

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P.(EFA)(COMM.) 1/2017 & IA No. 680-681/2017, 5164-5167/2017, 5169/2017, 5171/2017, 7939/2017, 7957/2017, 12465/2017, 12471/2017, 12503/2017 & 12533/2017**

Reserved on: 14.12.2018
Date of decision : 02.05.2019

CAMPOS BROTHERS FARMS Decree Holder
Through: Mr.Tanmaya Mehta, Mr.Siddhant Kr. Singh, Mr.Raghav Wadhwa, Mr.Anurag Sahay & Ms.Mallika Bhatia, Advs.
versus

MATRU BHUMI SUPPLY CHAIN PVT. LIMITED & ORS. Judgment Debtors
Through: Mr.Jayant Mehta, Mr.Sulabh Rewari, Mr.Kaustav Saha & Ms.Drishti Harpalani, Advs. for R-1, R-3 to R-9
Mr.Amit Agrawal, Adv. for R-2.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioner under Sections 48 and 49 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking enforcement of a Foreign Award dated 25.07.2016 passed by the Sole Arbitrator under the Arbitration Rules of Combined Edible Nut Trade Association (CENTA), now known as The Nut Association(TNA).
2. The petitioner had entered into three Contracts with the respondent no.1 (being contract Nos.10377, 10413 and 10428) and one Agreement

with the respondent no.2 (being contract no.10529) for the sale of Non-Pareil In-shell Almonds(NPIS).

3. One of the conditions of the contract was that the parties agree to abide by the Uniform Almond Export Contract (UAEC 2007) terms and conditions.

4. UAEC 2007 in Clause 42 thereof provides for arbitration in accordance with the Arbitration Rules of CENTA. Clause 41 further provides for the contract to be governed by the English Law.

5. There were to be ten shipments in all under the contracts between the petitioner and the respondent no.1. Of these five were delivered: invoices for two of them were raised in the name of respondent no.1 and invoices for 3 were raised in the name of respondent no.2 at the request of respondent no.1. Three shipments were delivered at the port, however, respondent no.1 refused to take delivery thereof on account of fall in prices. Out of these, for one shipment the invoice was in the name of respondent no.2.

6. As far as the contract between the petitioner and respondent no.2 is concerned, there were supposed to be two shipments, out of which one was made, however, respondent no.2 refused to accept the same on account of fall in prices, while for the second one, the shipment was not made by the petitioner at the request of respondent no.2.

7. As the respondents did not pay the price for the quantity shipped and accepted by them and the petitioner claimed losses for the shipments

that were made but not accepted by the respondents and for the shipment that was cancelled, disputes arose between the parties.

8. I may only note that for the shipments that were made but not accepted by the respondent nos.1 and 2, the petitioner alleged that to mitigate its losses, the petitioner sold these shipments to a third party, however, before doing so a No Objection Certificate (NOC) was required to be issued by the respondent nos.1 and 2. Respondent nos.1 and 2 used this as a ransom and refused to issue the NOCs without payment of costs that they had allegedly incurred in relation to local taxes and import charges. Having been left with no alternative, the petitioner agreed to provide credit notes for such claims, on the condition that the respondent nos.1 and 2 will make full payment for the five shipments that they have taken possession of.

9. In the meantime, parties also entered into negotiations, with the respondent nos.1 and 2 admitting to a liability of USD 494,676 vide their e-mail dated 24.02.2016, whereas the petitioner replied vide e-mail dated 24.02.2016 stating that it would not settle for an amount lower than USD 675,000 to be paid immediately and the remaining differential between USD 844,367.01 and USD 675,000 being added to the price of NPIS to be shipped from 2016 crop.

10. As the parties could not arrive at a settlement, the petitioner sent separate legal notices both dated 26.02.2016 to the respondent nos.1 and 2 claiming USD 1,025,611.11 from respondent no. 1 and USD 223,930.09 from respondent no. 2.

11. Respondent nos.1 and 2, by their common reply dated 11.03.2016 refuted the claim of the petitioner for damages, while reiterating their liability to pay USD 494,676 for the shipments duly made and accepted by the respondents.

12. The petitioner vide two separate notices dated 23.03.2016, one in relation to the three contracts with respondent no. 1 and the other with respect to the one Contract with respondent no. 2, invoked arbitration in the respective contracts with respondent nos.1 and 2 making reference to the CENTA Rules and nominating its Arbitrator.

13. Respondent no.1, through its Advocate sent a reply dated 01.04.2016 denying the existence of the Arbitration Agreement between the parties on the ground that the shipments were made under the Purchase Orders which in their submission superseded the contracts.

14. The petitioner by its e-mail dated 04.04.2016, however, refuted the submissions of respondent nos.1 and 2 made vide their response dated 11.03.2016 and 01.04.2016 referred hereinabove, and reiterated its demand for arbitration.

15. The respondent nos.1 and 2 vide their e-mail dated 08.04.2016 jointly refuted the existence of the Arbitration Agreement reiterating that the terms of the Purchase Order would prevail over the contracts.

16. The petitioner, again vide its e-mail dated 19.04.2016 advised the respondents that as they did not appoint their Arbitrator, Ms.Sheryl Wheeler who had been nominated by the petitioner, shall be appointed as a Sole Arbitrator and they would be informing TNA accordingly.

17. By a separate communication dated 19.04.2016, the petitioner requested TNA to appoint Ms.Sheryl Wheeler as the Sole Arbitrator.

18. In response to the above request, TNA vide its letter dated 25.04.2016 sought a confirmation whether the dispute between the parties is one of technical nature rather than quality and further stated that it is being assumed that the contracts make specific reference for the disputes to be adjudicated in accordance with the terms and conditions and Arbitration Rules of TNA. They further stated that they would give further time to the respondents to appoint an Arbitrator and only if the respondents failed to do so, the Arbitrator appointed by the petitioner may act as a Sole Arbitrator. Most importantly, the letter stated that each contract should be regarded as the subject of a separate arbitration. TNA also requested the petitioner to supply full names, addresses, e-mail addresses and contact numbers for each of the parties involved in the dispute.

19. It seems that instead of replying to the above e-mail, the petitioner filed its Statement of Claim clubbing the claims against respondent no. 1 and 2 and under all the contracts together. The petitioner explained the reason for filing a common Statement of Claim as under:

“3.6 The Seller now brings its claims under one Statement of Case due to the fact that:

(a) The Buyers are both represented by Mr.Kumar Aggarwal, and are affiliated companies;

(b) The facts of the claims are inextricably linked;

(c) The First Buyer is in any event appointed as Agent on behalf of the Second Buyer; and

(d) The Buyers have already acted as joint respondents by appointing a single law firm to respond in a single letter to the Seller's legal representatives' Letters before Action.”

20. It is important to note that the Statement of Claim gave details of the contracts regarding respondent nos.1 and 2 separately, while making the following claim:

“7. Quantum

7.1 As a result of the Buyers’ breach of Contract set out above the Seller has to date incurred losses of \$1,155,111.17 made up as follows:

7.1.1 \$929,981.32 with respect to breaches by the First Buyer; and

7.1.2 \$225,129.85 with respect to breaches of contract by the Second Buyer.

7.2 The Seller further claims:

7.2.1 Interest at the Contract rate of 1.5% per month; and

7.2.2 Costs, to be assessed by the Tribunal.

8 Request

8.1 The Seller requests that it be awarded:

8.1.1 Damages of \$1,155,111.17

8.1.2 Interest to be assessed on the basis of 1.5% from the date of breach until the date of the Award and thereafter until payment is received in full by the Seller.

8.1.3 Costs.”

21. Though the respondent nos.1 and 2 did not file any reply to the Statement of Claim, by their e-mail dated 06.05.2016 addressed to TNA, respondent no.1 again refuted the existence of the Arbitration Agreement between the parties *inter alia* stating as under:

"3. In no uncertain terms it is stated that there is no agreement much less any understanding to submit to the arbitration, either under Uniform Almond Export Contract ("UAEC 2007") or under the Rules of Arbitration of the Combine Edible Nut Trade Association ("CENTA") which now form part of, and formally known as, The Nut Association ("TNA"), and the CENTA Rules have been formally adopted as the Rules of Arbitration of TNA ("TNA Rules").

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12. We are informed that Campos has yet not confirmed back to you that the alleged contracts relied upon by them for invoking the present arbitration under the CENTA/TNA Arbitration Rules; make specific reference that any disputes are to be conducted in accordance with the Terms and Conditions and Rules of arbitration and Appeal of The Nut Association. Further, the alleged invoked arbitration is itself wrong for it defies the acknowledgment of Campos that the quality of the goods was itself bad and not all was worth human consumption. In absence of any such confirmation by Campos, it is difficult to understand the urgency shown by the Campos in appointing their arbitrator and filing the alleged claims. It is nothing but an exercise to oppress us in coercing to their illegal claims and demands.

13. We are yet to receive any letter intimating us the opportunity of appointing the arbitrator for the alleged disputes. The Association in their letter dated 25th April 2016 states that '.... This Association does like to give all parties to a dispute every opportunity of appointing their arbitrator so we shall be writing to the other parties to encourage them to appoint their own arbitrator from our Panel.' We state that we have not received any letter from the Association, as so stated, however, the urgency and expediency shown by Campos in filing their alleged claims before their Arbitrator, before any such letter by the Association, shows pre-determined approach for the resolution of their disputes by their own nominee arbitrator. Campos is thrusting but their nominee arbitrator on us, which is nothing but seemingly a procured forum for a favourable award.

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16. Further, Campos seems to have allegedly filed a claim where they have raised numerous different alleged contracts in one arbitration claim. This, even as per the practice of the Terms and Conditions and Rules of arbitration and Appeal of The Nut Association is not maintainable. In that conspectus, the alleged claims of Campos cannot even otherwise be proceeded with further by you or the Learned Arbitrator.”

22. The respondent no.1 by its above e-mail also refuted the claim of the petitioner on merits.

23. TNA vide its e-mail dated 12.05.2016, without making any reference to the e-mail dated 06.05.2016 addressed by respondent no.1, called upon the respondent nos.1 and 2 to appoint their nominee Arbitrator by no later than 19.05.2016. The opening sentence of this e-mail is important and is reproduced hereinunder:

“We understand that a dispute between Campos Brothers Farms and Matru Bhumi Supply Chain Pvt Ltd and between Campos Brothers Farms and Indraprastha Ice & Cold Storage Pvt Ltd has arisen and that Campos Brothers Farms have taken these disputes to arbitration in accordance with the Nut Trade Association's (TNA previously Centa' s) Rules under which you contracted and that Campos Brothers Farms have appointed Ms Sheryl Wheeler as their duly appointed arbitrator.....” (Emphasis Supplied)

Therefore, TNA was treating it to be a case of two separate references.

24. The respondent nos.1 and 2 neither responded to the above e-mail nor appointed their nominee Arbitrator.

25. By an e-mail dated 07.06.2016, the Arbitrator called upon the petitioner and respondent no.1 to submit additional documents latest by 13.06.2016.

26. The respondent no.1 and 2 under cover of their separate e-mails both dated 13.06.2016, while reiterating that there is no Arbitration Agreement between the parties, called upon the Arbitrator to supply a complete set of documents filed by the petitioner before the Arbitrator, including any and all correspondences exchanged between the petitioner, TNA and the Arbitrator. They further requested the Arbitrator to decide the issue of jurisdiction as a preliminary issue. The respondent no.1 and 2 also made certain submissions on the merit of the claims filed by the petitioner, including giving a parawise reply to the Statement of Claim. They also filed the documents sought for by the Arbitrator.

27. The respondent no.1 by an email dated 22.06.2016 made further submissions against the claim of the petitioner, while stating that they had not received any response to the email dated 13.06.2016 including the documents exchanged between the petitioner, TNA and the Arbitrator. This was reiterated by the respondent no.1 in its further email dated 06.07.2016.

28. In the meantime, the Arbitrator by her email dated 27.06.2016 requested Mr. David Sunderland, head of TNA, for his opinion on whether she is bound to consider the material submitted by the respondent nos.1 and 2 separately beyond the time prescribed, which was 13.06.2016. It is important to note that the material she was referring to

was the email dated 22.06.2016 addressed on behalf of respondent no.2 to the Arbitrator.

29. Mr. David Sunderland in the reply dated 28.06.2016, advised the Arbitrator that while TNA encourages the parties to send in submissions so that the Arbitrator can provide a fair judgment, there has to be a time limit after which no further consideration will be given to any further documents that are received. He further advised that the Arbitrator can ignore the late submissions of respondent no.2.

30. This exchange of e-mails was only between the Arbitrator and Mr.David Sunderland and was not in the knowledge of the parties.

31. The respondent no.1 sent a further reply dated 13.07.2016 to the Arbitrator stating that in view of various settlement offers, the total amount claimed by the petitioner cannot be more than USD 620,650. The reply also enclosed an email dated 12.07.2016 from the petitioner offering settlement at USD 675,000 with no further deductions.

32. The Arbitrator by the Impugned Award has passed the following directions:

“THE AWARD

I award that the buyer(S) Matru Bhumi Supply Chanin PVT Limited (First Buyer)

And

Indraprastha Ice & Cold Storage PVT LTD(Second Buyer) to pay:

Invoice(s) for goods received not paid= \$844,367.01 USD

Contract 10377 Loss of proceeds due to market differential of resale

\$43,760.92

Contract 10529 Loss of proceeds due to market differential of resale

\$45,099.15

Loss of proceeds for cancelled shipment 45,000 inshell pound x \$3.75 lb (contract value) vs Inventory value November 2015 calculated at \$3.00 per inshell pound x 45000

\$33,750.00

Contract 10428 Loss of proceeds due to market differential of resale

\$41,853.39

*Total \$1,008,830.47
USD*

I further award interest of 1.5% to seller per month on starting 01 December 2015 through 15 July 2016, in the amount of \$118,675.76 USD

I further award that the fees are to be paid by the buyers as follows:

Association £2,000

Arbitrator \$12,960.00 USD”

33. Awarding the abovementioned amount, the Arbitrator states that the buyers/respondent nos.1 and 2 did not make the submissions by the required due date of 13.06.2016.

34. As far as the reasons for the Award are concerned, the Arbitrator states that the Purchase Orders, though not submitted, were in complete

agreement with the seller's/petitioner's contract(s) and such contracts were signed prior to the commencement of any shipment(s). She further holds that the shipments were as per the contracts and though respondent nos.1 and 2 received five loads, however, they failed to pay for the same; the respondent nos.1 and 2 also refused the delivery of four loads and cancelled the delivery of one load thereby being in default of the contract(s) and liable to pay damages caused by their default. The Arbitrator further found that the resale value claimed by the petitioner was fair and reasonable and in accordance with the market at that time.

35. Learned counsels for the respondent nos.1 and 2 submit that the Arbitrator has not considered the submissions of the respondents challenging the maintainability of the arbitration proceedings. They submit that the petitioner had raised such objections in various correspondences addressed not only to TNA but also to the Arbitrator herself. They submit that in the present case the contracts made reference to the UAEC 2007 Terms and Conditions. It may be true that the UAEC 2007 in turn, in Clause 42 thereof, provides for arbitration in accordance with the CENTA Arbitration Rules, however, as there is no specific reference to arbitration in the contracts nor was a specific reference made in the contracts to the CENTA Rules, it could not be presumed that the parties had agreed to have their disputes resolved through arbitration. They submit that infact, the CENTA Rules had been replaced by TNA Rules, which in any case make the arbitration proceedings not maintainable. In any case, this was a case of two tiered incorporation by reference and by such general incorporation an Arbitration Agreement

cannot be said to have come into existence between the parties. They made reference to the judgments of the Supreme Court in *Inox Wind Ltd. v. Thermocables Ltd.* (2018) 2 SCC 519; *Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729; *M.R. Engineers and Contractors v. Som Datt Builders*, (2009) 7 SCC 696 and *Habas Sinai v. Sometal*, [2010] EWCH 29 (Comm).

36. On the other hand, learned counsel for the petitioner submits that the only objection taken by the respondent nos.1 and 2 before TNA and the Arbitrator was that the parties were governed by the Purchase Orders and not by the contracts. There was no objection taken regarding the two tiered incorporation as is now sought to be contended before this Court. Before this Court the respondents have not argued that the Purchase Orders superseded the Contract.

37. I have considered the submissions made by the learned counsels for the parties. Though, it is correct that the respondents had primarily raised an objection on the maintainability of the arbitration proceedings contending that the Purchase Orders and not the Contracts governed the relationship between the parties (which has not been argued before this Court), at the same time, in their e-mail dated 06.05.2016 referred hereinabove, the respondent nos.1 and 2 also stated that there is no Agreement much less any understanding to submit to arbitration either under UAEC 2007 or under CENTA Arbitration Rules or under the Rules of TNA. From the Award it is not ascertainable that the Arbitrator was alive to the objections raised by the respondent nos.1 and 2. In fact, as noted hereinabove, the only reference to the respondents' submissions in

the Award is that the respondents failed to submit documents within the timeline mentioned in the e-mail dated 07.06.2016. I shall be dealing with this finding a little later.

38. Having said so, I shall, however examine the plea of the respondent nos.1 and 2 on merit. I would first note that the counsels for the respondent nos.1 and 2 have not argued their case on the basis of the Purchase orders superseding the Contracts or that the Contracts did not govern the relationship between the parties. As noted hereinabove, their only submission is that the Contracts provide for at best a two tiered reference and the same does not qualify as an Arbitration Agreement under Section 7 of the Act.

39. In my opinion, the submissions of the counsels for the respondent nos.1 and 2 in this regard have no force. The contracts clearly record that the parties would be bound by the UAEC 2007 Terms and Conditions, which in turn contains an Arbitration Agreement in form of Clause 42 thereof. The respondent nos.1 and 2 were dealing in almonds and these rules being special to the commodity, cannot be said to be unknown to the respondents. This was also not a plea taken before TNA or before the Arbitrator.

40. In *Inox Wind Ltd.* (supra), the Supreme Court has considered the difference in a general reference to an earlier contract and a general reference to a standard form contract and held that while a general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form contract would be enough for incorporation of the arbitration clause.

In the present case, the reference was to a standard Contract of a body which is applicable to the trade in question. Therefore, applying the ratio of the judgment of the Supreme Court in *Inox Wind Ltd.* (supra), it cannot be said that there was no Arbitration Agreement in existence between the parties, and on this ground the enforcement of the Award cannot be refused.

41. In *Duro Felguera* (Supra), the Supreme Court held that Section 7(5) of the Act requires a conscious acceptance of the arbitration Clause from another document as a part of their Contract, before such Arbitration Clause could be read as a part of the Contract between the parties. It was further held that the question whether or not the Arbitration Clause contained in another document is incorporated in the Contract, is always a question of construction of document in reference to intention of the parties. The terms of a Contract may have to be ascertained by reference to more than one document. The Court, however, on facts found that Original Package No. 4 tender document had been referred in the MoU therein only to have more clarity in technical and execution related matters and Arbitration Clause contained therein was not intended to be incorporated in the MoU. The finding of the Court, therefore, was on facts of the said case.

42. As far as *M.R. Engineers* (Supra) and *Habas Sinai* (Supra) are concerned, they have been considered by the Supreme Court in *Inox Wind Ltd.* (Supra) while highlighting the difference in cases of a general reference to an earlier Contract vis-a-vis a Standard Form Contract.

43. It is next contended by the counsels for the respondents that the Award passed by the Sole Arbitrator cannot be enforced as it has been passed in violation of the Principles of Natural Justice. In this regard they have drawn my reference to the Award to submit that the Arbitrator has not considered any of the submissions made by the respondents in their e-mails dated 08.04.2016, 06.05.2016, 13.06.2016, 22.06.2016, 06.07.2016 and 13.07.2016. Infact, in Item 11 of the Award, the Arbitrator records that the respondents did not make submissions by the required date of 13.06.2016. They submit that this is factually incorrect inasmuch as the respondents had made submissions by e-mail dated 13.06.2016, including submitting the Purchase Orders and other information as called for by the Arbitrator in her e-mail dated 07.06.2016. The respondents have drawn my attention to the acknowledgment receipt from the e-mail server of the Arbitrator acknowledging receipt of the e-mails dated 13.06.2016 of the respondents. The counsels submit that apart from making submissions on the absence of an Arbitration Agreement between the parties, the respondents had also raised objections regarding maintainability of a common claim against respondent nos. 1 and 2, they being separate corporate entities. The respondents had also made submissions on merits of the claim of the petitioner, while reserving their right to file further submissions on receipt of documents filed by the petitioner before the Arbitrator and TNA.

44. The learned counsels for the respondents submit that the Award passed in violation of the Principles of Natural Justice would be a nullity and against the public policy of India and therefore cannot be enforced.

45. On the other hand, the learned counsel for the petitioner submits that the only objection raised by the respondent nos. 1 and 2 in their e-mails dated 08.04.2016 and 06.05.2016 was one of maintainability of the arbitration proceedings in light of their submission that the Purchase Orders superseded the Contracts. This submission has not even been pressed by respondent nos. 1 and 2 before this Court and therefore, no grievance can be made for non consideration of these e-mails by the Arbitrator. He further submits that the respondents were merely trying to delay the arbitration proceedings. Relying upon Clause 3(b) of the Rules of Arbitration and Appeal of CENTA, he submits that the respondent nos. 1 and 2 were obliged to appoint their Arbitrator within 14 days of the nomination of the Arbitrator by the petitioner. In spite of repeated opportunities and extension of time being granted not only by the petitioner but also by TNA, the respondent nos. 1 and 2 chose not to appoint their nominee Arbitrator and now cannot be heard to complain about violation of Principles of Natural Justice.

46. The learned counsel for the petitioner further submits that Clause 6 of the Rules provides that the Award be made within 35 consecutive days of the agreement of Arbitrators to Act. Therefore, the Arbitrator had to act with expedition and cannot be faulted for having done so in the present case.

47. The learned counsel for the petitioner further submits that by the e-mail dated 07.06.2016, the Arbitrator had only sought certain additional documents from both the parties. The e-mail cannot be considered as granting further opportunity to the respondent nos. 1 and 2 to file detailed submissions on the merit of the claim and therefore, the same has been rightly excluded from consideration by the Arbitrator.

48. He places reliance on the judgment of this Court in ***LDK Solar HI-Tech (Suzuhou) Co. Ltd. v. Hindustan Clean Energy Ltd.***, MANU/DE/2327/2018; ***National Ability S.A. v. Tinna Oil & Chemicals Ltds. & Ors.***, MANU/DE/0920/2008; ***H.P. Transport Corpn. v. K.C. Rahi***, (2008) 11 SCC 502; ***City Montessori School v. State of U.P.***, (2009) 14 SCC 253 and ***Secretary, Andhra Pradesh Social Welfare Residential Educations Institutions v. Pingida Sridhar***, (2007) 13 SCC 352 to contend that in an international arbitration, prejudice has to be shown to have been caused by denial of the Principles of Natural Justice. He submits that in the present case, the Arbitrator has, after considering the correspondences exchanged between the parties, awarded amounts in favour of the petitioner on the basis of the Contracts. The Arbitrator has also reduced the claim of the petitioner based on the evidence led before her and therefore, the Award is reasonable and enforcement thereof cannot be refused only on the hyper technical ground of a proper hearing not being granted to the respondents.

49. I have considered the submissions made by the learned counsels for the parties. Sub-Section 1 and 2 of section 48 of the Act are reproduced hereinunder:-

“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—

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

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

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

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

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—

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

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.]”

50. As noted above, the respondent nos. 1 and 2 had raised a preliminary objection challenging the maintainability of the arbitration proceedings under the aegis of TNA. It may be true that they have not contended before this Court the basis on which they were challenging the maintainability of the proceedings either before the TNA or the Arbitrator, and have raised fresh ground for such challenge before this Court, at the same time, as noted above, at no time the TNA or the Arbitrator gave any finding on the maintainability of the arbitration proceedings.

51. The respondent nos. 1 and 2 had also sought complete documents and correspondences exchanged between the petitioner, TNA and the Arbitrator. This gains more significance as TNA vide its letter dated 25.04.2016 had sought a confirmation from the petitioner that the dispute

between the parties is one of a technical nature rather than quality and further that the Contracts make specific reference for the disputes to be adjudicated in accordance with the terms and conditions and arbitration rules of the TNA. The learned counsel for the petitioner has submitted that the petitioner had supplied a copy of its Statement of Claim to the respondent nos. 1 and 2 and therefore, it must be presumed that all such documents were in possession of respondent nos. 1 and 2. The fact, however, remains that neither the Arbitrator nor TNA ever responded to such requests of the respondent nos. 1 and 2 seeking such documents.

52. Most importantly, the Arbitrator has clearly proceeded on the basis that the respondent nos. 1 and 2 did not make any submissions by 13.06.2016. The counsel for the petitioner, however, could not rebut the submission of the counsels for the respondent nos.1 and 2 that by their e-mails dated 13.06.2016 they had indeed made submissions within the time granted by the Arbitrator. Receipt of these e-mails has been automatically acknowledged by the Arbitrator's e-mail server.

53. Alongwith these e-mails, the respondent nos. 1 and 2 had filed the documents/submissions as required by the Arbitrator. These included the Purchase Orders, which the Arbitrator in Item 17 of the Award states were not submitted. What would be the effect of such Purchase Orders, was for the arbitrator to have considered.

54. In any case, the respondent nos. 1 and 2 had also made submissions on merit before the Arbitrator. Though the learned counsel for the petitioner submitted that the same were rightly excluded from consideration by the Arbitrator as the Arbitrator had never sought for the

same, the Award does not reflect any such reason given by the Arbitrator for excluding them from consideration. The Arbitrator does not record a finding that she has intentionally ignored such submissions as they were filed belatedly or beyond what was permitted. Infact, as noted above, as per the Arbitrator no submission was filed by the respondents by 13.06.2016, which is factually incorrect.

55. In exercise of powers under Section 48 of the Act, this Court cannot consider the submissions made by the respondent nos. 1 and 2 in their e-mail dated 13.06.2016 on merit as if it is a Court of Original Jurisdiction and find out whether such submission of the respondent nos. 1 and 2 had any merit or not. Once it is found that the Arbitrator has ignored the submissions of a party in totality, whatever be the merit of the submissions, in my opinion, such Award cannot be enforced being in violation of the Principles of Natural Justice and contrary to the public policy of India as stated in sub-Section 2(b) read with Explanation 1(iii) of Section 48 of the Act.

56. The judgment of ***LDK Solar*** (Supra) cited by the counsel for the petitioner would have no application to the facts of the present case. In the said case, the applicant had sufficient notice of the date of the oral hearing before the Arbitral Tribunal. The only grievance was that due to change of date of hearing, the applicant could not produce its witness. The Court found that the applicant had been duly informed of the dates of hearing and therefore cannot be heard in making a grievance of the same.

57. In ***National Ability S.A.*** (Supra), the Court found that the arbitration proceedings had been conducted in accordance with the

established practice and procedure followed in England and therefore, the Award could not be said to be in violation of the Principles of Natural Justice. In the present case, the Arbitrator herself having granted time to the parties to file further documents till 13.06.2016, cannot ignore the same if filed within time. If the Arbitrator does not agree with the submissions made by the respondent nos. 1 and 2 on such documents, in terms of Clause 5 of the CENTA Arbitration Rules, she was obligated to give reasons for the same. Such reasons cannot be presumed or supplanted by this Court.

58. For similar reasons, the judgments in *H.P. Transport Corpn.* (Supra), *City Montessori School* (Supra) and *Pingida Sridhar* (Supra) would have no application to the facts of the present case as this Court cannot sit as a Court of Original Jurisdiction to decide the merits and demerits of the claim/defence set-up by the respondents. Infact, this Court is forbidden from looking into the merits of such submissions made.

59. The learned counsels for the respondents have further submitted that it is an admitted case that three separate Contracts had been executed between the petitioner and respondent no. 1 and one Contract had been executed between the petitioner and respondent no. 2. Each Contract contains an Arbitration Agreement, however, constitutes a separate transaction as well. Even otherwise, respondent nos. 1 and 2 are separate legal entities and therefore, a single arbitration for all these distinct Contracts and for separate parties, that is, respondent nos. 1 and 2, was

not maintainable. In this regard they have placed reliance on Clause 7 of the CENTA Arbitration Rules, which reads as under:-

“7. String Arbitrations

In the event of a contract forming a part of a string of contracts which are, in all materials points, identical in terms except as to date and price, any arbitration for quality and/or condition shall be held as between the first seller and the last buyer in the string as though they were contracting parties. Any award so made shall, subject to the right of appeal as provided in these Rules, be binding on all intermediate contracting parties in the string and may be enforced by any intermediate party against his immediate contracting party as though a separate award had been made under each contract.”

60. Counsels for the respondents submit that in terms of these Rules, only String Arbitrations could be consolidated, however, as the present case does not involve String Arbitrations, a joint statement of claim and consolidated proceedings were not maintainable.

61. They further place reliance on Section 35 of the English Arbitration Act, 1996, which reads as under:-

“35 Consolidation of proceedings and concurrent hearings.

(1) The parties are free to agree-

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

(b) that concurrent hearings shall be held.,

on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.”

62. They submit that consolidation of Arbitration proceedings can take place only with the consent of the parties and the Arbitral Tribunal has no power to order consolidation of proceedings or even concurrent hearing.

63. The counsels for the respondents further place reliance on the following judgments in support of their submissions:-

1. ***Lafarge Redlands Aggregate v Shepherd Hill Civil Engineering***, (2000) 1 WLR 1621, 1640;
2. ***Bay Hotel and Resort Limited v Cavalier Construction Ltd.***, (2001) UKPC 34; &
3. ***Duro Felguera v. Gangavaram Port Limited***, (2017) 9 SCC 729.

64. They further submit that the petitioner itself had issued two separate legal notices dated 26.02.2016 to respondent nos. 1 and 2. TNA also vide its letter dated 25.04.2016 had stated that each Contract will be regarded as the subject of a separate arbitration. In spite of this, the petitioner chose to file a consolidated statement of claim justifying it on the following submission:-

“3.6 The Seller now brings its claims under one Statement of Case due to the fact that:

- (a) The Buyers are both represented by Mr Kumar Aggarwal and are affiliated companies;*
- (b) The facts of the claims are inextricably linked;*

- (c) *The First Buyer is in any event appointed as Agent on behalf of the Second Buyer; and*
- (d) *The Buyers have already acted as joint respondents by appointing a single law firm to respond in a single letter to the Seller's legal representatives' Letters before Action."*

65. They submit that though the respondents objected to the consolidated statement of claim being filed, the Arbitrator did not consider the said submission and infact, has gone ahead and passed the Award making respondent nos. 1 and 2 jointly and severally liable for the awarded amounts. They submit that even otherwise, such a direction could not have been made by the Arbitrator as respondent nos. 1 and 2 are separate legal entities and can therefore, at best be made liable for their individual Contracts. Placing reliance on the judgments of this Court in ***Sudhir Gopi v. India Gandhi National Open University***, 2017 SCC OnLine Del 8345 and ***Balmer Lawrie & Company Ltd. v. Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals (P) Ltd.***, 2017 SCC OnLine Del 7519, they submit that the Arbitrator has no power to lift the corporate veil and impose a joint and several liability on respondent nos. 1 and 2. They submit that this Court in exercise of its powers under Section 48 and 49 of the Act, cannot modify the Award and apportion the liability imposed by the Award on respondent nos. 1 and 2 separately. They rely on the judgments in ***K.S.R Murthy (D-2) v. M/s S.R Chit Funds Pvt. Ltd.***, 2001 SCC Online AP 1306 and ***Raghunath Badapanda v. Arakhit Sahu and Ors.***, 1972 SCC OnLine Ori 229.

66. On the other hand, the learned counsel for the petitioner submits that as would be evident from the e-mails dated 11.08.2015 and

12.08.2015 addressed by the respondent no. 1 to the petitioner whereby the respondent no.1 had sought the containers to be booked in the name of respondent no. 2 under Contracts with respondent no. 1, respondent nos. 1 and 2 are sister concerns. He further submits that all four Contracts were signed by the same gentleman on behalf of respondent nos. 1 and 2 and even the shareholding pattern shows that respondent nos. 1 and 2 are owned and controlled by the same family. He submits that the facts of the case are inter connected as one inextricable whole and have been treated by the respondent nos. 1 and 2 and also by the petitioner to be one single transaction. In this regard, he has placed reliance on the e-mail dated 28.12.2015 and other correspondences exchanged between the parties and more particularly on a common reply dated 11.03.2016 sent on behalf of respondent nos. 1 and 2 to the legal notices dated 26.02.2016 of the petitioner. He further submits that even in the submissions filed before the Arbitrator on 22.06.2016, 06.07.2016 and 13.07.2016, the admission of liability can be considered as being common by respondent nos. 1 and 2.

67. He further submits that by the conduct of the parties it is apparent that the respondents have consented to a single arbitration. He places reliance on the following judgment to buttress his submission:-

1. ***P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited and Others***, (2012) 1 SCC 594;
2. ***Astonfield Renewables Pvt. Ltd. v. Ravinder Raina***, 247 (2018) DLT 115; &

3. *Ameet Lalchand Shah v. Rishabh Enterprises*, AIR 2018 SC 3041.

68. As far as the joint and several liability imposed by the Award is concerned, he submits that the Award does not impose any joint and several liability on respondent nos. 1 and 2. According to him, a reading of the Award would show that the liability under the Award can be easily apportioned to respondent no. 1 and 2. In his submissions, the liability can be bifurcated amongst respondent nos.1 and 2 either on the basis of the invoices raised or on the basis of the Contracts entered into.

69. I have considered the submissions made by the counsel for the parties. Admittedly, there were three separate Contracts executed between the petitioner and respondent no. 1 and one Contract executed between petitioner and respondent no. 2. The petitioner had issued separate legal notices to respondent nos. 1 and 2 separately claiming the amount due from them. Even the TNA by its letter dated 25.04.2016 had advised the petitioner that each contract shall be considered as a separate reference to arbitration.

70. It may be true that the respondent nos. 1 and 2 are sister concerns or managed by the same family, however, it cannot denude them of their separate legal status and existence.

71. The contents of paragraph 3.6 of the Statement of Claim relied upon by the counsel for the petitioner does not justify lifting of the corporate veil, which is an essential attribute of a separate corporate personality.

72. In paragraph 5 of the Statement of Claim, infact, the petitioner gave separate details of its claims not only qua each contract but separately qua respondent nos. 1 and 2 as well.

73. In the Award there is no reason given by the Arbitrator for allowing a consolidated arbitration proceeding for distinct contracts and for distinct claims against respondent nos. 1 and 2.

74. Clause 5 of the Rules of Arbitration and Appeal of CENTA obliges the Arbitrators to give reasons for the Award. As noted above, the Award does not disclose any reasons for lifting of the corporate veil and/or consolidation of proceedings for claims against respondent nos. 1 and 2.

75. It may be correct that the Arbitrator, upon considering evidence led before it by the parties, comes to a conclusion that in the given facts the transaction, though under different Contracts, is one or that the corporate veil deserves to be lifted, however, for arriving at such a finding the Arbitrator has to give reasons for the same. This Court, in exercise of its power under Section 48 and 49 of the Act, cannot supplant such reasons by considering the claims and defence of the parties on merit. Whether the request of the respondent no. 1 to the petitioner to make shipments in the name of respondent no. 2 under Contracts that had been executed between the petitioner and respondent no. 1, would entitle the petitioner to file a consolidated statement of claim against respondent nos. 1 and 2 or not, was an issue to be determined by the Arbitrator and reasons for such determination were to be given in the Award. From a reading of the Award it seems that the Arbitrator was neither alive to the issue whether such claims against different Contracts can be consolidated as one, nor

was she alive to the fact that joint and several liability cannot be fastened on respondent nos. 1 and 2 without lifting the corporate veil and giving reasons for the same. The Award in question clearly qualifies as a non speaking Award.

76. Similarly, reliance of the petitioner on the e-mails addressed by the respondent nos. 1 and 2 and other correspondences, including reply sent to the legal notice on behalf of respondent nos. 1 and 2 jointly, were documents to be considered by the Arbitrator to arrive at a conclusion as to whether on the basis of such documents consolidated Arbitration proceedings can be conducted for all the Contracts and against respondent nos. 1 and 2.

77. In *P.R. Shah, Shares and Stock Brokers Private Limited* (Supra), there was a joint claim filed against a member and a non member of the Bombay Stock Exchange. Bye laws 248 to 281-D provided for arbitration between members and non members and Bye Laws 282 to 315-L provided for arbitration between members of the Exchange. The claim of respondent no. 1 therein was joint and several against the appellant and respondent no. 2 therein. In those peculiar facts, the Supreme Court held that a consolidated arbitration was maintainable.

78. In *Astonfield Renewables Pvt. Ltd.* (Supra), there were two Agreements. The Court found that the two Agreements formed part of one transaction and the Arbitration Agreement itself allowed a common arbitration to be conducted for adjudication of the disputes relating to both the Agreements. In the present case, there is no such Agreement between the parties.

79. In *Ameet Lalchand Shah* (Supra), the Supreme Court again found that though there were different Agreements involving separate parties, they were all related to a single commercial project and formed part of a single transaction effected through several Agreements. In the present case, the petitioner itself, while calculating the damages, as also in relation to the Contracts, made reference to respondent no. 1 and respondent no. 2 separately. It was not a case of a Principle Contract and the other deemed as the subsidiary Contracts forming part of a single transaction. The said judgment, therefore, can have no application to the facts of the present case.

80. In any case, as noted above, if the arbitrator had considered this issue giving reasons therefore, this Court may not have the power under Section 48 of the Act to test the validity of such reasons, however, the present is the case where the arbitrator has not only not given any reasons for her conclusion but infact, the Award indicates that the Arbitrator is not even alive to such an issue.

81. To compound the matter further, is the fastening of joint and several liability on the respondent nos. 1 and 2. As noted above, the petitioner had atleast in paragraph 3.6 of the Statement of Claim tried to justify filing of a consolidated Statement of Claim against respondent nos. 1 and 2. However, as far as joint and several liability of respondent nos. 1 and 2 is concerned, the petitioner gave no justification for the same.

82. In paragraph 1.7 of the Statement of Claim, the petitioner described the Agreements entered into between itself and respondent no.

1. In paragraph 1.8 of the Statement of Claim, the petitioner described its Agreement with respondent no. 2. In paragraph 4.1 and 4.2 of the Statement of Claim, the petitioner mentions the five shipments delivered under the Agreements with respondent no. 1. There are other averments also made in the Statement of Claim giving contract specific details. Paragraph 5 of the Statement of Claim gives the summary of losses, which is not only contract wise but also separately assessed for the contracts with respondent no. 1 in paragraph 5.1, and with respect to contracts with respondent no. 2 in paragraph 5.2. In paragraph 5.3 of the Claim, however, the petitioner consolidated losses on all the Contracts quantified at USD 1,155,111.17. Paragraph 7 and 8 of the Statement of Claim are important and are reproduced hereinbelow:-

“7. *Quantum*

7.1 As a result of the Buyers’ breach of Contract set out above, the Seller has to date incurred losses of \$1,155,111.17 made up as follows:

7.1.1 \$929,981.32 with respect to breaches of contract by the First Buyer; and

7.1.2 \$225,129.85 with respect to breaches of contract by the Second Buyer.

7.2 The Seller further claims:

7.2.1 Interest at the Contract rate of 1.5% per month; and

7.2.2 Costs, to be assessed by the Tribunal.

8 *Request*

8.1 The Seller requests that it be awarded:

8.1.1 Damages of \$1,155,111.17

8.1.2 Interest to be assessed on the basis of 1.5% from the date of breach until the date of the Award and thereafter until payment is received in full by the Seller.

8.1.3 Costs”

83. A reading of the Statement of Claim, therefore, clearly shows that there is not even a pleading leave alone any material placed on record for lifting of the corporate veil and making respondent nos. 1 and respondent 2 jointly and severally liable for all the Contracts.

84. It is also of some importance to note that the petitioner itself had issued separate legal notices dated 26.02.2016 (to respondent no.1 and respondent no.2) claiming an amount of USD 1,025,611.11 from respondent no.1 and USD 223,930.09 from respondent no.2. Therefore, even in these notices, leave alone any allegations justifying the lifting of the corporate veil, separate claims were made by the petitioner against respondent no.1 and respondent no.2. Further, vide notices dated 23.03.2016 separately addressed by the petitioner to respondent no.1 and respondent no.2, request for appointment of an Arbitrator was made to respondent no.1 for three contracts with it and to respondent no.2 for the one contract with it.

85. In view of the above, not only is there no reason given by the Arbitrator for fastening a joint and several liability on the respondent no.1 and 2, but at least prime facie based on the material placed on record and the pleadings of the petitioner, I find that such joint and several liability could not have been fastened on respondent nos.1 and 2. Merely because a common reply had been sent on behalf of respondent nos.1 and

2 or that in correspondences exchanged between the parties, joint references were made by respondent nos.1 and 2, in my opinion, would not be sufficient to lift the corporate veil.

86. It is no longer *res integra* that a corporate veil can be pierced only in rare and exceptional cases like where the corporate facade is used for improper purpose, for perpetuating fraud or for circumventing a statute. An abuse of corporate form is the bare minimum pre condition that must be met before the corporate entity can be disregarded [refer: **Sudhir Gopi** (Supra) and **Balmer Lawrie** (supra)].

87. Learned counsel for the petitioner, faced with the above predicament sought to urge that the Award does not, in fact, impose a joint and several liability on respondent nos.1 and 2 as it does not use the words “joint and several liability”. In my opinion, this argument of the petitioner is contrary to the Award itself. I have quoted hereinabove the final direction passed by the Arbitrator. It clearly directs both respondent no.1 and respondent no.2 to pay damages and costs as awarded.

88. Learned counsel for the petitioner then submitted that even though the Award is against both respondents, a reading of the Award would show that it can easily be deciphered to determine as to which portion of the Award is against which respondents. He submits that in this process, the Court can either go on the basis of the invoices raised or on the basis of the contracts entered between the petitioner and respondent no.1 and respondent no.2 respectively.

89. I do not find any merit in this submission.

90. Section 47 to 49 of the Act gives the scheme by which a Foreign Award can be enforced in India. The Court does not have the power to modify the Award in the process of its enforcement. The only limited power is in the proviso to Section 48(1)(c) of the Act, wherein the Court may separate the part of the Award which contains decision on matters submitted to arbitration from the one which were beyond the scope of the submission to arbitration, and enforce only that portion of the Award.

91. Albeit in relation to the Section 34 of the Act, this Court in *Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited*, (2019) SCC OnLine Del 6562, has held that the court cannot correct errors of arbitration, it can only quash the Award (in the present case refuse its enforcement), leaving the parties free to begin the arbitration again if they so desire.

92. In view of the above, I refuse the enforcement of the Award dated 25.07.2016 passed by the Sole Arbitrator and consequently dismiss the present petition. The pending applications are also disposed of accordingly.

NAVIN CHAWLA, J

MAY 02, 2019
RN/rv