

**THE HIGH COURT OF JUDICATURE AT MADRAS**

| <b>Reserved on</b> | <b>Delivered on</b> |
|--------------------|---------------------|
| 19~08~2021         | 03-09~2021          |

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

**O.P. No.757 of 2017,**  
**O.A.Nos.9, 10 and 11 of 2018,**  
**and Appln.Nos.88 and 2299 of 2018**

Subway Systems India Private Ltd.,  
having its registered office at Level 2, Elegance  
Mathura Road, Jasola, New Delhi – 110025  
Represented by its authorised  
representative Mr.Jaganath Rao  
having office at Subway Systems India Pvt. Ltd.,  
Level 2, Elegance Mathura Road,  
Jasola, New Delhi – 110025. .. Petitioner/Decree Holder

सत्यमेव जयते .Vs.

S. Sasikala  
Subway Store – 39997  
103-107, Nilgiris Building  
T.V.Sami Road (West)  
R.S.Puram, Coimbatore

.. Respondent / Judgment Debtor

**Prayer:** Petition filed under Section 44, 47, 48 and 49 of the Arbitration and Conciliation Act, 1996 to pass an order that the Award dated February 11, 2016 be deemed to be a decree of this Court and pass a direction to enforce and execute the same as a decree in favour of the Petitioner as against Respondent along with the cost in entirety and costs of this Petition.

For Petitioner : M/s. Rajkumar Jhabakh

For Respondents : Mrs. Revathi Manivannan

**ORDER**

This petition has been filed to enforce the foreign award dated 11<sup>th</sup> February, 2016.

2. The brief facts leading to file this Application is as follows:

2.a. The Petitioner is a company incorporated under the Companies Act, 1956. The Petitioner and the Respondent have entered a Franchisee Agreement dated March 31, 2006 referenced as #39997 for Respondent to open and operate a

SUBWAY® restaurant at Nigiris Department Store. Similarly, another agreement dated October 23, 2007 to amend the Franchisee Agreement in part. As the dispute arose in respect of the terms of Contract a notice of default issued by the Petitioner on November 21, 2014 for terminating the contract, the matter was referred to Sole Arbitrator in terms of the Contract. The learned Arbitrator has passed Award dated February 11, 2016. Hence this Petition is filed for enforcement of the Foreign Award.

3. It is the contention of the Respondent in a counter, admitting the Franchisee Agreement between the parties and the Termination Notice issued by the Petitioner. It is the contention that the Respondent that she was regular in payment of royalty without any default and pleaded that though the restaurant opened by the Respondent running in utmost satisfaction of the Petitioner. During 2014, the landlord for Store No.39997 had extended the Ground Floor by 4 feet, therefore it affected the visibility of the restaurant and the sales was drastically reduced. Further, as per Franchise Agreement store No.39907 was due for remodeling and the remodeling cost would be Rs.12,00,000/-. As the lease was expiring in a year, the Respondent decided to relocate the restaurant. However,

there was a delay on the part of the Petitioner.

4. Be that as it may. As far as the Award is concerned, it is the contention of the Respondent, she filed written submissions along with documents to the Arbitral Tribunal. Further contention is that there is no notice of invocation on the basis of the agreement dated 31.03.2006. Even after the Award, termination of the Franchisee Agreement, the Respondent continued the restaurant. Though several allegations were raised the main contention is that the Award is result of fraud, the Arbitrator just accepted the proposed Award. Therefore, it is her contention that Foreign Award is result of fraud.

5. It is the contention of the learned counsel appearing for the Respondent that the Petition is not maintainable as both parties are Indian and by virtue of definition under Section 2 (1)(f), the present Award is not a Foreign Award and hence cannot be enforced under Section under section 48 of the Act. It is further contention that the Award is against the public policy and vitiated by fraud. Further, the damages passed by the Arbitrator is against the provision of Contract Act. It is also her contention that the Award covers two different stores and there

are two different Franchisee Agreements and the same were not amended by the other. It is further contention that the Arbitrator failed to consider the contention of the Respondent during the Arbitral Proceedings. In support of her submissions learned counsel for the Respondent placed reliance of the following judgments:

1. *Kailash Nath Associates v. Delhi Development Authority [(2015) 4 SCC 136]*
2. *TDM Infrastructres Pvt. Lt.d, v. UE Development India Private Ltd., [(2008) 14 SCC 271]*
3. *Addhar Mercantile Private Limited v. Shree Jagadamba Agrico Exports Pvt. Ltd., [2015 SCC Online Bom 7752]*
4. *Kiddie Academy Domestic Franchising vs. Faith Enterprice DC [Civil No.WDQ-07-0705]*

6. Whereas it is the contention of the learned counsel appearing for the Petitioner that it is open to the parties of Indian Nation, chose the forum outside India. The same would be treated as Foreign Award under Part II of the Act.

Further, it is his submission that the contention of the Respondent that Award is vitiated by fraud cannot be countenanced as there was no pleading raised in the Petition.

7. It is also contended by the learned counsel for the petitioner that the proposed Award is general matter of practice, a copy has already been served to the Respondent. Therefore, at any stretch of imagination same cannot be held as a fraud. The Respondent having received notices and copies never disputed or raised any issue with regard to the same before the Learned Arbitrator. It is his contention that as far as the damages is concerned, the learned Arbitrator took note of the contractual terms and awarded pre-estimated damages. Therefore, it cannot be said that there was violation of any law.

8. It is his further contention that the Franchisee Agreement dated 31.3.2006 was amended on 23.10.2007. Clause 14 of the amended Franchisee Agreement makes it very clear that the earlier and existing Franchisee Agreements executed between the parties were amended. Therefore, it is the contention that further contract is not subject matter of the Arbitration cannot be true. The Respondent

has participated in the Arbitration Proceedings and Award has not been challenged and even the proceedings by the Arbitrator was not also challenged at any point of time. Therefore, at this stage, the Petitioner cannot raise the issues on merits and prayed for allowing the Petition. In support of his contention he relied upon the following judgments:

1. *PASL Wind Solutions Private Limited vs. GE Power Conversion India Private Limited [2021 SCC Online SC 331]*
2. *Vijay Karia and others vs. Prysmian Cavi e Sistemi Srl and Others [(2020)11 SCC 1]*
3. *Government of India vs. Vedanta Limited and others [(2020) 10 SCC 1]*
4. *Oil and Natural Gas Corporation Ltd., vs. Saw Pipes Ltd. [(2003) 5 SCC 705]*
5. *Associate Builders vs. Delhi Development Authority [(2015) 3 SCC 49]*

6. *Cruz City 1 Mauritius Holdings vs. Unitech Limited [2017 SCC Online Del 7810]*

7. *Unitech Limited vs Cruz City 1 Mauritius Holdings [2018 SCC Online SC 3619]*

9. With regard to the submission that the Award cannot be treated as Foreign Award since both the parties are Indians, it is to be noted that Section 2(1) (f) of the Arbitration and Conciliation Act, which reads as follows:

*“2 (1) (f) “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—*

*(i) an individual who is a national of, or habitually resident in, any country other than India; or*

*(ii) a body corporate which is incorporated in any country other than India; or*

*(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or*

*(iv) the Government of a foreign country;”*

10. The Respondent has relied the Judgment in ***TDM Infrastructure Private Limited vs. UE Development India Private Limited [(2008) 14 SCC 271]*** to contend that the Arbitration would not fall within the meaning of International Commercial Arbitration. It is to be noted that Award sought to be enforced would fall under Part II of the Arbitration and Conciliation Act. Part II deals with enforcement of Foreign Award as defined under Section 44 of the Arbitration and Conciliation Act, which is as follows:

**“44. Definition.—***In this Chapter, unless the context otherwise requires, “foreign award” means an 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—*

*(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and*

*(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.”*

11. Therefore, the above definition makes it very clear that once the Award fit into the category or definition of Section 44, it could be enforced under Part II. In this regard the Apex Court in a Judgment reported in ***PASL Wind Solutions Private Limited vs. GE Power Conversion India Private Limited [2021 SCC Online SC 331]*** has held that Section 44 is party-neutral, having reference to the place at which the award is made and it is also clarified that the earlier Judgment in ***TDM Infrastructure Private Limited*** (supra) does not apply to Foreign Award which could be enforced under section 48 of the Act.

12. The Three Judges Bench of the Honourable Supreme Court in **PASL Wind Solutions Private Limited** case (supra) held that where the law of India prohibits a certain act, the conflict of law rules as set down in Dicey's authoritative treatise will take care of this situation in most cases as the arbitrators would then apply these rules on the ground of international comity between nations in cases which arise between two Indian nationals in an award made outside India, which would fall within the definition of "foreign award" under section 44 of the 1996 Act. Therefore the contention of the learned Counsel for the Respondent is that in view of the Section 2(1)(f) of the Act, the present Award is not a foreign award and not enforceable under section 48 and 49 of the Act, has no leg to stand in view of the Law declared by the Apex Court.

13. With regard to other submissions that the Award is against the fundamental policy of India, on perusal of Section 48 of the Act, only a party against whom the foreign award sought to be invoked furnishes the proof with regard to any of the conditions set out in Section 48, enforcement of foreign award may be refused. Though it is contended that there was no proper opportunity, on perusal of the counter filed by the Respondent, the same makes it very clear that in fact the Respondent was aware of the proceedings and in fact she filed the

documents and written submissions before the learned Arbitrator. Therefore, the contention that he was not given proper opportunity before the Arbitrator has no leg to stand.

14.It is further submitted that the Award is vitiated by fraud and against the fundamental policy of India. It is relevant to note that what was the nature of the fraud, absolutely, there is no whisper in the counter. How the Award suffered from any fraud has not been pleaded. The main contention of the learned counsel is that the Petitioner has sent the proposed award along with the claim petitions and there is a collusion between the Arbitrator and the Petitioner. Whereas the learned counsel for the Petitioner it is only a general matter of practice to provide the format by the claimants along with the claim statement. In this case the copy also served to the Respondent which has not been disputed. Therefore, merely because the format has been sent along with the Claim Petition, it cannot be said that there is a collusion and the entire award is vitiated. In fact, the Award indicate that the Respondent also filed their submissions and documents. Even in the counter filed before this Court the same has been admitted. Therefore, it cannot be said that the Award is vitiated merely because format sent by the

Claimant.

15. It is to be noted that these all are general practice and procedure adopted by the Arbitrators in the international level. The Respondent being aware of the format never raised any issue in this regard before the Arbitrator nor in the written statement. Therefore having failed to raise objection about the procedure adopted by the Arbitrator, now he cannot permitted to raise such ground here. At any event, mere sending a format with claim statement cannot be amount to fraud. The Delhi High Court in Cruz City 1 Mauritius Holdings vs. Unitech Limited [2017 SCC Online Del 7810] in paragraphs 47 and 48 referring to the decision of the the Swiss Supreme Court and held that the good faith principle required a party to take a procedural plea immediately in the course of the arbitral proceedings. Such plea cannot be permitted at the recognition stage of the Foreign Awards.

16. With regard to the submissions that the Award is violated the fundamental policy of India, the issue is no longer *res integra*. In this regard in ***Vinay Karia and others v. Prysmian cavi E sistemi SRL and others [2020 (11) SCC 1]*** in para 40 relying ***Renusagar Power Co. Ltd. v. General Electric Co.,***

**[1994 Supp (1) SCC 644]**, the Apex Court extracted the findings of the ***Renusagar***

*“45. Moreover, **Section 48** of the 1996 Act does not give an opportunity to have a “second look” at the foreign award in the award enforcement stage. The scope of inquiry under **Section 48** does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.”*

17. In ***Government of India vs. Vedanta Limited [(2020) 10 SCC 1]*** it is held as follows:

*“98. The public policy defence for refusing enforcement under **Section 48** of the 1996 Act was interpreted by a three-judge bench of this Court in ***Shri Lal Mahal Ltd. v Progetto Grano [(2014) 2 SCC 433]*** This Court held that the law as*

*expounded in the Renusagar<sup>60</sup> judgment, would be applicable to the ambit and scope of Section 48(2)(b) even under the 1996 Act. The relevant extract from the judgment reads as:*

*“27. In our view, what has been stated by this Court in Renusagar with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must equally apply to the ambit and scope of Section 48(2)(b) of the 1996 Act. In Renusagar it has been expressly expounded that the expression “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression “public policy” used in Section 7(1)(b)(ii) was held to mean “public policy of India”. A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in Renusagar. For all this there is no reason why Renusagar<sup>3</sup> should not apply as regards the scope of inquiry under Section 48(2)(b). Following Renusagar, we think that for the purposes of Section 48(2)(b), the expression “public policy of India” must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by*

*one of the three categories enumerated in Renusagar. Although the same expression 'public policy of India' is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the Sections but, in our view, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.*

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*29. We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).*

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45. Moreover, *Section 48* of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award-enforcement stage. The scope of inquiry Under *Section 48* does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

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47. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under *Section 48(2)(b)* the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or

*(2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under [Section 48\(2\)\(b\)](#).”*

18. Therefore, in view of the law declared by the Honourable Apex Court, even the Award is in the result of ignoring or rejecting the result of inadmissible evidence Section 48 does not permit review of foreign award on merits particularly in procedural defects. Therefore, the contention of the Respondent counsel has to fail in this regard also.

19. With regard to the submissions that Section 74 of the Indian Contract Act has been violated, it is to be noted that the Contract itself the parties have clearly agreed a sum of Two Hundred and Fifty Dollars (\$250USD) per day for pre-estimated damages. In **ONGC Ltd.,vs. Saw Pipes [(2003) 5 SCC 705]** the Apex Court in para 41 and 42 clearly held as follows:

*“41. Therefore, when parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated*

*damages and is not by way of penalty duly agreed by the parties, there was no justifiable reason for the arbitral tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay in supply of goods.*

42. Further, in arbitration proceedings, the arbitral tribunal is required to decide the dispute in accordance with the terms of the contract. The agreement between the parties specifically provides that without prejudice to any other right or remedy if the contractor fails to deliver the stores within the stipulated time, appellant will be entitled to recover from the contractor, as agreed, liquidated damages equivalent to 1% of the contract price of the whole unit per week for such delay. Such recovery of liquidated damage could be at the most up to 10% of the contract price of whole unit of stores. Not only this, it was also agreed that:-

*(a) liquidated damages for delay in supplies will be recovered by paying authority from the bill for payment of cost of material submitted by the contractor;*

*(b) liquidated damages were not by way of penalty and it was agreed to be genuine, pre-estimate of damages duly agreed by the parties;*

*(c) This pre-estimate of liquidated damages is not assailed by the respondent as unreasonable assessment of damages by the parties.”*

20. Therefore, when the Respondent has agreed in the Franchisee Agreement and parties have agreed to pre-estimated damages at certain rates, it cannot be said that the Award of the Arbitrator is against the provision of law. In fact, Award is based on the contractual terms. In such view of the matter, this Court does not find any of the ground set out under Section 48 of the Act to refute the Award being enforced. Accordingly, the Petitioner is entitled to enforce the Foreign Award and the Award passed by the sole Arbitrator shall be deemed to be a decree of the Court.

21. Accordingly, the Original Petition is allowed. Connected Original

Applications and Applications are closed.

**03.09.2021**

Index : Yes

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Speaking/Non-Speaking order  
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**N. SATHISH KUMAR, J.**  
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