

Shin-Etsu Chemical Company Limited ... Petitioner
Vs.
Sterlite Technologies Limited ... Respondent

WITH
INTERIM APPLICATION NO.214 OF 2022
IN
COMMERCIAL ARBITRATION PETITION NO.639 OF 2021

Mr. Kevic Setalvad, Senior Advocate a/w. Mr. Jehan Lalkaka, Mr. Abhiraj Rao and Ms. Shreya Arur i/b. Bhagyashree Ganwani for Respondent.

Reserved on : 22nd FEBRUARY, 2023
Pronounced on : 5th JUNE, 2023

ORDER :

The present petition is filed for enforcement of foreign arbitral award dated 24.02.2021, passed by a learned sole arbitrator at Singapore as per the Rules of Arbitration of the International Chamber of Commerce (ICC). By the said award, the petitioner is entitled to recover specific amount from the respondent along with interest. It is an admitted position that a challenge raised before the Singapore High Court on behalf of the respondent against the said arbitral award was rejected on merits.

2. According to the petitioner, the grounds for resisting enforcement of such foreign award within the narrow scope available under Section 48 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to

as the 'Arbitration Act') have not been made out by the respondent and that therefore, the award deserves to be enforced and executed at the earliest. The endeavour on the part of the respondent before this Court is to claim that such enforcement of the foreign award is contrary to the public policy of India, in the context of which certain specific grounds have been raised. This Court is called upon to examine the said grounds while considering the present petition for enforcement of the award.

3. Brief facts leading to filing of the present petition are that, on 09.11.2017, the petitioner and the respondent entered into a sale and purchase agreement, whereby the petitioner agreed to sell and the respondent agreed to buy optical fiber preforms on a monthly basis, for use in the manufacturing plant of the respondent in India. There were three types of preforms, which were the subject matter of the said agreement and it is undisputed that the controversy between the parties pertains only to Standard Low Water Peak Fiber Preform (S-LWPFP). The parties agreed under the said agreement that the applicable law would be the law of Singapore and disputes, if any, arising between the parties would be settled by arbitration in Singapore, in accordance with the Rules of Arbitration of the ICC. The term of the agreement was from August 2017 to July 2022 and the dispute between the parties pertains only to the period between February 2019 to July 2022, restricted to price payable for the agreed volume of S-LWPFP preforms.

4. The terms of the agreement specified that if the parties failed to agree on the price of the said preforms for the periods of supply, the respondent would have the option to purchase the agreed volume at 110% of the price in effect during the immediately preceding six months. If the respondent failed to exercise such option, then the petitioner had the option to sell the said volume of preforms at 90% of the price in effect during the immediately preceding six months. In this

regard, clause 4 of the said agreement assumes significance. Disputes arose between the parties for the period between February 2019 and July 2019, for the reason that despite multiple rounds of good faith negotiations, the respondent did not exercise its option under the agreement and ultimately, the petitioner exercised its option being ready to sell the agreed volume of preforms at 90% of the price in effect during the immediately preceding six months. The respondent disputed the manner in which the petitioner sought to exercise its option, due to which there was failure to agree on the price and the petitioner could not make any shipment to the respondent from February 2019.

5. It is in this backdrop that in June 2019, the petitioner filed a request for arbitration with the Secretariat of the ICC Court. The petitioner claimed that the respondent had committed breach of its obligations under the said agreement in failing to accept delivery and in making payment for the S-LWPFP preforms for the aforementioned period. The petitioner claimed the price of the preforms or damages for the said period.

6. On 02.08.2019, Mr. Chan Leng Sun, SC, was jointly nominated by the parties to be the sole arbitrator and the appointment was later confirmed by the ICC Court. Accordingly, he was appointed as the sole arbitrator. On 19.08.2019, the respondent submitted its reply to the request for arbitration. Thereafter, case management conference was held and the proceedings commenced. A jurisdictional challenge raised by the respondent was rejected by the learned arbitrator on 23.11.2019 and hearings were conducted between July and September 2020. On 24.02.2021, the learned arbitrator passed the final award, partly accepting the claims of the petitioner. Accordingly, the learned arbitrator issued directions to the respondent to pay to the petitioner specific amount towards damages along with interest. The terms of the

agreement were interpreted to hold that on a reading of the agreement as a whole, the petitioner was entitled to the aforementioned amount.

7. While the petitioner was pursuing the respondent for payment in terms of the said arbitral award, on 31.05.2021, the respondent filed a petition before the Singapore High Court challenging the said award. On 28.12.2021, the Singapore High Court dismissed the petition and upheld the arbitral award in favour of the petitioner.

8. In the meanwhile, on 30.10.2021, the petitioner filed the present petition for enforcement of the arbitral award. Upon pleadings being completed, this Court took up the present petition for hearing. The petitioner has claimed before this Court that in terms of the directions given in the arbitral award, at the time when the petition was being heard, the petitioner was entitled to a sum of Rs.23,35,34,121/- (damages and costs with interest).

9. Mr. Sharan Jagtiani, learned senior counsel appearing for the petitioner submitted that as per the relevant provisions of the Arbitration Act, there was no impediment in enforcement of the said foreign award in the present case. The learned senior counsel submitted that in terms of the law laid down by the Supreme Court, as also in terms of the mandate of the New York Convention of 1958, the law emphasizes upon enforcement of foreign awards. The grounds available under Section 48 of the Arbitration Act for resisting a foreign award are in a narrow compass and they are water-tight in nature. The foreign award has to be read as a whole, without nit-picking and the expression ‘public policy of India’ has been consistently interpreted in a narrow fashion by the Supreme Court. The Court has discretion under Section 48 of the Arbitration Act not to enforce an award, even if one or more grounds are made out by the party resisting such an award, thereby indicating that

such a party has to cross a very high threshold to successfully avoid enforcement of the foreign arbitral award.

10. In the context of the specific grounds raised by the respondent in the present case while resisting the arbitral award, it was submitted by the learned senior counsel appearing for the petitioner that the respondent was not justified in claiming that the learned arbitrator in the present case had virtually re-written the contract or that the award was beyond the terms submitted for arbitration. It was further submitted that the claim of the respondent of violation of principles of natural justice, on the ground of not being able to present its case before the arbitrator, was also not made out in the facts of the present case.

11. It was submitted on behalf of the petitioner that the nature of contentions raised on behalf of the respondent before this Court while resisting the foreign arbitral award indicated that the challenge was on the merits of the award, which could not be examined by this Court in the present proceedings. It was submitted that there could be no dispute with the proposition that the present proceedings being distinct, ought not to be affected by rejection of challenge on merits by the Singapore High Court, but the respondent in the present case had failed to demonstrate as to how enforcement of the said foreign award could be said to be contrary to the public policy of India. The learned senior counsel appearing for the petitioner submitted that in the light of the narrow scope of jurisdiction available to this Court, detailed discussion on the interpretation of the agreement between the parties was not necessary. But, even if such an exercise was to be undertaken, it would be evident that the terms of the agreement between the parties, particularly clauses 4 and 6 thereof were construed in a most reasonable and proper manner by the learned arbitrator, thereby indicating that no ground was made out for claiming that the award was contrary to the

public policy of India. It was specifically submitted that the respondent could not rely upon the alleged jurisdictional error committed by the learned arbitrator, on the ground that the learned arbitrator had travelled beyond the agreement between the parties, for the reason that such a ground went into the realm of patent illegality, which is not a ground available under Section 48 of the said Act for resisting enforcement of the foreign arbitral award. On the aspect of the learned arbitrator having committed error by framing an issue under Section 50(2) of the Singapore Sale of Goods Act (SOGA), while considering the claim of damages of the petitioner and eventually granting relief under Section 50(3) of the SOGA, it was submitted that the relief was actually granted only under Section 50(2) of the SOGA, whilst the principle for determining hypothetical price was based on Section 50(3) of the SOGA. On this basis, it was submitted that a reasonable approach was adopted by the learned arbitrator and none of the grounds under Section 48 of the Arbitration Act were made out in the present case.

12. In support of the aforesaid contentions, the learned senior counsel for the petitioner relied upon the judgements of the Supreme Court in the case of *Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India*, **(2019) 15 SCC 131**, *Vijay Karia and others Vs. Prysmian Cavi E Sistemi SRL and others*, **(2020) 11 SCC 1**, *Gemini Bay Transcription Private Limited Vs. Integrated Sales Service Limited and another*, **(2022) 1 SCC 753** and the judgements of this Court in the case of *M/s. Louis Dreyfus Commodities Suisse S.A. Vs. Sakuma Exports Limited*, **(2015) 6 Bom CR 258**, *Nobel Resource Limited Vs. Dharni Sampda Private Limited*, **(2020) 1 Bom CR 422** and *Union of India Vs. Recon, Mumbai*, **2020 (6) Mh.L.J. 509**.

13. On the other hand, Mr. Kevic Setalvad, learned senior counsel appearing for the respondent submitted that the approach adopted by the

learned arbitrator in the present case ought to shock the conscience of this Court, as the terms of the agreement / contract between the parties were virtually re-written by the learned arbitrator and principles of natural justice were flagrantly violated, thereby indicating that enforcement of such an award was contrary to the public policy of India under Section 48(2)(b) of the Arbitration Act. At the outset, it was submitted that merely because challenge raised on merits on behalf of the respondent before the Singapore High Court against the award had failed, it ought not to *ipso facto* lead to enforcement of the said award at the hands of this Court. The learned senior counsel submitted that this Court as the Court enforcing the foreign award under the Arbitration Act was required to determine independently as to whether such an award could be said to be enforceable. By making copious references to the terms of the agreement executed between the parties, particularly clauses 4 and 6 thereof, the learned senior counsel appearing for the respondent submitted that the interpretation foisted on such terms by the learned arbitrator, could not be said to be even a possible view in the matter. In fact, the learned arbitrator virtually re-wrote the terms of the agreement between the parties, which was sufficient ground to demonstrate that enforcement of such an award would be contrary to the public policy of India, as it could be said to be in contravention with the fundamental policy of Indian law.

14. It was further submitted on behalf of the respondent that the award travelled beyond the terms of submission to arbitration. In this context, the learned senior counsel appearing for the respondent referred to Section 50 of the SOGA. It was submitted that the petitioner had categorically restricted its claim for damages under Section 50(2) of the SOGA, while the learned arbitrator granted damages under Section 50(3) thereof. This in itself, according to the learned senior counsel

appearing for the respondent, clearly indicated that sufficient ground was made out for resisting enforcement of such an award.

15. In this context, it was further submitted that since the stated case of the petitioner while claiming damages was under Section 50(2) of the SOGA, the respondent had resisted the same under the said provision. Yet, the learned arbitrator ended up granting relief to the petitioner under Section 50(3) of the SOGA, thereby indicating that the respondent was unable to present its case in the arbitration proceedings, showing flagrant violation of principles of natural justice. On this basis, it was submitted that the conscience of this Court ought to be shocked by the approach adopted by the learned arbitrator and notwithstanding confirmation of the award by the Singapore High Court, on an independent assessment of the arbitral award, this Court ought to dismiss the present petition.

16. In order to support the contentions raised on behalf of the respondent, the learned senior counsel relied upon judgements of the Supreme Court in the case of **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** (*supra*), **Vijay Karia and others Vs. Prysmian Cavi E Sistemi SRL and others** (*supra*), *PSA Sical Terminals Private Limited Vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and others*, (2022) 4 SCC 463 and *Government of India Vs. Vendanta Limited and others*, (2020) 10 SCC 1.

17. Having heard the learned counsel for the rival parties, in the backdrop of the material brought to the notice of this Court, before embarking upon analysis of the rival submissions, it would be appropriate to refer to the relevant provisions of the Arbitration Act, the SOGA and the judgements pertaining to enforcement of foreign awards

under the Arbitration Act.

18. Section 48 of the Arbitration Act refers to the conditions for enforcement of foreign awards. Section 48(2) of the Arbitration Act provides for the grounds on which enforcement of a foreign arbitral award may be refused by the Court and it reads as follows: -

“48. Conditions for enforcement of foreign awards. - (1)...

(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.”

19. Since detailed submissions were made by the learned senior counsel appearing for the rival parties in the context of Section 50 of the SOGA, pertaining to damages, it would be relevant to refer to the same and it reads as follows: -

“50.- Damages for non-acceptance

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."

20. It would be appropriate to refer to the scope available under Section 48(2) of the Arbitration Act for refusing enforcement of a foreign arbitral award. The Supreme Court in the case of **Vijay Karia and others Vs. Prysmian Cavi E Sistemi SRL and others** (*supra*) has discussed in detail, as to the approach expected from Courts while dealing with grounds raised for resisting enforcement of such foreign arbitral awards. In the said judgement, the Supreme Court found that in the cases decided in the United States of America demonstrated that there is indeed a "pro-enforcement bias" under the New York Convention. It was found that this has been adopted in Section 48 of the Arbitration Act and that the burden of proof has been shifted on parties objecting to enforcement rather than on the parties seeking enforcement of foreign arbitral award. The Supreme Court, after referring to a cross-section of relevant judgements, has held that there is indeed discretion in the Court while exercising power under Section 48 of the said Act to enforce or not to enforce a foreign arbitral award. The Court is expected to perform a balancing act while enforcing a foreign arbitral award. It is further held in the said judgement in the context of violation of principles of natural justice, particularly in the context of the claim of a party resisting enforcement of such an award on the ground of being unable to present its case, that such expression used in Section 48 of the Arbitration Act cannot be given an expansive meaning. This further indicates a policy of minimal interference in enforcement of foreign

arbitral awards under the Arbitration Act. The relevant portions of the judgement of the Supreme Court in the case of **Vijay Karia and others Vs. Prysmian Cavi E Sistemi SRL and others** (*supra*) read as follows: -

“50. The US cases show that given the “pro-enforcement bias” of the New York Convention, which has been adopted in Section 48 of the Arbitration Act, 1996 - the burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement and not the other way around; in the guise of public policy of the country involved, foreign awards cannot be set aside by second guessing the arbitrator’s interpretation of the agreement of the parties; the challenge procedure in the primary jurisdiction gives more leeway to Courts to interfere with an award than the narrow restrictive grounds contained in the New York Convention when a foreign award’s enforcement is resisted.

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59. On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone, for example, that a party has been unable to present its case before the arbitrator, and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a Court may well enforce a foreign award, even if such ground is made out. When it comes to the “public policy of India” ground, again, there would be no discretion in enforcing an award which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. It can thus be seen that the expression “may” in Section 48 can, depending upon the context, mean “shall” or as connoting that a residual discretion remains in the Court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion is limited to the circumstances pointed out hereinabove, in which case a balancing act may be performed by the Court enforcing a foreign award.

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81. Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression “was otherwise unable to present his case” occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this

expression would be a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Read along with the first part of Section 48(1)(b), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in *Ssangyong* (supra). A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award liable to be set aside on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48."

21. In the case of **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** (supra), the Supreme Court deliberated upon the question of availability of grounds for resisting enforcement of foreign arbitral award under Part II of the Arbitration Act. It was found that when a party resisting such a foreign arbitral award alleged that the learned arbitrator had wandered outside the contract, this would be a jurisdictional error, capable of correction on the ground of 'patent illegality', but such a ground is not available under Section 48 of the Arbitration Act to successfully resist enforcement of a foreign arbitral award. This is crucial in the facts of the present case. Relevant portion of the judgement of the Supreme Court in the case of **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** (supra) reads as follows: -

"69. We therefore hold, following the aforesaid authorities,

that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal.”

22. The position of law clarified in the aforesaid judgements of the Supreme Court has been followed in the case of **Gemini Bay Transcription Private Limited Vs. Integrated Sales Service Limited and another** (*supra*). The Supreme Court in the said judgement has held that when a foreign award gives reasons after appreciating the facts of the case, it is not possible for the Court under Section 48 of the Arbitration Act in India to re-appreciate the facts and to go into the merits of the matter. It is further held in the said case that even the aspect of damages being awarded without any basis, would not be a ground available under Section 48 of the Arbitration Act to resist enforcement of a foreign award, particularly because an exceptional case is required to be made out by a party resisting enforcement of such a foreign award and the conscience of the Court ought to be shocked to entertain any such claim.

23. This Court has also consistently followed the said dictum and it

has been held in the case of **M/s. Louis Dreyfus Commodities Suisse S.A. Vs. Sakuma Exports Limited** (*supra*) that Section 48 of the Arbitration Act does not give an opportunity to the Court to have a second look at the foreign award at the stage of enforcement. In the said case, this Court went to the extent of holding that the arbitral tribunal having considered a document submitted along with the written arguments could not be a ground for refusal of enforcement of a foreign award under Section 48 of the Arbitration Act. This Court in the said case referred to the judgement of the Supreme Court in the case of *Shri Lal Mahal Limited vs. Progetto Grano SPA*, **(2014) 2 SCC 433**, while granting enforcement of a foreign arbitral award. The said position of law was further followed by this Court in the case of **Nobel Resource Limited Vs. Dharni Sampda Private Limited** (*supra*).

24. Having referred to the position of law hereinabove, it would now be appropriate to apply the same to the facts of the present case. As noted hereinabove, the respondent has primarily resisted enforcement of the said foreign arbitral award on the grounds that the learned arbitrator virtually re-wrote the terms of the agreement / contract between the parties while holding in favour of the petitioner; the arbitral award went beyond the terms submitted for arbitration; and that the respondent was unable to present its case before the learned arbitrator, thereby showing flagrant violation of principles of natural justice. In this context, the respondent invoked, not only Section 48(2)(b) of the Arbitration Act, but also Section 48(1)(b) thereof.

25. The ground pertaining to alleged re-writing of the agreement / contract by the learned arbitrator, while interpreting the terms thereof, essentially is a matter touching upon the merits of the case. In terms of the position of law noted hereinabove, while exercising jurisdiction under Section 48 of the Arbitration Act, this Court cannot touch upon

the merits of the case. In order to get around the said settled position of law, it was vehemently argued on behalf of the respondent that the interpretation of clauses 4 and 6 of the agreement between the parties in the arbitral award, could not be said to be even a possible interpretation or view in the matter, insisting that such a flagrant misinterpretation ought to shock the conscience of the Court. On this basis, it was claimed that the enforcement of the said award would be contrary to the public policy of India.

26. This Court does not find any substance in the said contention. The said finding is reached on an independent assessment of the material on record and without being influenced by the findings rendered by the Singapore High Court, while rejecting the challenge raised on behalf of the respondent against the said award. Although the learned senior counsel appearing for the rival parties did refer to the judgement of the Singapore High Court in that context, this Court finds it unnecessary to refer to the same. On an independent assessment of the terms of the agreement between the parties, particularly clauses 4 and 6 thereof, it is found that the learned arbitrator arrived at a reasonable finding and clearly adopted a possible view in the matter. The relevant discussion in this regard is found in paragraphs 170 to 177 of the award, pertaining the question as to whether the respondent was in breach of the agreement by failing to perform its obligations. The learned arbitrator not only referred to clause 4 of the agreement, but also referred to clause 6 thereof. The learned arbitrator even referred to the evidence of the witnesses of the rival parties in the context of the said agreement, to reach reasonable findings. There is no question of such interpretative logic applied by the learned arbitrator, shocking the conscience of this Court to take the case within the realm of being 'contrary to the public policy of India'. This Court finds that the learned arbitrator adopted a

reasonable and possible view in the matter, while holding that if the interpretation canvassed by the respondent was to be accepted, it would leave almost no time or scope for the petitioner to exercise its option under clause 4 of the said agreement. Therefore, there is no substance in the said ground raised on behalf of the respondent.

27. In respect of Section 50 of the SOGA, which has been quoted hereinabove, the first aspect of the matter is the allegation of the respondent that the manner in which the learned arbitrator relied upon Section 50(3) of the SOGA, would show that while the terms submitted to the learned arbitrator and the issues framed in that context referred only to Section 50(2) of the SOGA, relief pertaining to damages was awarded to the petitioner under Section 50(3) thereof. Such a ground hints at an alleged serious jurisdictional error committed by the learned arbitrator. This Court has already noted hereinabove that in paragraph 69 of the judgement in the case of **Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India** (*supra*), the Supreme Court has specifically held that a jurisdictional error may give rise to a ground of ‘patent illegality’, but the same is not available as a ground for resisting enforcement of a foreign arbitral award. It is specifically held that the party resisting enforcement of a foreign arbitral award cannot be permitted to bring such a ground through the backdoor. On the basis of the said position of law itself, the said ground raised on behalf of the respondent deserves to be rejected.

28. Even otherwise, this Court considered the rival submissions and found that the learned arbitrator considered the claim of damages of the petitioner under Section 50(2) of the SOGA, but while ascertaining the same, in the context of hypothetical price for the S-LWPFP preforms, the learned arbitrator used the principle under Section 50(3) of the

SOGA, to arrive at findings. This Court is not convinced that the approach adopted by the learned arbitrator, in the facts of the present case, gives rise to the ground that the foreign award was contrary to public policy of India.

29. The other aspect of the matter pertaining to Section 50 of the SOGA, raised on behalf of the respondent, indicates alleged violation of principles on natural justice, as the respondent was unable to present its case before the learned arbitrator. The basis for raising such a ground is that, while the proceedings before the learned arbitrator, all along referred to Section 50(2) of the SOGA, the learned arbitrator ended up awarding damages under Section 50(3) thereof. In this context, the relevant portion i.e. paragraph 81 of the judgement of the Supreme Court in the case of **Vijay Karia and others Vs. Prysmian Cavi E Sistemi SRL and others** (*supra*) assumes significance. The same has been quoted hereinabove. The Supreme Court has categorically held that the expression ‘was otherwise unable to present his case’ used in Section 48(1)(b) of the Arbitration Act cannot be given an expansive meaning. It is held that such an expression is a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. It was held that where no opportunity was given to the party to deal with an argument, it would go to the root of the matter as it would result in denial of justice to the prejudice of a party.

30. A perusal of the arbitral award in the present case would show that, on the aspect of damages, the learned arbitrator gave ample opportunity to the parties to raise their respective contentions. The learned arbitrator referred to both sub-sections (2) and (3) of Section 50 of the SOGA and determined the measure of loss on the basis of difference in the price of the S-LWPFP preforms under the agreement less the hypothetical market price. It is significant to note that while

doing so, the learned arbitrator not only referred to the rival submissions on the said aspect of the matter, but also to the oral evidence of the witnesses, who appeared for the rival parties in the said proceedings. The learned arbitrator also quoted the statement of the witness for the respondent, wherein he agreed with the witness for the petitioner as regards the basis for the measure of loss claimed by the petitioner.

31. This clearly indicates that the respondent was not only granted sufficient opportunity to deal with the case of the petitioner, but the learned arbitrator engaged in considering the rival positions on the said aspect of the matter. There is nothing to indicate that in the facts of the present case, it could be said that the respondent was not granted an opportunity to deal with the specific case of the petitioner or that the findings of the learned arbitrator were based on evidence behind the back of the respondent. Thus, the respondent has failed to make out the said ground under Section 48(1)(b) of the Arbitration Act, to successfully resist enforcement of the foreign arbitral award.

32. A frail attempt was made on behalf of respondent to claim that the learned arbitrator relied upon an overruled judgement of the Singapore High Court on the aspect of damages. It was sought to be demonstrated on behalf of the petitioner that the overruling was on some other point. The respondent relied upon certain case laws in that regard. But this Court is of the opinion that the aforementioned ground does not come within the narrow scope available under Section 48 of the Arbitration Act for successfully resisting enforcement of the foreign arbitral award. Thus, this Court finds substance in the contentions raised on behalf of the petitioner. The respondent has not been able to make out any ground under Section 48 of the Arbitration Act, to successfully resist the enforcement of the foreign arbitral award in the present case.

33. Accordingly, the petition is allowed and it is ordered that the foreign arbitral award, in the present case, dated 24.02.2021 is enforceable and executable as a decree of this Court. The petitioner shall now take further steps for execution of the said foreign arbitral award, in accordance with law.

34. Pending applications, if any, also stand disposed of accordingly.

(MANISH PITALE, J.)

Minal Parab