

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CR No.6519 of 2018(O&M)
Date of Decision: 02.08.2019**

Pari Agro Exports

....Petitioner

Versus

Soufflet Alimentaire and another

.....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Puneet Bali, Sr. Advocate with
Mr. Prateek Sodhi, Advocate
for the petitioner.

Mr. Akshay Bhan, Advocate Sr. Advocate with
Ms. Alka Sarin, Advocate,
Mr. Alok Mittal, Advocate and
Mr. Sushant Kareer, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. The present revision petition has been preferred by the petitioner against the order dated 31.08.2018 passed by Additional District Judge-cum-Commercial Court, Amritsar, vide which objections filed by the petitioner against the enforcement of foreign award dated 14.02.2014/07.05.2014 were dismissed.

[2]. Petitioner is a registered firm. Since June 2012, one Mr. J.P. Brun was in contact with the petitioner firm through its

managing partner/respondent No.2. Mr. J.P. Brun is a broker. He had been writing to the petitioner on various occasions *inter alia* raising queries for various types of rice including Brown Cargo Traditional Basmati Rice, Pusa Cargo Brown Basmati Rice, Ranbir Traditional Cargo Brown Basmati Rice etc. for exporting about 500 MT per month shipment from India for different quantities and for different periods. The dialogue between the broker Mr. J.P. Brun and the petitioner started and thereafter, culminated into exchange of certain E-mails. The details of E-mails as brought on record by both the parties are admitted communications.

[3]. E-mail dated 30.10.2012 at 12:34 PM sent by Mr. J.P. Brun was to the following effect:-

“On Tue, Oct 30, 2012 at 12:34 PM, JP BRUN <jp.brun@brunrice.com>wrote;

Dear Vaneet,

It was nice to meet you at Sial on the last day.

I hope you had a nice trip back.

**Could you please let me have your best offer for
Brown Pusa on C+F EU basis?**

As well as Traditional Brown?

Kind regards

Jean-Pierre Brun

Marius Brun et Fils-Arles-France”

Vide the aforesaid E-mail, the broker wanted to know the best offer for Brown Pusa on C+F EU basis i.e. Eurofin Union (customer).

[4]. On 01.11.2012 at 13:12 PM, proforma respondent No.2 sent his quote and market report on Pusa, Traditional Basmati Rice and Ranbir. He quoted price for Brown Cargo Traditional Basmati Rice as USD 1033 Cnf, for Pusa Cargo Brown Basmati Rice as USD 928 Cnf and for Ranbir Traditinoal Basmati Rice as USD 897 Cnf. The price was inclusive of market charges of Marlus Brun, freight charges, testing charges for Eurofin for Aflatoxin, Dna and pesticides testing etc. The terms of payment was 100% cash against documents. In regard to terms of payment, respondent No.2 conveyed that he would like to have DNB report from his bankers on the buyer to comment on the terms of payment of DA so that he can take EGCG cover on the buyer. It was also communicated in the context of sharing buyers information so as to process the other formalities.

[5]. On 18.11.2012, proforma respondent No.2 also communicated to Mr. J.P. Brun (broker) in the context of follow up after sending Basmati Price quotes. In order to explore possibility of working with the broker and giving best offers, earlier to the aforesaid E-mail, one E-mail was also sent on

14.11.2012 in confirmation of the price quote received by the broker and also to take further steps to move forward. On 22.11.2012, Mr. J.P. Brun (broker) sent an E-mail to respondent No.2 making some inquiry in respect of 2000 Mt of Brown Traditional Basmati new crop, Milled Traditional Basmati new crop, Brown Pusa Basmati new crop, Milled Pusa Basmati new crop about 240 MT per month from December until May 2013 in 20 containers in bulk, C+F Genova-I, including 1% commission payment at 60 days from B/L. Broker asked respondent No.2 to let him know his best prices. Respondent No.2 gave the quote for the aforesaid varieties of rice on 23.11.2012 to the broker. The prices quoted for different varieties were to the following effect:-

1. Brown Traditional Basmati New Crop USD 1200

CNF

2. Milled Traditional Basmati New Crop USD 1400

CNF

3. Brown Pusa Basmati New Crop USD 999 CNF

4. Milled Pusa Basmati New Crop USD 1195 CNF

Interest @ 1% per month was to be added to the cost for 60 days payment. Terms subject to Euler Herms Receivable Insurance and EGCG cover from India with DNB report.

[6]. On 29.11.2012, the broker disclosed that he had two customers interested to buy Pusa Brown i.e.

1. 500 MT/month from December until June, C+F Antwerp with 15 days demurrage free at destination and payment at 60 days from B/L date at 970 USD/MT C+F and

2. 10X 20 every 15 days from December until February, total about 1500 MT at a price of 950 USD/MT C+F Fos sur Mer-France, payment at 45 days from B/L date.

He also disclosed that both of the buyers are French Buyers 1st class industrial companies and are buying with a pre-shipment control on DNA, GMO, pesticides and microbiological testing holds in EU. Broker asked respondent No.2 to give his feedback so as to book the aforesaid buyers.

[7]. Thereafter, on 01.12.2012, respondent No.2 sent an E-mail to the broker quoting price for Pusa Cargo Basmati Rice to be USD 995 Cnf. so as to ask him to confirm as the prices were on increasing note. The reason was also given that the buyers are not able to confirm traditional crop with suppliers due to shortage. Buyers have suddenly shifted to Pusa in Eu and Saudi Arabia. In last four years, Pusa paddy has become expensive than 1121 paddy.

[8]. On 03.12.2012, Mr. J.P. Brun disclosed the name of buyer for the first time as Soufflet Alimentaire and sent communication in the format that the subject matter of the letter was concluded through their intermediary. In this letter, price was quoted as USD 985/MT. Column of price, packing, shipment, control, payment and general conditions are to the following effect:-

“Price: USD 985/MT (Nine hundred and eighty five US dollars per metric ton) cost and freight free out Antwerp-Belgium.

Goods to be custom cleared by the buyer.

All taxes and duties in India to be at sellers expenses.

All taxes and duties at destination to be at buyers expenses.

Packing: In bulk, in Polyliner per container.

Shipment: 500 MT per month from January until June 2013, from the origin, both months included.

Shipments could consists of 21X20' FLC per vessel min./max. And containers should have a 14 days free time at unload port, no transshipment.

Shipment should not take place prior to approval of the pre-shipment sample by the buyer.

Control: A pre-shipment sample will be withdrawn

by Eurofins-India. The sample will be sent to Eurofins-Germany for analysis (DNA, GMO, Aflatoxins and pesticides residues with one certificate for each analyse) at sellers expenses. According to the results, buyer will give his approval for the shipment.

Weight and quality to be final at point of loading at the origin at sellers expenses by Eurofins-India. A sample of the parcel loaded in the container will be sent to the buyer together with an analysis report issued by the supplier, to the buyer.

Payment: 100% payable (D/A) at 60 days from B/L date and against presentation at the buyer bank of the following documents in good order:

- Original commercial invoices;***
- Original full set of B/L <<Clean on board>>marked<<freight prepaid>and<<shipped on board>>;***
- In case B/L is marked<< to be shipped>>then seller will provide an original certificate from the shipping company stating that the containers have been shipped, the containers numbers, the name of the vessel, the sailing date, the ETA-Antwerp-Belgium;***
- Origin Certificate;***

- Phytosanitary Certificate;***
 - Loaded Weight Certificate issued by Eurofins-India;***
 - Quality certificate issued by Eurofins-India-or similar, including Aflatoxin test;***
 - Fumigation Certificate;***
 - Authenticity certificate from B stating that the rice is India Basmati valid for abatement, issued according to the EU regulation Nr 1548/2004 dated August 30th 2004;***
 - GMO free certificate issued by Eurofins.***
- All documents must be issued at buyers name and should make reference to the invoice number.***

General

conditions:All minor disputes will be settled in an amicable way by the broker between the two parties. Incograin contract No.12 adapted to containers. Eventual arbitration to take place in Paris. The clause of ownership reserve is laid on this present contract. French law to apply.”

Column of general conditions find mentioned about incograin contract No.12, asking respondent No.2 to sign, stamp and send the copy of contract confirmation after fulfilling the requirements.

[9]. On 07.12.2012 at 15:16, the contractor again sent an

E-mail to respondent No.2, asking him to complete, stamp, sign and return the documents needed by buyer. He also communicated few points i.e.

1) A representative pre-shipment sample should be withdrawn by Eurofins-India and sent to your Eurofins Germany for analysis

-Dna

-GMO (included promoter 35S (P35S) et le terminator NOS (Tnos)

-Aflatoxins

-Pesticides residues (included QuGC-MCD/FPD+QuICMS/MS)

2) All Eurofins analysis reports must bear a common reference like your commercial invoice N/or B/L or Lot N for traceability purposes.

3) Upon receipt of the copy the analysis reports and according the result, buyer will give his approval for shipment.

4) A sample of the parcel loaded in the container(s) will be sent to the buyer together with an analysis report issued by the seller.

5) Original analysis reports will have to be

couriered along with the rest of the documents.

[10]. In reply to the aforesaid E-mail dated 07.12.2012 at 15:16, respondent No.2 replied through E-mail dated 07.12.2012 at 15:24, communicating that he will go as per schedule mentioned. Whether schedule was in respect of sampling or subject matter of E-mail dated 03.12.2012 would be a debatable issue.

[11]. Thereafter, broker again issued E-mail dated 11.12.2012 to respondent No.2 in the context of contacting Eurofins-India to come and collect the representative pre-shipment sample for the first shipment. Since Mr. J.P. Brun was the common broker, therefore, respondent No.2 sent an E-mail to him on 16.12.2012 that his procurement team was trying hard to cover the crop according to the specifications given, but could not cover the crop as per specifications and therefore, he showed his apprehension that he will not like to load anything which was under specifications as he was facing lot of problem with chalkiness in crop for the said year. Chalkiness in Pusa was a major issue for the relevant year and the market area with less of chalkiness was commanding extra prices. The market volatility due to acute shortage on traditional and Pusa had forced the respondent No.2 to write the said E-mail. In this context, E-mail was sent to know revised calculations according

to market conditions, so that deal may go smoothly. It was projected case of speculative business which may result in gain or loss to either of the parties.

[12]. The broker then sent an E-mail to respondent No.2 on 19.12.2012 that the prices cannot be re-negotiated. E-mail was to the following effect:-

“Dear Vaneet,

To follow with our discussion yesterday and your below E-mail, I would like to confirm that either the price or the terms of payment of the contract with Soufflet are in force and cannot be renegotiated.

On the other side, and taken into the high level of chalky kernels that your procurement staff is finding on analysis of the new crop samples, it was decided to sent by express mail service (DHL, Fedex or similar) a representative sample to my office. This will enable us to compare the chalky and immature kernels found in our lab and eventually send the copy of the sample to the buyer or discuss with him a change in the chalky percentage, in order to avoid any commercial difficulties.

Please confirm the courier tracking number for the samply to avoid further delay.

Kind regards

Jean-Pieree Brun

Marius Brun et Fils-Arles-France”

[13]. Broker also sent E-mail on 21.01.2013, advising

respondent No.2 to immediately change his attitude and nominate some responsible person of the company to act on his behalf and also claimed that the contract was concluded on 03.12.2012. He even mailed factum of purchase of rice two months ago vide E-mail dated 22.01.2013. Thereafter, respondent No.2 issued intimation to the broker on 28.01.2013 communicating that it has become impossible for him to execute the supplies by giving reasons in view of facts borne on record. Broker then communicated to respondent No.2 that the buyer has decided to launch arbitration against the company of respondent No.2 by claiming that default was on behalf of respondent No.2. Petitioner company had responded to the E-mail and claimed that they had not concluded contract *inter se* the parties. Petitioner further explained that due to volatility in the rice industries, prices have gone up by more than 25% than what used to be in the month of December (first week 2012). There were some conversations between the broker and the petitioner through respondent No.2 and the broker issued threatening E-mail to the petitioner to take severe actions against the petitioner such as action with Director General of Foreign Trade, APEDA and All India Rice Exports Association and launch case in Paris.

[14]. In the E-mail dated 31.01.2013, it was again clarified by

the petitioner that there was no agreement between the parties and he had advised the broker not to push the things unnecessarily. Petitioner also showed his unwillingness to continue with the issue. The E-mail was responded by the broker by raising assertions. The broker again requested the petitioner to propose something. On 05.02.2013, the broker tried to involve the petitioner in a kind of transaction and he requested the petitioner to send him urgently a new proposal by Fax or E-mail to enable him to initiate the things with the buyer. Such E-mail was in contradiction to the E-mail sent by the broker wherein it was asserted that neither the price nor the terms were re-negotiable.

[15]. On 06.02.2013, the petitioner sent E-mail to the broker re-emphasizing that petitioner had never entered into any contract with him and there was no concluded contract at any point of time. There was re-assertion by the broker in the reply to the aforesaid E-mail that contract was concluded on 03.12.2012. On 08.02.2013, the petitioner again received E-mail from the broker that the owner of respondent No.1 will be visiting India with French President Mr. Francois Hollaride and he advised the petitioner to meet him and discuss further course of action. The petitioner met the Purchase and Sales Director of respondent No.1. Purchasing and Sales Director of respondent

No.1 gave a new proposal vide E-mail dated 26.02.2013 for continuing with the business. Respondent No.1 had offered a new price i.e. USD 1090 instead of 985 USD. E-mail dated 26.02.2013 was exchanged between the petitioner and respondent No.1 for the first time. The new proposal was not found to be feasible by the petitioner and the same was declined by the petitioner.

[16]. On 21.06.2013, a notice was received by the petitioner from respondent No.1, wherein it was stated that petitioner has defaulted in the contract and as such, respondent had raised an invoice for the difference between the market price and the alleged contract in order to compensate and the petitioner must pay the invoice amount before 28.06.2013. It was also informed that in the event of failure to pay the amount, respondent No.1 shall invoke the arbitration clause. Petitioner did not reply to the aforesaid E-mail.

[17]. Thereafter, notice from the Arbitral Tribunal was received by the petitioner to attend the hearing on 29.11.2013 in France. The said summons were replied by the petitioner by E-mail dated 23.10.2013 wherein it was re-emphasised that there was no concluded contract between the parties and invocation of arbitration clause did not arise. The Arbitral Tribunal assumed jurisdiction and proceeded with the arbitration proceedings and

delivered *ex parte* award on 14.02.2014 against the petitioner.

The award was passed originally in French language.

[18]. For perusal of this Court, purported original copy in French language and translated copy have been placed on record by respondent No.1 as Ex.BB and Ex.CC along with other documents of communication between the parties. The aforesaid copies are notarized copies by notary i.e. N.J.D' Monte, Greater Bombay, Registered No.359.

[19]. Respondent No.1 filed execution of the aforesaid *ex parte* foreign award. Petitioner received summons of execution from the Court at Amritsar and thereafter, filed objections against the enforcement of award. The petitioner took several objections in respect of maintainability of execution as there was no concluded contract between the parties.

[20]. Objections were contested by respondent No.1. In reply, respondent No.1 had placed copy of contract dated 03.12.2012 Ex.H. which has been placed on record as Ex.H by respondent No.1. In reply to the objections, translated copy of incograin contract was also placed. It has also been placed before this Court as Exhibit-I.

[21]. Additional District Judge-cum-Commercial Court, Amritsar vide the impugned order dated 31.08.2018 dismissed the objections.

[22]. Learned Senior Counsel for the petitioner vehemently submitted that Mr. J.P. Brun was the common broker between the parties. In the E-mail dated 03.12.2012, the broker faxed a draft contract wherein for the first time, name of respondent No.1 was disclosed as customer. In the past communication, query was for two customers. Further the quantity of rice required by respondent No.1, the quality thereof, as well as certain other terms and condition were mentioned. The aforesaid E-mail also contained a vague reference of certain eventual arbitration. The price was unilaterally mentioned as USD 985, whereas there was no agreed rate between the parties as the petitioner had already quoted his price as USD 995 Cnf. The draft dated 03.12.2012 cannot be treated to be a more than an offer to the petitioner. It would be relevant to note that at the footnote, the following recital was made:-

“P.S.:Please sign, stamp this contract and fax it back to us”.

The draft which was sent on 03.12.2012 did not bear seal and signatures of respondent No.1 company i.e. the alleged buyer. The incograin contract No.12 i.e. model contract was not sent along with the draft, nor the same was available to the petitioner at any point of time before filing of reply to the objections by respondent No.1. Only draft was sent without any

signature and accompanying letter. The broker unilaterally labeled the same to be a concluded contract between the parties.

[23]. In the E-mail dated 04.12.2012, the broker again insisted on signing, stamping and sending the copy to him. The aforesaid demand was again reiterated in another E-mail dated 07.12.2012 which would show that besides insisting on signing the contract, it was further stated that the petitioner was required to send a pre-shipment sample to Eurofins Germany for analysis of the same and on receipt of the copy of the analysis report, the buyer/respondent No.1 would give its approval for shipment.

[24]. Learned Senior Counsel for the petitioner further submitted that evidently besides the fact that the contract was not a concluded contract, conclusion of contract was further projected by the broker that was subject to approval of the samples by the buyer. Therefore, sending of the samples, obtaining analysis report from Eurofins Germany, GMO free certificate from Eurofins, various other clearances/approvals/certificates, approval of the same from buyer, were amongst various contingencies which clearly made and conclusively established that the contract was not a conclusive and concluded contract between the parties. E-mail

dated 07.12.2012 was replied by the petitioner on 07.12.2012 itself within few minutes, wherein in response to the mail of even date, following words were used ***“All good. Will go as per schedule mentioned”***. The aforesaid E-mail dated 07.12.2012 was sent by the petitioner at 9:24 AM and was in response to the E-mail dated 07.12.2012 of the broker which was received at 9:16 AM. The schedule mentioned therein was clearly intended to refer the schedule of the pre-shipment sample and in no way, could be said to refer the shipment(s) of rice. The intention was absolutely clear from the E-mail dated 07.12.2012 written by the broker wherein he stated that: ***“Upon receipt of the copy of the analysis reports and according to the results, buyer will give his approval for shipment”***. Therefore, the approval for the shipment would have been based only on the analysis report and the results received therein. Pre-shipment sample was never sent nor the testing report was ever obtained. Evidently, at no point of time, there had been an assurance or promise on behalf of the petitioner for the supply of shipment of rice. The supply could not have been dispatched without the approval of the sample by the buyer.

[25]. On 11.12.2012, the broker again sent an E-mail to the petitioner *inter alia* requesting for return of signed and stamped

copy of the contract. Petitioner replied to the aforesaid E-mail vide E-mail dated 17.12.2012 within 10 days, informing the broker that the crop according to the specifications given by him was difficult to be procured and the petitioner would not like to load anything of these specifications. Petitioner also communicated that the petitioner was facing lot of problem with chalkiness in crop in that particular year and the market area with less of chalkiness was commanding extra prices in that particular year. The problems were conveyed to the broker and asked him to re-work on the calculations according to market conditions so that petitioner may not be put in major cash loss. Even at that juncture, there was no communication between the petitioner and respondent No.1 as the communications were *inter se* the petitioner and the broker. The broker did not reply to the aforesaid E-mail of the petitioner till 19.12.2012 and thereafter, refused to re-negotiate the prices. He rather proposed that chalky percentage in the rice could be changed on discussion with the buyer. Thereafter, he wrote an E-mail dated 28.12.2012 to the petitioner mentioning that the sample has not been received. The writing of the aforesaid E-mail itself suggested that though the broker was very much alive to the earlier communication, but still pretended to play safe on non-existent contract.

[26]. Petitioner again received E-mail dated 09.01.2013 from the broker, wherein the petitioner was requested to send the documents without referring the request of the petitioner for re-working on calculations. In E-mail dated 11.01.2013, the broker again termed the contract to be a concluded contract and there was implied refusal to re-work on the schedule as was requested by the petitioner. Broker kept on sending the E-mails by alleging the contract to be concluded contract time and again and the petitioner kept on denying the same.

[27]. Learned Senior Counsel for the petitioner also pointed that one Mr. Rajesh Sharma on behalf of the petitioner even called Mr. J.P. Brun and expressed the difficulty on behalf of the petitioner in supplying the samples to respondent No.1. The broker vide E-mail dated 22.1.2013 had acknowledged the conversation and even stated that 'solutions' and 'suggestions/proposals' be given. The aforesaid fact itself made it evident that the stand taken by the broker on earlier occasion was false. There was no concluded contract between the parties. Broker further stated in a very cleversome design that buyer had even sold the rice in the super markets in France. The said statement was made with all *mala fide* design as the same was impossible and inconceivable that the rice (even the sample whereof had never been sent nor had the shipment

been approved by respondent No.1), had already been sold in the super market by respondent No.1. Such a contingency cannot be believed by any stretch of imagination. It was nothing but an intended fraud on behalf of broker.

[28]. The representative of the petitioner responded to the E-mail dated 29.01.2013 and made it clear that there was no concluded contract *inter se* the parties and further explained that due to volatility in the rice industries, the prices had gone up by more than 25% than what used to be in the month of December first week 2012. The quality of rice which respondent No.2 had discussed with the broker was very much chalky as no one would like to bear huge losses. The broker issued threatening E-mail to the petitioner for taking action in different Forums. Petitioner vide E-mail dated 31.01.2013 again clarified that there was no concluded contract between the parties and advised him not to push the things unnecessarily. Broker again responded to the E-mail dated 31.01.2013 by raising cosmetic grounds. Broker again requested the petitioner to propose something. On 05.02.2013, broker in a desperate attempt to drag the petitioner into some kind of transaction, requested the petitioner to send him urgently a new proposal by fax or E-mail that will enable him to initiate negotiations with the buyer/respondent No.1. The said E-mail was suggestive of the

fact that there was no concluded agreement in the past. The said E-mail even exposed the earlier stand of the broker. The alleged stand of the broker in the context of price and terms being non-negotiable, stood exposed to the hilt. The desperate attempt of the broker to induce the petitioner to enter into a contract with respondent No.1 remained futile and was only one way proceeding.

[29]. In the E-mail dated 06.02.2013, the petitioner re-emphasised that respondent No.2 never entered into any concluded contract with the broker. On 08.02.2013, even the broker issued an E-mail to the petitioner that respondent No.1 was visiting India with French President and he advised the petitioner to meet him and discuss the situation. Petitioner met Purchase and Sales Director of respondent No.1. On 26.02.2013, Purchasing and Sales Director of respondent No.1 gave a new proposal vide E-mail Dated 26.02.2013 for the business. The earlier claim of the broker in respect of non-negotiability of price and terms stood exposed. Even respondent No.1 had offered new price i.e. USD 1090 instead of 985 USD. E-mail dated 26.02.2013 was the only mail/exchanged between the petitioner and respondent No.1. The proposal was not found feasible by the petitioner and the petitioner declined the same. Thereafter, process of issuing notice before invoking alleged

arbitration started and that ultimately, resulted in passing of *ex parte* award against the petitioner.

[30]. Learned Senior Counsel for the petitioner further contended that the petitioner never signed, stamped and sealed any of the agreement with respondent No.1. Contract dated 03.12.2012 was vague and one sided and was subject to certain contingencies shown therein. A contract was required to be signed and stamped by the petitioner and thereafter, it was to be faxed back to the broker. Petitioner never signed and stamped the same. The identity of the buyer was disclosed for the first time in the E-mail dated 03.12.2012. The broker had claimed that the query was for two customers, however in the alleged contract dated 03.12.2012, only respondent No.1 was shown as buyer. Even the contract was not signed by respondent N.1 as no signature or stamp of respondent No.1 had appeared on the contract. Even he did not indicate any acceptance by respondent No.1. The copy of contract dated 03.12.2012 as produced as Ex.H on record, does not contain the words ***“P.S: Please sign, stamp this contract and fax it back to us”***. The aforesaid words have been deleted which have been duly reflected in actual copy which was supplied to the petitioner wherein in addition to the aforesaid words, seal of the notary did not appear. The column of brokerage was also not shown in

Ex.H. In the aforesaid alleged contract dated 03.12.2012, column of general conditions contained a vague reference of incograin contract No.12. Neither the copy of the aforesaid incograin contract No.12 was attached with the E-mail dated 03.12.2012, nor the copy of the same was ever supplied to the petitioner at any point of time. No such copy was supplied even before filing of objections by the petitioner. The award and incograin contract were in French language. The contract itself was subject to various contingencies.

[31]. Learned Senior Counsel for the petitioner also emphasised that there was no arbitration agreement *inter se* the parties even as per alleged agreement dated 03.12.2012. The reference to incograin contract No.12 cannot be treated to be separate agreement for arbitration. No such incograin contract was signed along with the alleged agreement dated 03.12.2012. The agreement did not contain any arbitration clause. The incograin contract was not signed by the parties, nor the letter of acceptance of incograin contract was issued by the petitioner. There was no arbitral clause in the agreement. The arbitral clause was only present in incograin and the incograin contract was not part of the agreement dated 03.12.2012 as the same was not accepted by the petitioner in any E-mail or communication between the parties. The general conditions of

contract dated 03.12.2012 had a vague reference of incograin contract No.12. Concededly, neither the copy of aforesaid model contract was annexed with the E-mail dated 03.12.2012, nor the copy thereof was supplied to the petitioner at any point of time. Incograin contract No.12 purportedly under its clause XXL provided for an arbitration before the *Chambre Arbitrale Internationale De Paris*. The contract dated 03.12.2012 did not contain any arbitration clause, nor any such clause was referred. The clause as referred by respondent No.1 was incorporated only in incograin. Petitioner never impliedly and expressly accepted or agreed to the arbitration in respect of any incograin contract as the same was never made available to the petitioner.

[32]. Learned Senior Counsel for the petitioner further submitted that arbitration agreement has to be distinct and separated from the contract. He also submitted that petitioner never had any access to the incograin contract. Even as per requirement of this incograin contract No.12, it has to be signed by the parties to confirm the agreement in writing or to provide due evidence of agreement by any other means. The access to the aforesaid agreement could have been made by members of Paris Grain Trade Association by putting member access with reference to login and password. The contract was published on

the website www.incograin.com or available from *Syndicat de Paris*. Since the petitioner was not member of the *Syndicat de Paris*/Paris Grain Trade Association, therefore, there was no occasion for the petitioner to have any access to incograin, nor the same was supplied by respondent No.1 before filing reply to the objections of the petitioner.

[33]. The first paragraph of Incograin contract reads as under:-

“1. Conclusion-Confirmation of Contract

A sale and a purchase are concluded when there is an agreement of intent between the parties.

Each contract is subject to the fiscal, customs and social legislation in force at the time of concluding the contract. Each subsequent modification is at the expense or for the benefit of the buyer.

Moreover, any commercial contract that refers to the Incograin Contract Forms (published on the website www.incograin.com or available from the Syndicat de Paris) shall be subject to the contract form in force on the date of signature of the contract.

The contract may be concluded verbally or in writing, but the contracting parties are strongly advised to confirm the agreement in writing or to provide due evidence of the agreement by any other means.

Any confirmation sent by broker on the basis of a firm order or a firm offer is binding on the ordering

or offering party, and said party may not subsequently apply any modification to said order/offer. In all cases, the written text must contain all agreed conditions.

On conclusion of the contract, the broker is liable to the principal for any misconduct or negligence on the part of the broker.

The broker must designate the counter-party on obtaining the agreement of the contracting parties. A counter-party may not subsequently be refused without valid reason. In all cases, any such refusal must be justified and notified immediately.

If the confirmation differs from the agreement reached, it may only be disputed by written message at the latest during the working day (9 a.m. to 5 p.m.) immediately following its receipt.

If the confirmations are issued at the same time, the confirmation of the broker or, in its absence, the confirmation of the seller shall have precedence, unless contested with good reasons and in writing within the same deadline as above. However, if a contract has been exchanged and signed by both parties, this document shall have precedence.”

The copy of English version of aforesaid Incograin Contract Form No.12 is shown to have been notarized from N.J.D' Monte, Greater Bombay, Registered No.359, Expiry date 05.05.2016, Government of Maharashtra.

[34]. By referring to **CR No.2471 of 2016** titled **National**

Alumunum Co. Ltd. Vs Subhash Infraengineers Pvt. Ltd.

and another, decided on 22.10.2016 and **Indowind Energy**

Ltd. Vs. Wescare (I) Ltd. and another, 2010(5) SCC 306,

learned Senior Counsel for the petitioner submitted that the term agreement in writing, as applicable to part II, has been defined in First Schedule of Article II of The Arbitration and Conciliation Act, 1996 (for short 'the Act'). The definition is much narrower than Section 7 of the Act. Reference can be made to **Virgoz Oils and Fats Pte Ltd. Vs. National Agricultural Co-operative Marketing Federation of India Ltd., 2017(3) R.A.J. 627 (Delhi High Court)**. It is conceded position that incograin model contract which as per respondent No.1 contained arbitration clause was never signed by the petitioner, nor the same was served upon the petitioner by way of exchange of letter/telegrams or other means of E-mails. It cannot be treated to be concluded arbitration agreement *inter se* the parties by any legally conceivable manner. The award rendered by the Tribunal in such a scenario would be a nullity.

[35]. In the absence of any valid contract for arbitration, enforcement under Section 49 of the Act can be refused. Incograin contract No.12 was never easily available. The English copy of incograin contract has been placed on record for the first time as Ex.I with the reply to the objections filed by

the petitioner. The aforesaid contract itself provides for its availability on www.incograin.com. The aforesaid website is in French language. It is accessible only to members of Paris Grain Trade Association. The confirmation of contract under the aforesaid incograin model contract provides that the contract form in force on the date of signature of the contract. It has been provided that the written text must contain all agreed conditions. Concededly, the contract was never signed, nor the agreed terms *inter se* the parties made part of the contract. Therefore, no valid arbitration agreement ever existed between the parties.

[36]. Learned Senior Counsel for the petitioner further submitted that the arbitral Tribunal had no jurisdiction and even if, the petitioner has not participated in the arbitral proceedings and failed to assail the award before Appellate Tribunal in France, there is no bar to challenge its enforceability in terms of Section 48 of the Act. Sections 47, 48 and 49 of the Act mandated that the Court in India has to satisfy itself qua the enforceability of the foreign award before allowing its execution. Foreign award *per se* cannot be deemed to be a decree of the Court and such award should satisfy compliance of Section 47 of the Act and Court is required to adjudicate the objections under Section 48 of the Act. It is only thereafter award can be

declared enforceable in terms of Section 49 of the Act.

[37]. Part II of the Act deals with Enforcement of Certain Foreign Award Chapter I New York Convention Awards. Section 44 (a) of the Act deals with foreign awards i.e. arbitral award on differences between persons arising out of legal relationships, whether contractual or not considered as commercial under the law in force in India, made on or after the 11th day of October, 1960- - in pursuance of an agreement in writing for arbitration to which the convention set forth in the First schedule applies. Articles II, III, IV and V of the First Schedule and Sections 47 and 48 of the Act of 1996 would give useful input to the controversy.

Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term "*agreement in writing*" shall include an arbitral clause in a contract or an arbitration

agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Articles. There shall not be imposed substantially more onerous conditions or higher: fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

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

29 (a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in Article II or a duly certified copy thereof.

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

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that-

- (a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or**
- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or**
- (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions (xi matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or**
- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the**

agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that-

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

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

[38]. In order to appreciate the controversy, Sections 47 and 48 of the Act are also reproduced hereasunder:-

“47. Evidence.—

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

- (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;***
- (b) the original agreement for arbitration or a duly certified copy thereof; and***
- (c) such evidence as may be necessary to prove that the award is a foreign award.***

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

[Explanation.-In this section and in the sections following in this Chapter, “Court” means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such

High Court.]

48. Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

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

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

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

be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

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

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

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

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

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

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

(i) the making of the award was induced or affected

by fraud or corruption or was in violation of Section 75 or Section 81; or

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

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

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

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

[39]. Evidently, perusal of the First Schedule Article II Sub Clause 2 would reveal that it is mandatory on the part of the Court to proceed with the requirement that agreement should be in writing or an arbitration agreement, signed by the parties or

contained in an exchange of letter of telegrams. Admittedly, no such agreement much less an arbitration agreement was signed by the parties. Besides an unilateral mail that too a draft of the contract was sent to the petitioner, there was not even a single mail, letter or other relevant document showing that the petitioner had ever impliedly or expressly agreed to and subjected itself to the jurisdiction of any arbitration in Paris. Arbitral Tribunal at Paris has illegally assumed jurisdiction and passed an *ex parte* award which is totally inexecutable in nature.

[40]. Compliance of Section 47 of the Act and satisfaction recorded thereunder would allow the Court to proceed further. It is only after satisfaction of compliance under Section 47 of the Act, the award can be declared to be enforceable under Section 49 of the Act. Unlike the domestic awards, the Court does not set aside the foreign award and merely tests the same qua its enforceability in terms of provisions of the Act. Learned Senior Counsel made a reference to **OMP No.223 of 2006** titled **Hindustan Petroleum Corporation Ltd. Vs. M/s Videocon Industries Ltd. and others** decided on 13.07.2012 by the Delhi High Court. Objections under Section 34 and 48 of the Act are distinct in nature. Under Section 48 of the Act, the Court does not set aside the award and only decides its enforceability,

whereas under Section 34 of the Act, the award can be set aside. Learned Senior Counsel also referred to **Gemini Bay Transcription Pvt. Ltd., Nagpur Vs. Integrated Sales Service Ltd. and others, 2018(3) RCR (Civil) 228 (FB) (Nagpur Bench) Bombay High Court** on the point that enforcement of the foreign award in terms of Section 49 of the Act is different than enforcement under Section 36 of the Act. Section 49 of the Act does not use the expression **“as if it were a decree of the Court”** as found in Section 36 of the Act.

[41]. Learned Senior Counsel for the petitioner also referred to **Marina World Shipping Corpn. Vs. Jindal Exports P. Limited, ILR (2007) Del 1294** decided by the Delhi High Court, wherein it was held that it is a statutory requirement that in order to rely upon a foreign award, the petitioner has to comply with and satisfy the requirements and conditions of Part-II, Chapter-I, particularly the provisions of Section 44 and Clause(2) of Article II of First Schedule, which require existence of an arbitration agreement in writing. A successful party in order to enforce and execute an award has to initiate legal proceeding as per conditions envisaged under Section 47 of the Act. The requirements as set out in Sections 47 and 48 of the Act are mandatory and are required to be complied with irrespective of the fact that an award has already been passed by a foreign

Court and no appeal has been preferred therefrom. Before ordering for execution, the Court has to examine whether or not the foreign award is enforceable. Without compliance of Section 47 of the Act seeking enforcement of award, there cannot be a legally enforceable award in favour of the award holder. The award holder is obliged to comply with Section 47 of the Act.

[42]. Learned Senior Counsel for the petitioner also referred to **Kalmart Systems (M) SDN BHD Vs. National Agricultural Co-operative Marketing Federation of India Ltd., 2015(14) RCR (Civil) 485 (Delhi High Court)** and submitted that if one were to have regard to para 2 of Article II of the New York Convention, an agreement in writing would include not only an arbitral clause in a contract or even an arbitration agreement signed by parties but also that which emerges out of exchange of letters and telegrams. Section 44 of the Act would require following ingredients to be satisfied:-

- (i) it should be an award pertaining to differences between persons arising out of legal relationships which, may or may not be contractual but, which are considered commercial under the law in force in India;**
- (ii) the legal relationship should pertain to a period on or after 11.10.1960;**

(iii) the award should be passed in pursuance of an agreement in writing to which the convention on recognition and enforcement of foreign arbitral award (hereinafter referred to New York Convention) as set out in the first Schedule to the Act applies; and

(iv) lastly, the award should be passed in one such territory which the Central Government based on the principles of reciprocity has declared to be a territory to which the New York Convention applies.

[43]. The award shall be qualified and considered as a foreign award if it satisfies the provisions of Act and comes within the definition provided under Section 44 of the Act. The First Schedule Article II Sub Clause 2 would show that it is a mandatory requirement that agreement should be in writing or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. It is an undisputed fact that no such agreement much less an arbitration agreement was signed by the parties. Unilateral mails sent as a draft of contract were not sufficient to constitute any enforceable agreement. There was not even a single mail/letter/document whereby the petitioner had ever expressly or impliedly agreed and subjected itself to the jurisdiction of arbitration at Paris. The award was ex

facie opposed to the public policy of India. There was patent non-compliance of Section 47 of the Act. It has been specifically mandated that the person applying for the enforceability of the award, if the award is in the foreign language, is required to produce an English translated copy thereof certified by diplomatic or consular agent of that country. In the present case, evidently, no such copy has been placed on record, rather the same is stamped by “*Vise ne VARIETUR sous le no.52508-1, Nicholas Hoogland, Expert-Traducteur*”. Pertinently the term VARIETUR in English language means the notary public. The Incograin Model Contract is in French language. In addition to the submission that the aforesaid contract was never served upon the petitioner and the same was not even placed on record at the time of institution of the execution, it is pertinent to note that the copy placed on record is certified and attested by a notary at Mumbai. As such, Section 47 of the Act has not been complied with.

[44]. Learned Senior Counsel for the petitioner further submitted that ratio of **P.E.C. Ltd. Vs. Austbulk Shipping SDN BHD (2019 (1) RCR Civil 77)** is not attracted for the reasons that the aforesaid judgment was rendered while considering the objection that certified arbitration agreement was not placed on record at the time of filing of the enforcement petition, although

the same had been placed on record at a later stage. In the said context, the Court observed that interpretation of word “shall” as “may” is restricted only to the initial stage of filing of the application and not thereafter and the Court felt that it was not necessary to adjudicate on this issue as the subject matter of this case did not relate to non-filing of the arbitration agreement during the enforcement proceedings. There was no dispute that the arbitration agreement has been brought on record by both the parties. Learned Senior Counsel for the petitioner further submitted that it is not the case that the entire scheme of Section 47 of the Act has been rendered nugatory by the aforesaid judgment. In the present case, neither the translated copy of award, nor the translated copy of the original agreement and nor the certified copies thereof, in terms of Section 47 of the Act have been placed on record.

[45]. Learned Senior Counsel for the petitioner also placed reliance upon **Civil Appeal No.4998 of 2009 (Supreme Court)** titled **Shin-Etsu Chemical Co. Ltd. Vs. Vindhya Telelinks Ltd. and others** decided on 27.03.2009 and contended that the words “right to appeal” refers to a right conferred either under the Constitution of India or under a statute to file an appeal to a higher Court against the judgment, decree or order of a lower Court, without having to first obtain any permission or leave. If

the Act does not contain any express bar against exercise of revisional power by the High Court provided exercise of such revisional power does not mitigate against giving effect to the provisions of the Arbitration Act, the revisional jurisdiction of the High Court under the Code or under any other statute shall not stand superseded under the Arbitration Act in the aforesaid scenario. He further referred to **Shyam Sunder Agarwal and Co. Vs. Union of India, 1996(2) SCC 132**. After the scope of revision under Section 115 was curtailed by Amended Act 46 of 1999 w.e.f 01.07.2002, the availability of even the remedy by invoking the supervisory jurisdiction under Article 227 of the Constitution of India has been considered as an adequate alternative remedy for the purposes of Article 136 of the constitution of India.

[46]. Learned Senior Counsel for the petitioner also referred to **C/SCA/737/2018** titled **State of Gujarat Vs. Union of India (DB) (Gujarat High Court)** decided on 07.05.2018 and contended that even in case of express bar of revision in Section 8 of The Commercial Courts Act, extraordinary supervisory jurisdiction under Article 227 of the Constitution of India is not affected. It was held after relying upon **L. Chandra Kumar Vs. Union of India and others, 1997 AIR SC 1125** that Section 8 of the Commercial Courts shall not affect the power of

High Court under Article 227 of the Constitution of India. However, the powers should be exercised very sparingly and in exceptional cases. Learned Senior Counsel for the petitioner also submitted that Article IV of the First Schedule requires that parties relying on New York Convention award must produce the duly authenticated original award or a duly certified copy of it or original agreement and duly certified copy of it. All the constituents are certification of these performances both in the context of act and New York Convention and therefore has a practical significance. Learned Senior Counsel for the petitioner also referred to **CWP No.4411 of 2018** titled **Shri Balaji Industrial Products Limited Vs. AIA Engineering Limited and others** decided on 02.07.2018, wherein the same proposition was held.

[47]. At last, learned Senior Counsel for the petitioner submitted that the Court below itself has placed reliance on E-mail dated 07.12.2012. The company of respondent No.1 and the broker was unbecoming of genuine party to the contract and the petition under Section 227 of the Constitution of India is maintainable as the petitioner cannot be held to be remediless even if, right to appeal to the petitioner has not been given in Section 50 of the Act.

[48]. Per contra, learned Senior Counsel for the respondents

submitted that Mr. J.P. Brun was a common broker who was to receive his commission of 1% of the price of the contract for his services. Petitioner had requested the broker for some contracts for the sale of rice. Relationship between them started from the year 2011 which is apparent from the E-mail dated 14.11.2011, wherein future course of action was suggested. E-mail dated 18.11.2011 sent by the petitioner was also in the context of expressing his eagerness to work with the broker. Thereafter, E-mail dated 30.10.2012 was sent by the broker, acknowledging the meeting with the petitioner in Sial to be nice and further sought a quote price from the petitioner in respect of Brown Pusa Rice on C&F EU basis. Petitioner replied to the aforesaid on 01.11.2012 and sent his quote. Petitioner was well aware that business was to take place at 100% cash against documents and sampling was to be done at the expense of the seller and had a mention about DNB report in order to show credit worthiness of the buyer. The exchange of E-mail is a matter of record. Petitioner sent his quote on 23.11.2012 wherein he again mentioned regarding EGCG cover from India with DNB report. On 29.11.2012, the broker sent an E-mail in respect of two French buyers to the petitioner suggesting that he was the common broker. Petitioner was aware that the shipment was subject to approval of sample and thereafter bill

of lading. The procedure was well known to the petitioner and thereafter, he had demanded DNB report of the buyer. E-mail dated 29.11.2012 was replied by the petitioner on 01.12.2012 with certain changes in the conditions as shown in the letter. On 03.12.2012, a contract was sent by the broker to the petitioner mentioning terms and conditions. The contract was claimed to be concluded contract at USD 985. Thereafter, pre-shipment sample was to be drawn at the expenses of seller and was to be sent to the buyer for approval. The payment was to be made 60 days from the bill of lading. All the conditions were also known to the petitioner as the petitioner had itself sent the same in its own quotation to the broker. It was proper on the part of the broker to reveal the name of the buyer just before conclusion of the contract. Earlier the name was kept confidential. Learned Senior Counsel for the respondent No.1 further submitted that respondent group has annual sales of 4.44 billion euros and that is why, the name was not disclosed to the petitioner at initial stage of process.

[49]. The general condition clause was also present in the contract dated 03.12.2012 wherein it was stated that-

“All minor disputes will be settled in an amicable way by the broker between the two parties. Incognain contract No.12 adapted to containers. Eventual arbitration

to take place in Paris. The clause of ownership reserve is laid on this present contract. French Law to apply”.

Reference to incograin contract made it clear that arbitration is to take place in Paris and French law will apply.

[50]. E-mail was sent to the petitioner on 04.12.2012 wherein it was stated that-

“Thank you very much for this contract concluded yesterday together. You will find a copy of the contract confirmation (please sign, stamp it and send it back to me), the buyers specs, the list of documents requested by the quality department of the buyer, as well as a supplier questioner that you need to fulfill and send back to us. My Assistant, Ms. Laurence Fluent, reading a copy will be able to assist you in all the steps of the contract follow up”.

[51]. Another E-mail was sent on 07.12.2012 by Ms. Laurence Fluent wherein it was again reiterated that the business had been concluded between the parties. E-mail sent by the petitioner on 07.12.2012 would show that he admitted everything to be good and further communicated that he will go as per schedule mentioned. In view of above, whatever was suggested and discussed was admitted by the petitioner and

thus contract was a concluded contract. E-mail dated 17.12.2012 sent by the petitioner was also suggestive of the fact that the factum of concluded contract was admitted and thereafter, the petitioner wanted to re-work on the details. Denial from the petitioner came for the first time only vide E-mail dated 29.01.2013, wherein the petitioner had shown its difficulty in executing the contract on volatile market prices. Non-signing of contract as per incograin contract No.12 did not make the condition of signature to be mandatory. As per incograin contract No.12,

“the contract may be concluded verbally or in writing, but the contracting parties are strongly advised to confirm the agreement in writing or to provide due evidence of the agreement by any other means.”

“If the confirmation differs from the agreement reached, it may only be disputed by written message at the latest during the working day (9.00 am to 5.00 pm) immediately following its receipt. Requirement of signature on contract as per Clause 1 of the Incograin Contract No.12 is merely directory in nature and not mandatory”.

[52]. Learned Senior Counsel for the respondents

vehemently submitted that it was a case of concluded contract between the parties. Petitioner had experienced in selling rice at international level and was aware that payment was to be made in cash against documents. Petitioner was also aware that shipment sample was to be signed by the seller on his own expenses which was further evident from the E-mail dated 01.11.2012. The contract dated 03.12.2012 was a concluded contract wherein terms and conditions were formulated and were duly accepted by the petitioner in E-mail dated 07.12.2012, when he replied that **“he will go as per schedule”**. Learned Senior Counsel for the respondents further submitted that contract was not required to be signed and the signature of the petitioner was not required as the acceptance in letter or telegram was valid as per Clause 2 of Article II of First Schedule of the Act. Petitioner sent its acceptance to the contract through E-mail dated 03.12.2012. E-mail being electronic mechanism would fall within the definition of letters and thus Article II would be applicable. There was no condition in incograin contract No.12 that an agreement between the parties should be mandatorily signed so as to construe the contract to be a valid concluded contract. Clause 1 of incograin contract No.12 provides that an agreement can be entered verbally or in writing. [53]. Learned Senior Counsel for the respondents also

referred to **Cetaco Sa Vs. Bombay Export International, 2003**

(3) KHLJ 311 to contend that a common broker if floats a contract between the parties, the same would be a concluded contract. Petitioner never appeared before the arbitral Tribunal in France and never took the aforesaid pleas before the competent Court in France before the award was passed. The agreement was concluded contract between the parties. The only remedy available with the petitioner was to challenge the findings of the arbitral Tribunal before the French Court. The conclusion of contract in view of French law is a question of fact and the same has been answered by the arbitral Tribunal. The validity of such question cannot be raised before this Court which has been assigned with the duty to enforce the said award. The award under the Act can only be challenged on the grounds mentioned in Section 48 of the Act and not on merits. The petitioner cannot challenge the validity of award.

[54]. Learned Senior Counsel for the respondents further relied upon **Inox Winds Ltd. Vs. M/s Thermocables Ltd., 2018** **(1) RCR (Civil) 552** to contend that general reference to a standard form of contract would be enough for incorporation of the arbitration clause. The validity of the arbitration clause cannot be doubted. The validity of agreement was a question to be decided on merits. This issue cannot be gone into at the time

of enforcement of award. Petitioner had never challenged the award of the arbitral Tribunal before the French Court as per French law, which was applicable to the agreement in question. The scope of Section 47 of the Act is very limited. Learned Senior Counsel for the respondents referred to **Civil Appeal No.5085 of 2013** arising out of **SLP(C) No.13721 of 2012** titled **Shri Lal Mahal Ltd. Vs. Progetto Grano Spa** decided on 03.07.2013 wherein it was held that the enforcement of award can be refused only within the parameters of Section 48 of the Act. Learned Senior Counsel for the respondents further submitted that the petitioner cannot raise objection under Section 47 of the Act for non-filing of the documents. Petitioner cannot raise any objection under Section 47 of the Act for refusing to grant enforcement of the award. By referring to **PEC Ltd. Vs. Austbulk Shipping SDN BHD, 2019(1) RCR (Civil) 77**, learned Senior Counsel for the respondents contended that Section 48 of the Act deals with the circumstances when enforcement of award can be refused, but the same does not include non-filing of documents as mentioned in Section 47 of the Act. An application for enforcement of foreign award can be rejected only on the grounds specified in Section 48 of the Act. Learned Senior Counsel also referred to exact meaning of the term VARIETUR which does not mean notary public, but the

same has latin phrase which means “that nothing has changed during the process of translation”. “**Traducteur Jure**” means “**Sworn Translator**”. Learned Senior Counsel for the respondents further submitted that Sworn Translator translated the award on 09.06.2014. Sworn translators are registered with the Court of Appeal in Paris, France and their names are publicly available and verifiable on a list maintained by the Ministry of Justice in France.

[55]. Learned Senior Counsel for the respondents further submitted that the petitioner cannot raise the ground under Section 48(2)(b) of the Act for the reason that the agreement was prior to the Amendment Act, 2016, which was in place prior to amendment. In the earlier unamended Act, public policy was defined to mean fraud or corruption only. Petitioner had not led any evidence to show as to how arbitral award was passed by fraud or corruption.

[56]. At last, learned Senior Counsel for the respondents submitted that petition under Article 227 of the Constitution of India is not maintainable in view of **Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil, 2010(8) SCC 329**, wherein it was held that the object of Article 227 is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory. Learned Senior

Counsel for the respondents submitted that new plea cannot be allowed to raise in exercise of powers under Article 227 of the Constitution of India. Petitioner cannot be allowed to lead any evidence on the issue which was not raised in the form of appeal before the competent Court in France. He also referred to **Union of India Vs. Ibrahim Uddin, (2012) 8 SCC 148** in the said context.

[57]. I have heard learned counsel for the parties and have also perused the material brought on record including the written submissions submitted by the parties.

[58]. Following points arise for consideration of this Court:-

1. Whether the agreement dated 03.12.2012 was a concluded contract?
2. Whether there was any arbitration agreement between the parties?
3. Whether the award passed by the arbitral Tribunal stood vitiated for want of jurisdiction?
4. Whether the award was unenforceable?
5. Whether the jurisdiction of the High Court under Article 227 of the Constitution of India can be invoked in the facts and circumstances of the case?
6. Whether the award was the result of fraud?

[59]. Perusal of the record would show that certain

contingencies were mentioned by the common broker while sending the draft copy of the agreement dated 03.12.2012. The copy of the draft was required to be signed and stamped by the petitioner and then, the same was to be faxed back. Admittedly, the agreement was neither signed, nor stamped by the petitioner. For the first time, name of respondent No.1 was disclosed as customer. Previous communications were suggestive of the fact that the query was for two customers. There was reference of some eventual arbitration in the communication. In the aforesaid agreement, price was unilaterally mentioned as USD 985 Cnf as against the price quoted by the petitioner as USD 995 Cnf. Even after 03.12.2012, the broker had been demanding that the contract be signed by the petitioner. Reference can be made to communications dated 04.12.2012, 07.12.2012, 09.01.2013 and 21.01.2013. Draft dated 03.12.2012 did not bear seal and signature of respondent No.1 (alleged buyer).

[60]. Perusal of Ex.H submitted by respondent No.1 in this Court would show that the same is not in consonance with the original E-mail, copy of which is attached by the petitioner as Annexure P3 in the petition. Copy of agreement as attached by respondent No.1 as Ex.H has the seal/stamp of respondent No.1. Words ***“P.S.:Please sign, stamp this contract and fax it***

back to us” were conspicuously deleted, whereas the same were very much present in the copy of original draft sent to the petitioner. There was no seal of notary in the original copy whereas in the copy Ex.H, the seal of notary appeared. Column of brokerage was also missing in Ex.H. In the column of general conditions, there was a vague reference of incograin contract No.12. Copy of aforesaid model contract was not annexed with this E-mail dated 03.12.2012, nor the same was made available to the petitioner at any point of time before filing of reply to the objections of respondent No.2. Only draft copy was sent without any signature and accompanying letter. There was no arbitration clause in the aforesaid draft E-mail dated 03.12.2012. Incograin contract No.12 was never signed by the petitioner, nor any letter of acceptance of incograin contract No.12 was written by the petitioner. Arbitration clause was only found in incograin contract No.12. Incograin contract No.12 was not part of draft E-mail dated 03.12.2012, nor the same was accepted by the petitioner by way of any subsequent communication through E-mail. Broker unilaterally labeled the draft E-mail dated 03.12.2012 as a concluded contract between the parties. The identity of the buyer was disclosed for the first time. In the E-mail dated 29.11.2012, the broker had claimed that query was for two customers, however, in the aforesaid draft dated 03.12.2012,

only respondent No.1 was shown as buyer. The draft did not contain signature/stamp of respondent No.1, however, the same was inserted in the copy of Ex.H produced by respondent No.1 besides other exhibits as part of set A in this Court. The copy also contained seal of notary as well as J.P. Brun common broker. The aforesaid characteristics as per last page of the copy attached by the petitioner in the petition were missing. Petitioner was never apprised of actual proposed terms and conditions governing the perpetrated contract. Contingencies were never answered by the petitioner. Petitioner was required to send pre-shipment samples to Eurofins-Germany for analysis of the same and upon receipt of the copy of analysis report, the buyer would have given his approval for shipment. In the E-mail dated 04.12.2012, the broker insisted on signing, stamping and sending the same to him. Even the same was reiterated in other E-mail dated 07.12.2012. The sending of samples, obtaining analysis report from Eurofins-Germany and GMO free certificate from Eurofins were the grounds besides other clearances from buyer. These pre-requisites clearly indicated that the contract was yet to be concluded between the parties and the same could not be labeled unilaterally by the broker as concluded contract.

[61]. In the event of rejection of sample, the petitioner was

not to deliver the goods as the same was subject to approval by the buyer. Mere sending of a draft of unsigned/unstamped agreement/contract would not have culminated in a concluded contract. The draft was never signed, stamped and sent by the petitioner. The draft was neither expressly nor impliedly accepted by the petitioner. E-mail dated 07.12.2012 was replied by the petitioner on 07.12.2012 even in few minutes in which response to E-mail of even date was made. Words ***“All good. Will go as per schedule mentioned”*** would remain explanatory inasmuch as that E-mail dated 07.12.2012 was sent by the petitioner at 9:24 AM in response to E-mail dated 07.12.2012 sent by the broker which was received at 9:16 AM. In the light of these two E-mails corresponding to each other, the aforesaid words would not advance any such conclusion that the schedule as mentioned in draft E-mail dated 03.12.2012 was admitted by the petitioner in any certain term. The schedule mentioned in the E-mail sent by the broker was intended to refer to the schedule of pre-shipment sample. The aforesaid mention in no terms could be considered to be a shipment of rice. The intentions were apparent from E-mail dated 07.12.2012 sent by the broker wherein he stated that ***“Upon receipt of the copy of the analysis reports and according to the results, buyer will give his approval for shipment”***. The approval of shipment

was contingent upon report of analysis and results therein. Pre-shipment samples were never sent, nor test report was obtained. At no point of time, there was an assurance or promise on behalf of the petitioner for supply of any shipment of rice. Even the supply could not have been made without approval of the buyer.

[62]. Perusal of the documents supplied by the respondents in the Court as Exs.A to E would indicate that the same have no concern with the controversy. The identity of the prospective buyer was not revealed, however, the petitioner had made a specific request for the same in Ex.B i.e. E-mail dated 01.11.2012 which was prior to 03.12.2012. The draft had been written to the petitioner on various occasions *inter alia* putting queries for different varieties of rice i.e. Brown Cargo Traditional Basmati Rice, Pusa Cargo Brown Basmati Rice and Ranbir Traditional Cargo Brown Basmati Rice. The aforesaid queries were in the context of different quantities and the period was also different. None of the aforesaid queries ever culminated in a concluded assignment.

[63]. On 11.12.2012, the broker again sent an E-mail to the petitioner, requiring him to sign and stamp the copy of contract. The reply submitted by the petitioner on 17.12.2012 suggested that there was difficulty in procurement due to chalkiness in the

crop for a particular year and there was rise in prices in that particular period. The problems were conveyed to the broker and asked him to re-work on the calculations according to market conditions. Even at that juncture, there was no communication between the petitioner and respondent No.1 as the communications were *inter se* the petitioner and the broker. The broker did not reply to the aforesaid E-mail dated 17.12.2012 till 19.12.2012 and thereafter, he refused to re-negotiate the price. On the other hand, he proposed that chalky percentage in the rice could be changed on discussion with the buyer. Thereafter, he wrote E-mail dated 28.12.2012 to the petitioner that the samples were not replied. The aforesaid writing of E-mail was suggestive of the fact that though the broker was very much in the knowledge of the earlier communication, but he still pretended to play on the safer side even on the basis of unconcluded contract. Thereafter, E-mail dated 09.01.2013 was received by the petitioner from the broker requiring him to send documents without referring to the request of the petitioner in respect of re-working of the calculations. In E-mail dated 11.01.2013, the broker again termed the contract to be a concluded contract and there was implied refusal to re-work the schedule as was requested by the petitioner.

[64]. Mr. Rajesh Sharma on behalf of the petitioner even

called Mr. J.P. Brun and expressed the difficulty on behalf of the petitioner in supplying the samples to respondent No.1. The broker vide E-mail dated 22.1.2013 had acknowledged the conversation and even stated that 'solutions' and 'suggestions/proposal' be given. Inviting solutions and proposals/suggestions would indicate that there was nothing concluded in prior point of time. The stand of the broker in the E-mail dated 22.01.2013 would throw everything to the wind and would expose the stand of the broker to the hilt. In the aforesaid E-mail, the broker had recited that the buyer had bought rice two months ago because he needed the same. He had sold the same in the meanwhile in super markets in France and relied totally on the petitioner to supply the rice. The aforesaid communication was not only *mala fide*, but the action was totally inconceivable. Samples were never sent to the broker/buyer nor any shipment was approved by the buyer. How the buyer had sold the rice in super markets was nothing but imagination and creation of the broker in order to pressurize the petitioner on a speculative communication. Such contingencies could not advance the case of the respondents in any manner. Respondent No.1 through his broker projected a false claim and had not come on record with clean hands. Petitioner again responded through E-mail dated 29.01.2013 that there was no

concluded contract between the parties due to volatility in rice industries where the prices had gone up. In subsequent E-mails also the petitioner clarified that there was no concluded contract between the parties and broker should not push the issue any more by way of any cosmetic grounds.

[65]. On 05.02.2013, broker in continuation of his desperate attempts requested the petitioner to send him urgently a new proposal in order to enable him to initiate negotiation with respondent No.1. This communication itself suggested that there was no concluded agreement between the parties in the past. This E-mail even exposed the earlier stand taken by the broker. This attempt was aimed to induce the petitioner to enter into a contract with respondent No.1, but the same remained unfruitful. In the E-mail dated 06.02.2013, the petitioner again reiterated that he never did any concluded contract. In the E-mail dated 08.02.2013, it was communicated to the petitioner that owner of respondent No.1 was visiting India with French President and he advised the petitioner to meet him and discuss the situation. Petitioner met Purchase and Sales Director of respondent No.1. Purchasing and Sales Director of respondent No.1 gave a new proposal vide E-mail dated 26.02.2013 for the business. Even respondent No.1 had offered a new price i.e. USD 1090 instead of 985 USD. This was the only E-

mail/exchange between the petitioner and the alleged buyer. Even this proposal was not found to be feasible by the petitioner and he declined the same. The aforesaid communication dated 08.02.2013 is one of the communication attached by the petitioner in the civil revision. Respondent No.1 while replying to the arguments of the petitioner admitted the E-mail dated 21.01.2013, 29.01.2013 and other E-mails, but has not referred to E-mail dated 08.02.2013. The aforesaid act was nothing, but concealment of material information which ought to have been shared by respondent No.1.

[66]. In the E-mail dated 06.02.2013, petitioner had also emphasized that respondent No.2 never entered into any concluded contract with the broker. The communication between the Purchasing and Sales Director of respondent No.1 and the petitioner was the subject matter of E-mail exchanged between the parties and thus cannot be denied. Even the respondents have not replied to the aforesaid fact in their written submissions.

[67]. In the light of aforesaid material on record, it can be concluded that there was no concluded contract between the parties. The broker was involved in a speculative business platform from where he could have launched the business on behalf of respondent No.1, but there was no concluded contract

with the petitioner.

[68]. The exchange of E-mails/communications after February 2013, were concealed by respondent No.1 while seeking enforcement of the award. The draft E-mail dated 03.12.2012 had reference of incograin contract No.12 in the general conditions, but there was no arbitration clause contained therein, nor any such clause was referred to in the draft E-mail dated 03.12.2012. The copy of incograin contract No.12 was not attached with the draft agreement dated 03.12.2012, nor the same was supplied at any point of time before reply to the objections filed by the petitioner before the executing Court. It was only in the reply to the objections in para No.3, it was disclosed that incograin contract No.12 was under Clause XXL provided for an arbitration before the *Chambre Arbitrale Internationale De Paris*. It was neither the claim of respondent No.1 that the draft E-mail dated 03.12.2012 contained arbitration clause, nor any clause was ever referred to. The clause as incorporated in incograin contract No.12 had different recital under which the same should have been signed by the parties. As per claim set up by respondent No.1, clause was incorporated in incograin contract No.12. The aforesaid fact clearly pointed out that the petitioner had never impliedly or expressly accepted or agreed to the arbitration as the clause

was never made available to the petitioner. The arbitration agreement has to be distinct agreement and the same has to be separated from the contract/agreement. The term agreement in writing as applicable in Clause 2 of Article II of First Schedule of the Act has narrower scope in terms of definition than Section 7 of the Act. Arbitration agreement need not to be signed by the parties and the same can be implemented if the same is exchanged by letters/telegrams or other means.

[69]. In the instant case, incograin model contract had an arbitration clause, but the same was neither signed by the petitioner, nor the same was ever served upon the petitioner by way of any exchange of letter or telegram or exchange of E-mails. In the absence of any concluded arbitration agreement *inter se* the parties, the award passed on such alleged concluded agreement is a nullity in the eyes of law and Tribunal had no jurisdiction to arbitrate upon such an issue. The availability of incograin contract being a model contract on the website i.e. www.incograin.com would give rise to many questions to be answered by respondent No.1. The aforesaid website is in French language. The website is accessible only by the member of Paris Grain Trade Association. The copy of screenshot of the website was placed before this Court which clearly reflected non-access by any private persons to the

aforesaid website. In the heading of confirmation of contract in incograin model contract, it was mentioned that the contract form in force on the date of signature of the contract. The written text must contain all agreed conditions. Since the contract was never signed by the petitioner nor any terms agreed *inter se* the parties, therefore, there was no valid arbitration agreement between the parties on the strength of incograin contract No.12 which was vaguely recited in general conditions in the draft E-mail dated 03.12.2012.

[70]. The arbitral proceedings were initiated on the basis of unconcluded contract. There was no arbitration agreement draft dated 03.12.2012. The applicability of incograin contract No.12 was not attracted in view of nomenclature of the said model contract itself, therefore, arbitral Tribunal had no jurisdiction and the failure on the part of the petitioner to participate in the proceedings and further failure to assail the same before the Appellate Tribunal in France would not bar to challenge the enforceability of the award in India. The Court in India has to satisfy itself in respect of enforceability of a foreign award before allowing its execution. Sections 47, 48 and 49 of the Act have to be tested. The foreign award is not *per se* deemed to be a decree of the Court. The Court has to record its satisfaction in terms of Section 47 of the Act and to adjudicate the objections

raised by the judgment debtor of the award under Section 48 of the Act and thereafter, award would be deemed to be a decree of the Court. While dealing with the aforesaid issues, the Court would not set aside the foreign award, rather it merely tests its enforceability in terms of provisions of the Act.

[71]. In **Hindustan Petroleum Corporation Ltd.'s case (supra)** and **Gemini Bay Transcription Pvt. Ltd.'s case, Nagpur**, it was held that objections under Sections 48 of the Act without there being compliance of Section 47 of the Act by the decree holder were not held to be maintainable. Without compliance of Section 47 of the Act, the Court would not entertain defence against enforceability of the award. The award holder has to comply with the requirements of Section 47 of the Act. Objections under Sections 34 and 48 of the Act are different in character. Under Section 48 of the Act, the Court does not set aside the award, but only decides its enforceability, whereas under Section 34 of the Act, the award can be set aside. Enforceability of the award in terms of Section 36 is different than enforceability of foreign award under Section 49 of the Act.

[72]. In **Marina World Shipping Corpn.'s case (supra)**, it was held that it is a statutory requirement that the award holder should satisfy the requirements and conditions of Part-II, Chapter-I, particularly the provisions of Section 44 and Clause

(2) of Article II of First Schedule, which require existence of an arbitration agreement in writing. The award holder has to initiate legal proceedings in accordance with Section 47 of the Act. The requirements as set out in Sections 47 and 48 of the Act are mandatory and are required to be complied with irrespective of the fact that the award has been pronounced by a foreign Court and no appeal was preferred against the same. Para Nos.11, 12, 13, 14 and 18 of the aforesaid judgment are necessary to be quoted hereasunder:-

“11. During the course of arguments, counsel appearing for the respondent vehemently submitted that there is no arbitration agreement between the parties, which is signed by the parties and, therefore, it cannot be said that there is any debt, which is legally due and payable to the petitioner, nor the said alleged debt could be the subject matter of the present petition as no steps have been taken by the petitioner to prove and establish that the aforesaid award is enforceable.

12. It is a statutory requirement that in order to rely upon a foreign award, the petitioner has to comply with and satisfy the requirements and conditions of Part-II, Chapter-I, particularly, the provisions of

Section 44 and Clause (2) of Article-II of the First Schedule, which require existence of an arbitration agreement in writing. A successful party, in order to enforce and execute an award, has to initiate legal proceeding as envisaged under Section 47 of the Act.

13. A foreign award can be enforced under Chapter-II provided two basic norms are satisfied, namely, the parties have submitted to the arbitration by an agreement which is valid under its governing laws ; and the award is valid and final according to the law which governs the arbitration proceeding. It is also a requirement of law that a party seeking to enforce a foreign award has to make an application under Section 47 of the Act and the said application has to be accompanied by documentary evidence as mentioned in the said provision. This application for enforcement can be filed only by a party seeking enforcement of a foreign award, and not by a party which is resisting enforcement of the foreign award. Such an application also can only be filed before a Civil Court as defined in the Explanation, i.e., the principal Civil Court in the

district or the High Court exercising ordinary civil jurisdiction. The party as against whom a foreign award is sought to be enforced has a right to contest the enforcement on one or some of the defenses as mentioned in Clauses (a) to (c) of Sub-section 1 of Section 48 of the Act. The said party has to satisfy the court by furnishing proof to the court that one or more of the five conditions is attracted calling for refusal to enforce the foreign award. Under Sub-section (2) of [Section 48](#), the court can also and on its own refuse to enforce a foreign award, if any of the pre-conditions is not satisfied. Merely because a foreign award has not been set aside by a competent court/authority, it does not mean that the foreign award becomes automatically and immediately enforceable. The requirements as set out in [Sections 47](#) and [48](#) of the Act are mandatory and are required to be complied with irrespective of the fact that an award has already been passed by the court in England, and no appeal has been preferred there from.

14. In the matter of enforceability of a foreign award in India, the [Indian Arbitration Act](#) and not the

English Arbitration Act would govern. [Section 48](#) of the Act gives an independent right to any party to challenge and object to a foreign award when its enforcement is sought in India. These rights which are given to a party are not dependent on whether the losing party has challenged and questioned the award in the country of its origin. Therefore, under the English Arbitration Act, when an award is passed and no appeal is filed there from, it is binding on the parties in the country of its origin only. But the losing party has the right to resist the said award within the parameters laid down under [Sections 47](#) and [48](#) of the Act, as and when the said award is sought to be enforced in India. Therefore, failure to avail of or file any appeal under the English Arbitration Act would, in no manner, interfere with the rights of the respondent to challenge the legality of the award in this court on the grounds as set out in [Sections 47](#) and [48](#) when an effort is made to enforce the said award in India.

18. By filing the present petition in this court, the petitioner seeks to contend that there is already an adjudication of the debt by the arbitrator by giving

an award in favor of the petitioner and against the respondent, and as the debt is ascertained through adjudication, the same requires obedience and performance. Therefore, it is obvious that the petitioner sought for payment of the amount as awarded under the foreign award, which according to the petitioner, is a debt due and payable. The petitioner sought performance and obedience of the said alleged debt by giving a winding up notice and thereafter filing this petition by stating that as there was no performance or obedience of the award in terms of the notice, therefore, it should be deemed that there is neglect and refusal to pay the said amount. The question, therefore, is whether such action is permissible, particularly, when for seeking performance and enforcement of a foreign award, it is mandatory for the petitioner to follow the procedure prescribed under [Section 47, Arbitration Act](#). Even for holding that the award is binding on the parties, it must be held by the Court that the award is enforceable. Therefore, without first ascertaining and giving a decision as to whether or not the foreign award is enforceable, it

cannot be said that the same is a debt presently due and payable. In order to become a subject matter of winding up, it must be a debt ascertained, and payable in accordance with law, but so long as the debt although ascertained is not payable in accordance with law, the same cannot be a subject matter of a company petition, for a debt which is barred by limitation, although is ascertained, but is not payable in view of application of the provisions of the [Limitation Act](#). Similarly, a debt although ascertained, but is held to be not enforceable, cannot be said to be binding between the parties and, therefore, cannot be the subject matter of a company petition. It is also established that there is distinction between the enforcement of a foreign award and recognition of the same; and that it is mandatory for a party seeking enforcement of an award to move an application before the competent Civil Court wherein the opposite party could raise objections to the enforcement of a foreign award. Even if no such objection is raised, the Court has the obligation to examine and decide whether the condition mentioned in [Section 48\(2\)](#) of the

Arbitration Act is satisfied. Only where the court is so satisfied that the award is enforceable in India, then Only, the said award would be deemed to be a decree of the court. It is also held that a Company Court cannot adjudicate and decide the question of enforcement of a foreign award, and also whether or not the conditions for such enforcement are satisfied. The same is to be adjudicated upon and decided by a Civil Court in terms of the provision of Explanation to [Section 47](#) of the Act.”

[73]. Evidently, the application for enforcement of the award can only be filed by the award holder and not by the party who resisted the enforcement of the foreign award. Merely because the foreign award was not set aside by the competent Court in appeal, it does not mean that the foreign award automatically enforced. The requirements under Sections 47 and 48 of the Act are mandatory and are required to be complied with irrespective of the fact that the award has been passed by the foreign Court and no appeal was preferred there by the judgment debtor of the award. The rights conferred upon the party are not dependent upon the challenge or no challenge made to the award in the foreign country. In such eventuality, the award was binding only in that country, where the same was passed, but

the losing party has a right to resist the same within the parameters as laid down in Sections 47 and 48 of the Act when its enforceability comes to be questioned.

[74]. In view of above, there was no impediment in filing objections to the enforcement of award. In **Kalmart Systems (M) SDN BHD's case (supra)**, it was held that even if, the award was *ex parte*, the objections were maintainable against enforceability. In the absence of valid contract for arbitration, enforceability of the award under Section 49 of the Act can be refused. Section 44 of the Act would require following ingredients to be satisfied:-

- (i) it should be an award pertaining to differences between persons arising out of legal relationships which, may or may not be contractual but, which are considered commercial under the law in force in India;**
- (ii) the legal relationship should pertain to a period on or after 11.10.1960;**
- (iii) the award should be passed in pursuance of an agreement in writing to which the convention on recognition and enforcement of foreign arbitral award (hereinafter referred to New York Convention) as set out in the first Schedule to the**

Act applies; and

(iv) lastly, the award should be passed in one such territory which the Central Government based on the principles of reciprocity has declared to be a territory to which the New York Convention applies.

If the award has not satisfied ingredients of Section 44 of the Act, enforceability of the same can be denied under Section 49 of the Act.

[75]. The ratio of **P.E.C. Ltd. Vs. Austbulk Shipping SDN BHD's case (supra)** is distinguishable as the said judgment was rendered while considering the objections that certified arbitration agreement was not placed on record at the time of filing of the objections for enforcement of the award. Although the same was placed on record at a later stage. In that context, following observations were made in para No.21 of the judgment:

“21. Reading the word "shall" in Section 47 of the Act as "may" would only mean that a party applying for enforcement of the award need not necessarily produce before the Court a document mentioned therein "at the time of the application". We make it clear that the said interpretation of the word "shall" as "may" is restricted only to the initial stage of the filing of the application and not thereafter. It is clear from the decisions relied upon by the counsel for

the Appellant that Courts in certain jurisdictions have taken a strict view regarding the filing of the documents for enforcement of a foreign award. Courts in many other jurisdictions have taken the opposite view that the application for enforcement of the foreign awards does not warrant rejection for non-filing of the relevant documents including the award and the arbitral agreement. We need not adjudicate on this issue as the subject matter of this case does not relate to the non-filing of the arbitration agreement during the enforcement proceedings. There is no dispute that the arbitration agreement has been brought on record by both the parties.”

Since interpretation of word “shall” was restricted only to the initial stage, therefore, the Court did not adjudicate on the issue as the subject matter of the case was not relating to non-filing of arbitration agreement in the enforcement proceedings. There was no such dispute in the cited case that the arbitration agreement was not brought on record, rather the position was otherwise and the arbitration agreement was brought on record by both the parties in the cited case. The scheme of Section 47 of the Act has not rendered the requirements to be nugatory. Neither the translated copy of the award, nor the translated copy of original agreement of arbitration certified in accordance with law under Section 47 of the Act were placed on record.

[76]. On the basis of aforesaid reasonings, it can be concluded that the execution of award can only be held to be maintainable if the requirements of Sections 47 and 48 of the Act are complied with. It is only after holding the award to be enforceable, there should not be any delay in enforcing the same. The ratio of **Kandla Export Corporation and another Vs. M/s OCI Corporation and another, 2018(2) RCR (Civil) 283** can be explained in this manner. On the basis of interpretation attached to **P.E.C. Ltd. Vs. Austbulk Shipping SDN BHD's case (supra),** ratio of **S.B. Arbitration Application No.26 of 2017** titled **Maximus International General Trading LLC Vs. R.K. Industries** decided on 20.02.2019 has its application. The question of prejudice caused to the parties objecting to the enforcement of award cannot be ignored as the enforceability of award has to be tested at the threshold of requirements under Sections 47 and 48 of the Act.

[77]. In the instant case, since the award itself is based on unconcluded contract, therefore, requirements of Section 47 of the Act cannot be dispensed with particularly when original award or copy thereof, has not been authenticated in the manner as required by the law of the country in which it was made. Original agreement for arbitration or a duly certified copy

thereof, has not been filed. Respondents were legally required to produce translated English copy certified by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law enforced in India. Only a notarized copy has been produced that too on conflicting note viz-a-viz the copy attached by the petitioner or copy forming subject matter of Ex.H in the set A submitted by respondent No.1. The *differentia* is only the fact that there was no concluded contract in the present case. A void transaction cannot be given effect in terms of its enforceability without complying with the requirements of Sections 47 and 48 of the Act. The aforesaid distinction is the criteria which makes the present case distinct from the ratio of **Maximus International General Trading LLC's case (supra).**

[78]. For the reasons recorded hereinabove, aforesaid points No.2 to 4 are answered.

[79]. Under Section 50 of the Act, a remedy of an appeal is provided against the order refusing to refer the parties to arbitration under Section 45 of the Act and against the order refusing to enforce a foreign award under Section 48 of the Act, to the Court authorized by law to hear appeals from such order. Under Sub Section (2) of Section 50 of the Act, no second appeal shall lie from an order passed in appeal under this

Section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.

[80]. Perusal of the provision would show that right to appeal is available only in case of refusal to enforce a foreign award under Section 48 of the Act. In case of allowing enforcement of a foreign award, there is no right of appeal provided under the statute. It can be noticed under Section 48(2) of the Act that the enforcement of an arbitral award can be refused if the Court finds that the enforcement of award would be contrary to the public policy in India. Vide Act No.3 of 2016 (w.e.f. 23.10.2015). the explanation was amended. Earlier explanation was to the following effect:-

“Explanation:- Without prejudice to the generality of clause (b) of this sub Section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.”

After the amendment, Explanation Nos.1 and 2 have been added to the following effect:-

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

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or***
- (ii) it is in contravention with the fundamental policy of Indian law; or***
- (iii) it is in conflict with the most basic notions of morality or justice.***

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

[81]. In ***Shiv Shakti Coop. Housing Society, Nagpur Vs. M/s Swaraj Developers, 2003(2) RCR (Civil) 676 (SC)***, the Hon'ble Apex Court was dealing with the effect of amendment under Section 115 CPC which was made by Amendment Act No.46 of 1999 w.e.f. 01.07.2002. The consideration was on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceedings. If the answer is 'yes', then the revision is maintainable. On the contrary, if the answer is 'no', then the revision is not maintainable. If the order is of interim nature and does not finally decide the *lis*, the revision will not be maintainable. The Court held that even if, the revision is not maintainable, there cannot

be a bar on challenge being made under Article 227 of the Constitution of India if the order is found to be patently illegal and suffered with jurisdictional error or a manifest justice has been caused to the party which is not capable of correction at any later stage of proceedings. In **Surya Dev Rai Vs. Ram Chander Rai, 2004(1) RCR (Civil) 147 (SC)**, it was held by the Hon'ble Apex Court that supervisory jurisdiction of the High Court under Article 227 of the Constitution of India is to keep the subordinate Courts within their bounds. Jurisdiction of High Court to issue writ of *certiorari* under Article 226 of the Constitution of India and supervisory writs are almost the same. The scope of Article 227 of Constitution of India is much wider in exercise of supervisory jurisdiction over its subordinate Courts. Under Article 226 of the Constitution of India, the writ Court cannot substitute its own orders, whereas under Article 226 of the Constitution of India, it can pass and substitute any appropriate orders. Jurisdiction of the High Court under Article 226/227 of the Constitution of India cannot be tied down in a strait-jacket formula. Article 227 of the Constitution of India confers on every High Court the power of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction excepting any Court or Tribunal constituted by or under any law relating to the armed forces.

The power under Article 227 of the Constitution of India is wider in the sense that the power of superintendence is not subject to any technicalities of procedure or traditional fetters which are to be found in *certiorari* jurisdiction. Else the parameters invoking the exercise of power are almost similar. Proceedings under Article 226 of the Constitution of India are in exercise of the original jurisdiction of the High Court, whereas proceedings under Article 227 of the Constitution of India are not original but only supervisory. This power has to be exercised very sparingly and only in appropriate cases for the purpose of keeping the subordinate Courts and Tribunals within the bounds of their authority. This power can be exercised in cases of grave injustice or failure of justice such as when the Court or Tribunal has assumed a jurisdiction which it does not have, or has failed to exercise a jurisdiction which it does have, such failure has occasioned a failure of justice and when the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction. After dilating upon the amendment in Section 115 CPC, the Court held that the curtailment of revisional jurisdiction of the High Court does not take away the constitutional jurisdiction of the High Court to issue a writ of *certiorari* to a Civil Court nor the power of superintendence conferred on the High Court under Article 227

of the Constitution of India is taken away. However, the exercise of power under Article 227 of the Constitution of India is subject to rules of self discipline and practice.

[82]. The view expressed in aforesaid **Surya Dev Rai's case (supra)** was re-considered by the Hon'ble Apex Court in **Radhey Shyam and another Vs. Chhabi Nath and others, 2015(2) RCR (Civil) 606** and it was held that judicial orders of the Civil Courts are not amenable to a writ of certiorari under Article 226 of the Constitution of India. The scope of Article 227 of the Constitution of India is different from Article 226 of the Constitution of India. It was held that there are no precedents for the High Courts to issue writs to subordinate Courts. Control of working of subordinate Courts in dealing with their judicial orders is exercised by way of power of superintendence under Article 227 of the Constitution of India. To that extent, the view expressed in **Surya Dev Rai's case (supra)** was overruled and it was held that all Courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227 of the Constitution of India. Writ jurisdiction is constitutionally conferred on all High Courts.

[83]. In **Shri Balaji Industrial Products Limited's case (supra)**, the bar under Section 8 of the Act of 2015 and remedy of appeal as provided under Section 13 of the Act of 2015 were

considered. It was held that powers under Article 227 of the Constitution of India being in the nature of supervisory jurisdiction can be invoked despite bar provided under Section 8 of the Act of 2015 if it could be shown that the Commercial Court has exceeded its jurisdiction, committed a manifest error and gross injustice has been caused to the aggrieved party. This power has to be exercised very sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors.

[84]. In **L. Chandra Kumar's case (supra)**, Hon'ble Apex Court after considering the ratio of **Kesavananda Bharati Vs. State of Kerala, 1973(4) SCC 225** and **Minerva Mills Ltd. Vs. Union of India, 1980(3) SCC 625** held that power of judicial review over legislative action vested in the High Courts under Article 226 of the Constitution of India and in the Supreme Court under Article 32 of the Constitution of India is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted. The power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution.

[85]. Power of superintendence and the power of judicial review of the High Court under Article 226/227 of the Constitution of India cannot be taken away by law or even by constitutional amendment. Despite Section 8 of the Act of 2015 barring revision petition against any interlocutory order before the Commercial Court and Section 13 of the Act of 2015 confining appeals, apart from the final judgment, to the orders specifically enumerated under Order 43 CPC, there can be no impediment for exercising power of supervisory jurisdiction under Article 227 of the Constitution of India.

[86]. The view expressed by the Hon'ble Apex Court in **Sadhana Lodh Vs. National Insurance Company Limited, (2003) 3 SCC 524** in the context of amendment under Section 115 CPC was relied by the Hon'ble Apex Court in **Radhey Shyam and another's case (supra)** wherein the ratio of **Surya Dev Rai's case (supra)** was partly overruled to the extent of amenability of judicial orders of the Civil Courts in writ jurisdiction under Article 226 of the Constitution of India.

[87]. Section 8 of the Commercial Courts Act starts with *non-obstante* clause. The legislative intent becomes clear as the provisions contained under Section 8 of the Commercial Courts Act are mandatory in nature, however, owing to the ambit and scope of supervisory jurisdiction of the High Court under Article

227 of the Constitution of India, the Court can decide the *lis* on merits instead of maintainability of the revision petition.

[88]. Even otherwise, Section 48 of the Act provides a remedy of filing objections by the petitioner. A right has been given under the statute, where there is a right, there has to be a remedy to redress the grievance in case the Court has not exercised the jurisdiction vested in it. ***Ubi jus ibi remedium*** applies to the present case. When remedy is suspended in respect of infringement of Article 22 of the Constitution of India, the right thereunder also falls with it. Right and remedy are reciprocal in nature. There cannot be any right without a remedy and *vice versa*. Whenever there is a right, there has to be an action for its enforcement. There is no wrong without a remedy. Where there is a right, there is a Forum for its enforcement. It would be wrong to imagine a right without a remedy. The view expressed by the Hon'ble Apex Court in **Makhan Singh Tarsikka Vs. State of Punjab, 1964 AIR (SC) 381, Dhannalal Vs. Kalawatibai and others, 2002(2) RCR (Rent) 126** and **Civil Appeal Nos.361-362 of 2005** titled **Bhagwati Developers Private Ltd. Vs. The Peerless General Finance Investment Company Limited and others** decided on 04.04.2013 can be referred.

[89]. In view of discussions made hereinabove, I am of the

view that the revision petition under Article 227 of the Constitution of India is maintainable.

[90]. It is a settled principle of law on the strength of **S.P. Changalvaraya Naidu (dead) by LRs. Vs. Jagannath (dead) by LRs., 1994(1) RRR 253, Hamza Haji Vs. State of Kerala and another, 2006 AIR (SC) 3028, A.V. Papaya Sastry and others Vs. Government of A.P. and others, 2007(2) RCR (Civil) 431, Balwant Rai Tayal Vs. M/s Subhash Oil Company, Hisar through Shri Raghunath Sahai, 2003(2) RCR (Rent) 148, Ramesh Kumar and another Vs. Furu Ram and another, 2012(2) RCR (Civil) 720 and Smt. Badami (deceased) by her LR Vs. Bhali, 2013(1) RCR (Civil) 821** that fraud vitiates all solemn acts. The decision obtained on fraud has to be treated as a nullity by every Court whether superior or inferior and the same can be challenged in any Court even in collateral proceedings. A litigant who approaches the Court is bound to produce all documents executed by him which are relevant to litigation. Withholding of vital information/document in order to gain advantage would be a fraud on the Court as well as on the opposite party. Such person can be thrown out at any stage of litigation. Fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of other. Limitation starts from the date on which the fraud is

detected. Since the fraud vitiates everything, therefore, judgments and orders in hierarchy are also to be treated as nullity by every Court superior or inferior. Doctrine of merger and finality will not apply to such orders. Fraudulent acts can be recalled by *suo motu* exercise of revisional jurisdiction. A litigant is bound to produce on record relevant documents to the litigation. Withholding of the same to gain advantage on the other side would be a fraud on the Court as well as on the opposite party.

[91]. The detailed discussions on incograin contract No.12, disclosure of said model contract only in the reply to the objections under Section 48 of the Act, non-verification/non-certification of the translated copies of award by the competent authority, the apparent tampering in the draft agreement dated 03.12.2012 vis-a-vis copy attached by respondent No.1 in the list of documents as Ex.H in the High Court and non-disclosure of material information with regard to intended re-working on the agreement after 05.02.2013 when owner of respondent No.1 visited India with French President Mr. Francois Hollaride would bring the issue under the ambit of fraud and therefore, the controversy would be covered under original explanations to Section 48(2)(b) of the Act as well as explanation added vide Amendment Act No.3 of 2016. The award in any case is found

to be in conflict with public policy of India as the same was induced by a fraud. In view of this position, the orders passed by the Hon'ble Division Bench of this Court in TA-COM-1-2018, requiring the petitioner to furnish bank guarantee in order to test *bona fide* of the petitioner at that time, cannot be construed to be an impediment in declaring that the award is not enforceable under Section 48 of the Act. The stage before the Hon'ble Division Bench was a pre-cognizance stage. The controversy at that stage was only with regard to maintainability of the petition i.e. whether before the Commercial Court or before Commercial Division of the High Court. The dismissal/withdrawal of transfer application in my considered opinion would not take away right of the petitioner arising out of impugned order.

[92]. For the reasons recorded hereinabove, this revision petition is accepted. Impugned order dated 31.08.2018 passed by Additional District Judge-cum-Commercial Court, Amritsar is hereby set aside. Normal consequences to follow. All pending applications are accordingly disposed off in the light of order passed in main case.

02.08.2019

Prince

(RAJ MOHAN SINGH)
JUDGE**Whether reasoned/speaking****Yes/No****Whether reportable****Yes/No**