to the amended statement of claim and the claim filed by the petitioner and the written statement filed by the respondent and more particularly paragraphs 35 to 39 of the written statement. A perusal of the said written statement filed by the respondent herein clearly indicates that it was the case of the respondent itself that the damages of any breach were to be assessed on the basis of the minimum performance principle. A perusal of the said award clearly indicates that though a claim made by the petitioner was for much higher amount, the arbitral tribunal accepted the method of damages canvassed by the respondent in its written statement and did not allow the entire claims made by the petitioner. In my view, the respondent thus cannot object to the enforcement of the said award on this ground at all.

57. In my view, whether the evidence produced by the parties was sufficient or not before the arbitral tribunal on the basis of which the arbitral tribunal had awarded a particular claim in a foreign award, this Court cannot refuse to enforce a foreign award based on sufficiency or in-sufficiency of such evidence produced by the parties before the arbitral tribunal and cannot come to a different conclusion based on such evidence. I am not inclined to accept the submission of the learned senior counsel for the respondent that the arbitral tribunal had applied different yardsticks to the parties.

58. Insofar as the objection raised by the respondent that the arbitral tribunal had provided for ad-hoc rate of discount with respect to the amounts held to be payable by way of damages for 7th, 8th, 9th and 10th years on the premise that the petitioner would receive accelerated payments of these amounts is concerned, or that no reasons are recorded by the arbitral tribunal on this issue is concerned, it is not in dispute that in the counter claim made by the respondent, no such claim for ad-hoc rate of discount was made by the respondent. The petitioner however had made a concession before the arbitral tribunal for ad-hoc rebate at the rate of 5%. There was no dispute raised by the respondent in respect of the said rebate offered by the petitioner. In the facts and circumstances of this case, the arbitral tribunal had accepted the concession made by the petitioner and awarded the said relief in favour of the respondent. In my view, this Court cannot refuse to enforce the foreign award on the ground that the arbitral tribunal could not have accepted the concession made by the petitioner and could not have given the relief to the respondent. In my view, there is thus no substance in this submission made by the learned counsel for the respondent.

59. Insofar as the judgment of the Supreme Court in case of **Kranti Associates** (supra) relied upon by the learned senior counsel for the respondent is concerned, in my view since the arbitral tribunal has rendered sufficient reasons in the impugned award on each of the issues raised by both the parties, the said judgment of the Supreme Court would not assist the case of the respondent.

60. Insofar as the judgment of the Supreme Court in case of

Murlidhar Chiranjilal (supra) relied upon by the learned senior counsel for the respondent is concerned, it is held by the Supreme Court that the petitioner is debarred from claiming any part of damages which is due to his neglect to take such steps and it is his duty to take all reasonable steps to mitigate the loss consequent on the breach. In the facts of this case, the petitioner had taken various steps to mitigate the loss. The petitioner had examined two witnesses whose evidence remained uncontroverted. The arbitral tribunal has rendered a finding of fact that even in respect of those two shipments, there was a loss suffered by the petitioner inspite of the steps taken by the petitioner to mitigate the loss. The said judgment of the Supreme Court thus would not assist the case of the respondent.

61. Insofar as the judgments of the Supreme Court in case of **Kailash Nath Associates** (supra) and the judgment of this Court in case of **M/s.B.E. Billimoria & Company Limited** (supra) are concerned, this Court cannot go into the sufficiency or insufficiency of the evidence before the arbitral tribunal which was considered while awarding claim for damages in foreign award or any other claim while considering the objection raised by a party to the enforcement of the foreign award. Be that as it may in the facts and circumstances of this case, a perusal of the record clearly indicates that the petitioner had not only taken steps to mitigate the losses but had also led evidence to prove the claim for damages. The arbitral tribunal has accepted the principles for awarding damages as canvassed by the respondent. In my view, all these judgments thus would not assist the case of the respondent and are clearly distinguishable in the facts and circumstances of this case.

62. Insofar as the submission of the learned senior counsel for the respondent that there was no judicial approach on the part of the arbitral tribunal in proceeding with the claims made by the petitioner and while allowing the claim for damages in favour of the petitioner and thus the award was contrary to the fundamental policy of Indian Law as laid down by the Supreme Court in **Associate Builders** (supra) and in case of **O.N.G.C. Limited** (supra) which principles are applicable to a petition under section 48 is concerned, this Court in case of **Sideralba S.P.A.** (supra) and in case of **M/s.Louis Dreyfus Commodities** (supra) has after adverting to these two judgments referred to aforesaid and relied upon by the learned senior counsel for the respondent, has held that the power of the Court while applying the expression “Fundamental Policy of Indian Law” interpreted by the Supreme Court in the case of **O.N.G.C. Limited** (supra) and **Associate Builders** (supra) is very narrow and limited and is not wider than while dealing with the domestic award. It is held by this Court that the Court while dealing with the 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. I am thus not inclined to accept the submission of the learned senior counsel for the respondent that the principles laid down by the Supreme Court in case of **O.N.G.C. Limited** (supra) and in the case of **Associate Builders** (supra) which judgment had considered domestic awards under section 34 of the Arbitration Act can be extended to and would apply when the Court is hearing a petition for enforcement of a foreign award.

63. Insofar as the submission of the learned senior counsel for

the respondent that even in case of **Shri Lal Mahal Limited** (supra) the Supreme Court had held that there is no bar in refusing to enforce a foreign award by applying the test laid down by the Supreme Court in case of **Associate Builders** (supra) and **O.N.G.C. Limited** (supra) is concerned, a plain reading of the judgment of the Supreme Court in case of **Shri Lal Mahal Limited** (supra) does not indicate what is canvassed by the learned senior counsel for the respondent. This Court in the judgment of **M/s.Louis Dreyfus Commodities** (supra) and in case of **Sideralba S.P.A.** supra) has already considered this issue and has held that though 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 the said foreign award is contrary to the fundamental policy of Indian Law, powers of the Court exercising powers under section 34 and 48 of the Arbitration Act differs in degree and are not identical.

64. In my view, the judgment of the Supreme Court in case of **Shri Lal Mahal Limited** (supra), in case of **Renusagar Power Company Limited** (supra), judgment of this Court in case of **Sideralba S.P.A.** (supra) and in case of **M/s.Louis Dreyfus Commodities** (supra) squarely apply to the facts of this case. I am respectfully bound by the said judgments.

65. The Supreme Court in 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 execute the award for enforcement on the ground of public policy. In my view, the said foreign award is final insofar as merits of the claim awarded by the arbitral tribunal is concerned.

66. In my view, the principles laid down by the Supreme Court in the case of **Shri Lal Mahal Limited** (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.

67. 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.

68. 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*)."

69. 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 September, 2014 is enforceable under Part-II and is binding on all the parties. I am therefore, of the view that the foreign award stands as a decree and the petitioner holding the said foreign award has become entitled for enforcement of the said foreign award and for taking 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). Arbitration Petition No.59 of 2015 is made absolute in terms of prayer clause (a).

b). Interim reliefs granted by this Court on 4th May, 2016 in this arbitration petition, 7th June, 2016 in Notice of Motion (Lodging) No.1671 of 2016 and Notice of Motion (Lodging) No.1655 of 2016 in paragraph 33 (a) to 33 (d) to continue for a period of eight weeks from today.

c). No order as to costs.

(R.D. DHANUKA, J.)

70. At this stage, Mr.Doctor, learned senior counsel appearing for the respondent seeks stay of the operation of the order passed by this court insofar as Arbitration Petition No.59 of 2015 is made absolute in terms of prayer (a) by this court is concerned. The application for stay is vehemently opposed by Mr. Balsara, learned counsel for the petitioner.

71. Mr.Balsara, learned counsel for the petitioner invited my attention to the order dated 7th June, 2016 passed by this court in Notice of Motion (L) No.1671 of 2016 and Notice of Motion (L) No. 1655 of 2016 and would submit that by the said order, this court had already ordered the respondent to disclose the amounts recoverable

from its creditors. He submits that pursuant to an order passed by Division Bench of this court, the respondent has already deposited the said envelop containing such information in this court on 16th June, 2016. He submits that since this court has already declared the said foreign award enforceable as a decree of this court, Prothonotary and Senior Master shall be directed to furnish a copy of the said disclosure filed by the respondent to the petitioner.

72. Mr.Doctor, learned senior counsel for the respondent on the other hand opposes the said application on the ground that the appeals filed by the respondent against the interim order passed by this court are pending before the Division Bench and are directed to be placed on board on 5th July, 2016. He submits that since the said envelop containing the disclosure was filed pursuant to the order passed by the Division Bench, if the petitioner seeks to apply for copy of the said disclosure, the petitioner can apply before the Division Bench. Statement of the learned senior counsel for the respondent is accepted.

73. It is made clear that the petitioner would be at liberty to make an appropriate application before the Division Bench for seeking liberty to obtain photocopy of the disclosure filed by the respondent before this court on 16th June 2016. In view of the statement made by the learned senior counsel for the respondent, this court need not consider the application of the learned counsel for the petitioner for furnishing the photocopy made by the respondent before this court at this stage.

74. Insofar as application for stay made by the learned senior

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counsel for the respondent of the prayer granted by this court in terms of prayer clause (a) of the Arbitration Application No.59 of 2015 is concerned, application for stay is rejected.

(R.D. DHANUKA, J.)