

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.09.2016

DELIVERED ON : 26.10.2016

Coram

The Honourable **Mr. Justice RAJIV SHAKDHER**

Original Petition No.127 of 2016

Thaicom Public Company Limited

41/103, (New No.63/21), Rattanathibet Road,

Nonthaburi 11000, Thailand

... Petitioner

Vs.

Raj Television Network Ltd.,

32, II Pose Road, Teynampet,

Chennai - 600 008.

... Respondent

PETITION filed under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 to enforce the award dated 21.09.2015.

For Petitioner : Mr.R.Parthasarathy

For Respondent : Mr.K.Harishankar

ORDER

1. This is a petition filed under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 (in short the "1996 Act") to enforce the foreign award dated 21.09.2015 as a deemed decree.

1.1. The petitioner is the original claimant. The respondent herein was also the respondent in the arbitration proceedings.

1.2. For the sake of convenience, the petitioner and the respondent will be collectively referred to as parties.

PREFATORY FACTS:

2. The brief facts, which are required to be noticed in order to adjudicate upon the instant petition, are as follows:

The parties herein had entered into a transponder services agreement dated 10.09.2003 (hereafter referred to as "the agreement"). Under the agreement, the respondent was entitled to use C-Band Regional Beam Transponder, on Thaicom 3, for delivery of its television transmissions.

2.1. The tenure of this agreement was four (4) years and nine (9) months. The agreement commenced on 01.10.2003 and was to expire on 30.06.2008.

2.2. In terms of the said agreement, for the services rendered by the petitioner, the respondent was required to pay US \$35,834 per month.

2.3. Under the agreement, it was the respondent's obligation to uplink their digital telecommunication signals to the petitioner's transponder from its own earth station situate in India.

3. Evidently, the respondent, for some reason, experienced, in November, 2004, difficulty in uplinking its television signals to the petitioner's transponder.

3.1. The respondent, thus, called upon the petitioner to render assistance for even uplinking television signals to the petitioner's transponder.

4. It is, in this background, that the agreement was varied to include a provision for additional payments for the uplinking/teleport services, provided by the petitioner, qua its, 1st, 2nd and 3rd channels. The additional payments, factored-in, were US \$ 1,00,000, US\$ 90,000 and US \$80,000, for the 1st, 2nd and 3rd channels, respectively.

5. It appears, that in view of the subsisting contractual relationship obtaining between the parties, the petitioner also agreed to provide occasional services for re-distributing videos of other satellites on a need basis to cover aspects like, breaking news, sports and live events.

5.1. Evidently, the petitioner raised invoices for these occasional services as well, from time to time.

6. Since, the respondent, defaulted in making payments for, the various services provided by the petitioner, disputes arose between the parties, in or about, December, 2005.

6.1. Consequent thereto, meetings were held between the representatives of the parties on 31.01.2006 and 02.08.2006. In the 1st meeting, an agreement was entered into between the parties, whereby, the petitioner agreed to waive the outstanding amounts, vis-a-vis, teleport services, based on a condition that the amounts outstanding towards transponder services and uplink service fees would be liquidated.

6.2. At the 2nd meeting, i.e., on 02.08.2006, once again, an agreement was arrived at between the parties, whereby, the petitioner agreed to waive not only outstanding teleport services fees, but also, agreed to grant the respondent, further fee adjustment to facilitate timely payment of all outstanding dues.

6.3. It appears, that a further agreement was arrived at between the parties, which was, that, teleport services fees would be reduced to US \$ 15,800 per month.

7. Apparently, on account of the change in Regulations brought about, in India, in July, 2007, local broadcasters could broadcast their TV content, only, via India Satellites. Since, the respondent, shifted its content to an Indian Satellite, i.e., INSAT -2E, parties agreed mutually to bring their contractual relationship to an end.

7.1. Accordingly, on 04.08.2007, based on mutual consent, the agreement was terminated.

8. Evidently, the respondent failed to pay its dues, which propelled the petitioner, albeit, after a delay of nearly 5 years, to demand payment of outstanding dues, by serving upon the respondent, a legal notice dated 23.10.2012.

8.1. The result of the aforementioned demand was that, a sole Arbitrator got appointed in terms of Clauses 19 and 23 of the agreement. As provided under Clause 23 of the agreement, the arbitration was held in Singapore.

9. The Arbitrator, after giving due opportunity to both parties to present their claims, and to lead in oral evidence in the matter, proceeded to pass the subject award.

9.1. Before the Arbitrator, the petitioner had cited two witnesses, while the respondent cited one witness. Parties were also given due opportunity to file their

written submissions.

10. The Arbitrator, after considering the merits of the matter, gave the following reliefs to the petitioner; which are set out in paragraph 48 of the award.

"(i) An order that the Respondent shall pay **US\$ 384,122.54** to the Claimant for the unpaid fees;

(ii) An order that the Respondent shall pay **US\$ 71,812.21** to the Claimant for Legal Fees and other costs incurred in the arbitration proceedings;

(iii) An order that the Respondent shall pay **US\$ 268,425.88** for interest on unpaid amounts incurred until 31 January 2014;

(iv) An order that **simple interest of 10% per annum** is payable on the sum of **US\$ 384,122.54** from 31 January 2014 until full payment."

10.1. It is this award that the petitioner seeks to enforce.

11. Upon notice being issued in the petition, the respondent has filed its objections in the form of a counter

affidavit.

CONTENTIONS:

11.1. Arguments on behalf of the petitioner have been advanced by Mr.R.Parthasarathy, Advocate, while, on behalf of the respondent submissions have been made by Mr.K.Harishankar, Advocate.

11.2. Since, the respondent's reply is in the nature of objections to the award, let me, briefly set out the objections raised on its behalf.

12. The first objection raised on behalf of the respondent, is that, the Arbitrator, in passing the award, had acted beyond his jurisdiction, inasmuch as, "a major part of the disputes, which were adjudicated upon by him, were outside the scope of the agreement."

13. Learned counsel for the respondent submitted that the claims were beyond limitation, as prescribed under the Indian Law. It was stated that the agreement between the parties was entered as far back on 10.09.2003, and that, it was mutually terminated on 04.08.2007. The payments required to be made by the respondent were provided for in the agreement. It was stated that, since, payments were being made for the services rendered by the petitioner, the petitioner chose not to exercise its rights given under

Clause 5.1 and Clause 13.5.1 of the agreement.

13.1. Based on the aforesaid clauses of the agreement, it was contended, that if, the payments, as prescribed under the agreement, had not been made, the petitioner would have in the ordinary course suspended the transponder services, which was its right under the said clauses of the agreement, qua any payment, which remained unpaid for more than 10 days.

13.2. The argument, thus, was that, the commencement of arbitration via, notice dated 23.10.2012, was belated and beyond limitation. In other words, it was contended that any claim, which pertained to a period falling beyond three years preceding 23.10.2012, could not have been entertained by the learned Arbitrator.

13.3. This argument was supported by relying upon the prescribed period of limitation of three years, available under the Indian Limitation Act, 1963 (in short "the Indian Limitation Act"). Furthermore, in this context, learned counsel for the respondent, while conceding that the law of limitation was part of the procedural law, stressed the fact that the Statute of limitation was, simultaneously, also a part of the public policy of India and therefore, no foreign award could be enforced in India, which was beyond the

period of limitation, as prescribed under the Indian Limitation Act.

13.4. Thus, the argument made before me ran as follows: The claim, which was subject matter of the award, being barred under the Indian Limitation Act, rendered the award "patently illegal" and, hence, syllogistically would render the award, in conflict, with the public policy of India.

13.5. Learned counsel further argued that, since, the limitation period prescribed under the Singaporean law, was six years, it was in conflict with the Indian law of limitation, which prescribed three years, rendering therefore, the main agreement, itself, void. According to the counsel, this flaw had resulted in the subject award being bad in law. In this context, a reference was made to Section 45 of the 1996 Act.

13.6. The other objection raised by the counsel for the respondent, is that, the Arbitrator had awarded claims even with respect to teleport and occasional services, which were not, subject matter of the agreement between the parties and, therefore, had, in a sense, stepped outside the jurisdiction vested upon him under the agreement.

14. On the other hand, learned counsel for the petitioner largely, relied upon the award in support of his submissions. Learned counsel, however, brought to my notice the fact that not only was Singapore, the seat of arbitration, but that, the parties had also agreed that the governing law would be the Singaporean law.

14.1. It was contended that the objections raised on behalf of the respondent with regard to whether limitation, as prescribed under Singaporean law, or that, which was prescribed under the Indian Law, would apply was an issue, which had been considered by the learned Arbitrator. It was contended that the respondent, for the reasons best known to it, chose not to assail the award in the designated Courts, in Singapore, and therefore, at the stage of enforcement, this Court could not have a re-look at the merits of the award.

14.2. In the context of limitation, learned counsel submitted that the Indian Limitation Act is applicable to only domestic awards and that too, by virtue of Section 43 of the 1996 Act. Since, Section 43 of the 1996 Act fell in Part I, it would apply only to domestic arbitrations.

14.3. Learned counsel submitted that the present award is a foreign award. It was contended that the subject award

had emerged out of disputes adjudicated upon in an international commercial arbitration, and therefore, the resultant award could only be governed by Part II of the 1996 Act.

14.4. The argument, in nutshell, was that the Indian Limitation Act was not applicable to an award, which was governed by Part II of the 1996 Act.

14.5. The submission made on behalf of the respondent that the claims made by the petitioner were beyond the period of limitation prescribed under the Indian Limitation Act and therefore, the resultant award was unenforceable in India as it was contrary to the public policy of India, since, limitation was part of the public policy of India, was refuted by the learned counsel for the petitioner.

14.6. Learned counsel for the petitioner submitted that the Supreme Court in the case of **Shri Lal Mahal Limited V. Progetto Grano Spa - (2014) 2 SCC 433** had clearly held that the expression "Public Policy in India" had to be given a "narrower" meaning, when Courts in India were called upon to enforce a foreign award.

14.7. It was contended that, therefore, this Court could only examine the purported violation of the public policy of India based on three parameters. These being:

fundamental policy of India, the interest of India, and justice and morality. It was submitted that none of the objections raised on behalf of the respondent came within the scope of any of the three parameters prescribed by the Supreme Court in ***Shri Lal's case***.

14.8. This apart, learned counsel submitted that limitation was part of procedural law and therefore, would be governed by that curial law, which would govern the arbitration proceedings. Since, the seat of arbitration was Singapore, the applicable curial law was the law of Singapore, and therefore, the claims, which were lodged by the petitioner could only, have been, examined in the light of the period of limitation, provided under the Singaporean law.

14.9. In support of this submission, counsel for the petitioner relied upon the judgment rendered in : ***NNR Global Logistics (Shanghai) Company Limited and another V. Aargus Global Logistics Private Limited and another, 2012 Indlaw DEL 2087.***

14.10. In so far as the objection taken on behalf of the respondent concerning the jurisdiction of the learned Arbitrator to allow the claim with respect to teleport and

occasional services was concerned, learned counsel for the petitioner submitted that there were no objections articulated by the respondent in its statement of defence, as noticed in the award itself, and that, it was only at the stage, when its counsel was advancing closing submissions before the learned Arbitrator, that submissions qua jurisdiction were put forth. Learned counsel submitted that, therefore, this objection/ground was not now available to the respondent to impugn the award.

REASONS :

15. I have heard the parties and perused the records. What emerges is that there are two broad issues, which need to be dealt with before a conclusion is reached one way or the other :

i) First, whether the award, which is based on the application of Singaporean law of limitation, would be unenforceable in India on the ground that it is violative of the public policy in India.

ii) Second, whether the Arbitrator had stepped outside his jurisdiction by considering the claims made by the petitioner for teleports and occasional services, as they were, purportedly, not part of the main agreement.

16. Insofar as the first issue is concerned, what is required to be noticed, is that, even according to the respondent, limitation is part of procedural law. Admittedly, under Clauses 19 and 23 of the agreement, parties had agreed that the governing law would be the Singaporean law and that the seat of arbitration would be Singapore. The arbitration, as a matter of fact, was held in Singapore. The Arbitrator, while, considering this objection made the following observations:

"39. Procedural issues shall be governed by the law of the seat of arbitration, i.e., Singapore law, and limitation is a procedural matter. Hence, Indian limitation law does not apply.

40. Article 6(1) of the Singaporean Limitation Act provides that action founded on contract "shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:. The earliest due date of payment for the invoices was 23 July 2007. The Notice of Arbitration was served on the Respondent on 23 October 2012 and pursuant to Article 3(2) of the UNCITRAL Rules, "arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the Respondent.". Hence, any claim

within six years before 23 October 2012, i.e. 24 October 2006 is not time-barred.

41. *Save for the Occasional Service fees, which the Claimant is no longer pursuing, all the claims made are within the limitation period and thus, not time-barred.*

42. *The Tribunal agrees with the submissions of the Counsel for the Claimant that, neither the nationality of a party, nor the actual or possible forum of enforcement are touchstones for the determination of which limitation law applies to the claim. Counsel for the Respondent failed to provide legal bases or authorities to support his contention to the contrary."*

17. The respondent questioned the conclusion reached by the learned Arbitrator that the Singaporean Limitation Act would apply based on the following syllogism. The syllogism is articulated as follows:

17.1. The claim made is barred by Indian Limitation Act. Limitation is part of public policy of India. Therefore, claim awarded in violation of Indian Limitation Act would result in the consequent award being in conflict with the public policy of India and hence, unenforceable in

India.

17.2. According to me, this argument is flawed, for the reason that, while, limitation is, concededly, part of public policy in India, what would be required to be examined is, as to which law, would govern limitation. The common ground being that limitation, in the facts of this case, is conceded to be part of procedural law.

17.3. Pertinently, though, in this case, in so far as the substantive law is concerned, while parties have agreed to be governed by Singaporean law, there was no agreement with regard to the procedural law. Therefore, quite clearly, the procedural law would be that law, which is, closely associated with the place where the action is adjudicated upon, i.e., in this case, the seat of arbitration. Therefore, while limitation is part of procedural law, it would necessarily involve application of that law of limitation which is closest to the seat of arbitration; in this case, the Singaporean law. Therefore, the law of limitation, which would be applicable to the claims lodged by the petitioner would be, in my opinion, the law of limitation as applicable in Singapore.

18. As rightly contended by the learned counsel for the petitioner, a somewhat similar issue came up for consideration in ***NNR Global Logistics's case*** cited supra.

18.1. In that case, parties had entered into a memorandum in the area of freight forwarding business. Disputes erupted between them, which led to arbitration being triggered. Parties, via a side letter, had agreed that the Indian law would be the substantive law of the agreement, while, the arbitration agreement, itself, would be governed by the laws of Malaysia. Arbitration was held in Malaysia. The issue which came up for consideration before the Delhi High Court was: whether the claims lodged would be governed by the Indian law of Limitation Act (i.e. the Limitation Act of 1963) or, the Malaysian, Limitation Act of 1950. The Court came to the conclusion in that case that Malaysian law of limitation would apply, as the seat of arbitration, was located in Malaysia.

18.2. The observations made by the Court in that behalf, being apposite, are set forth below:

"15. In light of the above submissions, the issue that is to be considered first is whether the law of limitation is a procedural

law or a substantive law so far as time limits barring the remedy such as for breach of contract is concerned. The Madras High Court in *Chairman, Railway Board, Government of India v. P. Chandrasekaran* [decision dated 17th January 2006 in Writ Petition No. 29444 of 2003] held that "the principle of limitation bars the remedy but does not extinguish the right, save and except Section 27 of the Limitation Act, by virtue of which not only the remedy is barred but a right accrues in favour of a person who has prescribed his right over immovable property by the principle of adverse possession."

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17. The learned Arbitrator ruled that the statute of limitation both in India and Malaysia being procedural, an action could be brought in Malaysia even if the period of limitation for the claims as per the ILA had expired.

18. As regards the question whether the law of limitation is a substantive law or a procedural law, the decision of the Supreme Court in *Thirumalai Chemicals Limited v. Union of India* is instructive. There it was explained that the procedural law establishes a mechanism for determining the rights and liabilities and machinery for enforcing them. It was categorically held that "right of appeal may be

a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation." It was categorically held that "unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective." The Court while discussing limitation further held that the "law of limitation is generally regarded as procedural and its object is not create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law."

19. The Law Commission of India in its 193rd report on 'Transnational Litigation - Conflict of Laws - Law of Limitation' discussed how in the context of expansion of international trade it has become necessary to take notice of the fundamental changes in the law of limitation in all common law countries. While recommending that India should adopt the

practice in civil law countries, it was pointed out that as of now the law of limitation was considered in India as part of the procedural law and not the substantive law.

20. In light of the above legal position, this Court rejects the contention of Argus that since the substantive law of the contract between the parties is Indian law, it is the ILA that would apply. The law of limitation being a procedural law would be part of the curial law, which in this case would be the law of seat of arbitration, i.e. the Malaysian law. This legal position is acknowledged even in Bharat Aluminium Co.

Applicable curial law is that of Malaysia

21. In the event for the purpose of the present petition the next question required to be considered is whether by virtue of seat of arbitration being Malaysia, the curial law would be the Malaysian law. While the substantive law is spelt out in the contract between the parties, the curial law concerning the procedure and the law of limitation would be a part of such procedure for enforcing the rights and obligations of the parties.

22. In Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. (1993) AC 334 it was held that in the absence of an explicit choice of a curial law, the inference is that the parties when contracting to arbitrate in a

particular place "consented to having the arbitral process governed by the law of that place is irresistible." Article V(1)(d) of the New York Convention also states that an Award may be set aside by the Courts of the country where enforcement is sought if the arbitral procedure "was not in accordance with the agreement of the law of the country where the arbitration took place."

23. In *Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru* (1988) 1 Lloyd's Rep 116 (CA), it was held:

"All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (a) the law governing the substantive contract; (2) the law governing the agreement to arbitrate and the performance of that agreement; (3) the law governing the conduct of the arbitration. In the majority of the cases all three will be the same, but (1) will often be different from (2) and (3) and occasionally, but rarely, (2) may also differ from (3)."

24. The following observations of Mustill and Boyd have been relied upon by the Supreme Court in *Dozco India Private Limited v. Doosan Infracore Company Limited* (2011) 6 SCC 179 and *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* (1998) 1 SCC 305:

"there is a strong prima facie presumption that

the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings."

25. Likewise in Bharat Aluminium Co. it has been held that "the legal position that emerges from a conspectus of all the decisions, seems to be that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings."

26. In the instant case, the conclusion drawn by the learned Arbitrator that it is the MLA which would apply is perfectly plausible and consistent with the internationally accepted legal position which has been reaffirmed by the Constitution Bench of the Supreme Court in Bharat Aluminium Co. At this juncture it is necessary to note that the declaratory part of the decision in Bharat Aluminium Co., regarding the curial law in an international arbitration being that of the seat of arbitration is in line with the internationally accepted legal position which is what has been reiterated in the impugned Award. Therefore, even while Aargus' petition

under Section 34 is being considered on merits because of the prospective overruling of Bhatia International in Bharat Aluminium Co. the declaratory part of the latter decision makes it clear that the curial law in an international arbitration is that of the seat of arbitration and in the instant case it is the Malaysian law.

27. Once the ruling of the learned Arbitrator that it is the MLA that applies to NNR's claims is upheld, then obviously NNR's claims have rightly been held to be within limitation. The Court therefore does not consider it necessary to examine NNR's alternative plea that even if the ILA is held to apply, its claims would not be barred by limitation."

(Emphasis is mine)

19. In the instant case, the matter stands on a higher footing, as parties in the agreement itself, provided, that the seat of arbitration would be Singapore. Quite clearly, curial law would be the law of the seat of arbitration, which is Singapore.

20. Therefore, once it is accepted that the law of limitation would be the Singaporean law, as has also been

ruled by the learned Arbitrator, the next tertiary issue which would arise for consideration would be: Would such a conclusion, lead to violation of the public policy in India.

20.1. This question can be answered in two ways. First, that since, one has concluded that the Indian Law of Limitation would not apply, there could be no question of violation of Public Policy of India.

20.2. Second, which is a reasoning that flows from the first conclusion - that a claim awarded contrary to the period of limitation, prescribed under the Indian Limitation Act could, at best, be termed in the given situation, as an infraction of an Indian Legislation, and that such infraction, would, necessarily, not, impinge upon the fundamental policy of India. As was observed in Renusagar's case, which was cited with approval in Shri Lal Mahal, **"contravention of law alone will not attract the bar of public policy and something more than contravention of law is required"**.

20.3. Once it is held that, in the given facts, Singaporean law of limitation would apply, then the breach, if any, of the Indian Limitation Act, would be a contravention of a procedural law, which would not

necessarily, as indicated above, impinge upon the fundamental policy of India.

20.4. The Supreme Court in the case of **Shri Lal Mahal's case** noticed its own decisions in **ONGC Ltd. V. Saw Pipes** - [(2003) 5 SCC 705] and **Renusagar Power Company V. General Electric Company** - [(1994 Supp (1) SCC 644)]. The Court, in **Shri Lal Mahal's case** made a distinction between the width and amplitude of the concept : "public policy of India", when applied to actions filed under Section 34 of the 1996 Act to set aside a domestic award and, the scope of the said concept, when, applied in context of examination of objections to a foreign award, filed under Section 48 of the 1996 Act. The Court, clearly held that the expression "public policy of India", when, applied in the context of Section 48(2) (b) of the 1996 Act, had to be given a narrower meaning, as against a situation, which arises in the context of a challenge to the award under Section 34 of the 1996 Act.

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20.5. The rationale advanced, was that, a Section 34 Petition is instituted, at stage, prior to an award, morphing into an executable decree, while, Section 48

objection is preferred, to keep at bay enforcement of a foreign award, which is treated, at par with a decree.

20.6. The Court, in **Shri Lal Mahal's case**, ultimately, upheld the dicta laid down in its earlier judgment in **Renusagar Power Company V. General Electric Company - 1994 Supp(1) SCC 644**, which adumbrated that public policy in the context of foreign award has to be viewed in a narrower sense, and that, in order to attract the bar of public policy qua enforcement of a foreign award, it must invoke something more than just a mere violation of the law of India.

20.7. The observations of the Supreme Court in this context are set forth below, for the sake convenience:

"23. Of the many questions framed for determination, the two questions under consideration were; one, "Does **Section 7(1)(b)(ii)** of the Foreign Awards Act preclude enforcement of the award of the Arbitral Tribunal, GAFTA for the reason that the said award is contrary to the public policy of the State of New York?" and the other "what is meant by public policy in **Section 7(1)(b)(ii)** of the Foreign Awards Act?". This Court held that the words "public policy" used in **Section 7(1)(b)(ii)**

of the Foreign Awards Act meant public policy of India. The argument that the recognition and enforcement of the award of the Arbitral Tribunal, GAFTA can be questioned on the ground that it is contrary to the public policy of the State of New York was negated. A clear and fine distinction was drawn by this Court while applying the rule of public policy between a matter governed by domestic laws and a matter involving conflict of laws. It has been held in unambiguous terms 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 cases involving a foreign element than when purely municipal legal issues are involved.

24. Explaining the concept of "public policy" vis-à-vis the enforcement of foreign awards in *Renusagar*, this Court in paras 65 and 66 (pgs. 681-682) of the Report stated:

65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I (e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1)

of the Protocol & Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

(emphasis supplied)

25. In *Saw Pipes*, the ambit and scope of the court's jurisdiction under Section 34 of the 1996 Act was under consideration. The issue was whether the court would have jurisdiction under Section 34 to set aside an award passed by the Arbitral Tribunal, GAFTA which was patently

illegal or in contravention of the provisions of the 1996 Act or any other substantive law governing the parties or was against the terms of the contract. This Court considered the meaning that could be assigned to the phrase "public policy of India" occurring in [Section 34\(2\)\(b\)\(ii\)](#). Alive to the subtle distinction in the concept of 'enforcement of the award' and 'jurisdiction of the court in setting aside the award' and the decision of this Court in *Renusagar*, this Court held in *Saw Pipes* that the term "public policy of India" in [Section 34](#) was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it becomes final. Having that distinction in view, with regard to [Section 34](#) this Court said that the expression "public policy of India" was required to be given a wider meaning. Accordingly, for the purposes of [Section 34](#), this Court added a new category - patent illegality - for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against public policy. Award could also be set

aside if it was so unfair and unreasonable that it shocks the conscience of the court.

26.....

27. In our view, what has been stated by this Court in Renuagar³ 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 the 1996 Act. In Renuagar³ it has been expressly expounded that the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression "public policy" used in Section 7(1)(b)(ii) was held to mean "public policy of India". A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in Renuagar. For all this there is no reason why Renuagar should not apply as regards the scope of inquiry under Section 48(2)(b). Following Renuagar, we think that for the purposes of Section 48(2)(b), the expression "public policy of India" must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the three categories enumerated in Renuagar. 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, in our view, 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. "

(emphasis is mine)

20.8. It must be noted, that the Supreme Court, as a matter of fact, overruled in the said judgment, a view taken by a two Judge Bench of that very Court in **Phulchand Exports Ltd. V. O.O.O.Patriot - (2011) 10 SCC 300**, wherein the width and scope of the expression " public policy of India" found under Section 48(2)(b) of the 1996 Act and Section 34 of the 1996 Act was put at par.

21. Having regard to the ratio laid down by the Supreme Court in **Shri Lal's case (cited supra)**, it is clear that the objection to the enforcement of a foreign award, on the ground that it is contrary to the public policy of India would be upheld, only if, the award is contrary to i) fundamental policy of India; ii) the interest of India and iii) justice and morality.

21.1. In the instant case, the objections articulated clearly do not fall foul of the head, the fundamental policy

of India, for the reasons given above.

21.2. The other two subsidiary grounds, i.e., interest of India or, even justice and morality, were neither argued nor, are they available to the respondent, in the context of the present case.

22. Furthermore, the conclusion reached by the learned Arbitrator that the Singapore Limitation Act would apply, can, at worst be said to be a plausible view, though, in my opinion, it is the correct conclusion given the facts obtaining the present case. Thus, in my view, it cannot be said that the impugned award is violative of the fundamental policy of Indian law, if the test of plausible view is applied.

23. In view of the above, the objection raised on this score, on behalf of the respondent, has to be rejected, as being untenable. It is held accordingly.

24. This brings me to the other ground of challenge, which is, that the, Arbitrator, in awarding claims, in respect of teleport and occasional services, had stepped out of the periphery, i.e., the jurisdiction prescribed for him by the agreement.

25. In respect of this objection, the argument advanced by the petitioner's counsel, that the respondent, had not,

raised this objection till such time closing submissions were propounded on behalf of the respondent, before the Arbitrator, appears to be correct.

25.1. The reason, that, I am persuaded to come to this conclusion is based on a perusal of the defence statement filed before the learned Arbitrator. A perusal of the defence statement would show that the only objection which the respondent had raised, vis-a-vis, jurisdiction, was pivoted on the applicability of the laws of limitation, i.e., whether the Indian Law of Limitation or, the Singaporean Law of Limitation would apply in the given circumstances. Insofar as the claims made by the petitioner with regard to teleport and occasional services were concerned, it was simply stated by the respondent, in paragraph 5 of its statement of defence, that, all payments had been made, and therefore, nothing more was due and outstanding. There was no assertion made that the demand of payment qua the said services was outside the realm of the agreement obtaining between the parties.

25.2. This aspect is evident, when, one reads the pleadings holistically.

26. The learned Arbitrator in his award in paragraph

Nos.36 and 37, in my view, has correctly taken the same view, which is borne out by the following observations:

" 36. The Tribunal agrees with the Claimant that the jurisdiction of the Arbitrator was never raised prior to the Respondent's closing submission despite the Tribunal's effort to enquire and confirm their position during the oral hearing. Article 16(2) of the Model Law, is applicable to bar the Respondent's belated jurisdictional challenge, which reads:

" A plea that the tribunal does not have jurisdiction shall be raised no later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of an arbitrator. A plea that the tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified."

37. The Tribunal is of the opinion, since no explanation was ever provided for the Respondent's change of position, nor extension of time sought for the delay, in any event the delay in raising the plea is unjustified and thus the jurisdictional challenge should be rejected."

27. I must also record that, based on the evidence

placed, before the learned Arbitrator, he has, in fact, returned a finding of fact that variations were carried out qua the agreement, whereby, the petitioner had agreed, at the request of the respondent, to extend teleport and occasional services, to the respondent. Furthermore, based on the testimony of respondent's, witness No.1, Mr.M.Ravindran, the learned Arbitrator did come to the conclusion that teleport services were an integral part of the transponder services, i.e., the main agreement and that the issue pertaining to outstanding fees in respect of the three services, i.e., transponder services, teleport and occasional services, was discussed and, consequently, formed part of the two meetings held on 31.01.2006 and 02.08.2006. Findings to this effect are found in paragraph 38 of the award.

28. This brings me to the last aspect, which was raised before me, i.e., if the Indian Limitation Act were to apply, the claims made by the petitioner under the agreement were not sustainable, as it had been rendered null and void on account of expiry of period of limitation.

28.1. In this context, quite strangely, Section 45 of

the 1996 Act was sought to be taken recourse to by the counsel for the respondent. In my view, as has been correctly found by the learned Arbitrator, the Section obliges a judicial Authority to refer parties to Arbitration, unless it is found that such an agreement is either null and void or, inoperative or, incapable of being performed. This Section is, thus, pressed into service, when one of the contesting parties takes recourse to a remedy other than the remedy of arbitration contrary to the arbitration agreement obtaining between them. In such an eventuality, the party wishing to enforce the arbitration agreement, approaches the judicial authority, before whom the action is instituted by the opposite party, to refer the parties to arbitration. The party, which intends to continue its action before the concerned judicial authority can avoid being referred to arbitration, only if, it is able to satisfy the judicial authority that the arbitration agreement is either null and void or, inoperative or, incapable of being performed.

28.2. Frankly, given the scope of Section 45, to my mind, this argument was not available before the learned Arbitrator. However, since, in any event, such a submission

was made, the learned Arbitrator, evidently, dealt with the same and held that as the Singaporean law of limitation applied, the agreement, which was otherwise lawful and binding, was neither null and void, nor inoperative or incapable of being performed, within the meaning of Section 45 of the 1996 Act.

29. In my view, no fault can be found with the reasoning of the learned Arbitrator, and therefore, this submission, being misconceived, is also rejected.

30. Thus, having regard to the foregoing discussion, the submissions advanced by the respondent are rejected in their entirety.

31. The consequent result is that, the prayer made in the captioned petition will have to be allowed. It is ordered accordingly. Parties are, however, left to bear their own costs.

Sd/ R.S.A.J

26.10.2016

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//Certified to be a true copy//

Dated this the day of 2017

R.s/13.02.2017

COURT OFFICER

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