REPORTED

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) 541/1998

DATE OF DECISION: November 27 , 2008

GLENCORE GRAIN ROTTERDAM B.V. ..... Plaintiff
Through: Mr. V.P. Singh, Sr. Advocate with
Mrs. Anju Bhattacharaya, Mr. Amit Bansal,
Ms. Manisha Singh, Advocates

versus

SHIVNATH RAI HARNARAIN (INDIA) CO. ..... Defendant
Through: Mr. Rakesh Tiku with Ms. Nisha,
Advocates

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

JUDGMENT

: REVA KHETRAPAL, J.

1. This is a suit under Section 48 of the Arbitration and Conciliation Act, 1996 (for short "the Act, 1996") for filing and enforcement of the foreign

award No.12031 A dated 29.07.1997.

FACTS

2. The background facts as set out in the plaint are as follows.

3. The plaintiff is a company based in Rotterdam, Netherlands while the defendant is a partnership firm based in India with its office at A-8, Bhagwan Dass Nagar, New Delhi – 110 026. Between 30th November, 1994 and 8th June, 1995, the plaintiff entered into eleven contracts with the defendant, in terms whereof a total quantity of 300,500 MT of Indian white rice was to be sold by the defendant and purchased by the plaintiff. All these eleven contracts were negotiated and concluded through an English broker, Jackson Son & Co. (London) Ltd. In respect of each contract, immediately after the business had been concluded, Jackson Son & Co. sent to both parties, by fascimile transmission, their Contract Confirmation Notes. At the end of each of these Contract Confirmation Notes, Jackson Son & Co. stated:

> *"All other terms as per London Rice Brokers' Association Contract number 3."*

Thereafter, in respect of each contract, Jackson Son & Co. prepared formal contracts written on London Rice Brokers Association Contract No.3 (for short "LRBA Contracts"). These formal LRBA written Contracts were then sent by Jackson Son & Co. to the plaintiff and the defendant by fascimile transmission.

4. The case of the plaintiff is that the contractual relationship between the plaintiff and the defendant was governed by the terms and conditions contained in the aforesaid eleven LRBA written Contracts, the certified copies of which have been placed on record. According to the plaintiff, Clause 11 of the said LRBA Contracts contains an arbitration clause which provides for settlement of any dispute under the contract by arbitration of the London Rice Brokers Association. Clause 14 of the said LRBA Contracts provides that the contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English Law. For the facility of reference, clauses 11 and 14 of the said LRBA Contracts are reproduced as under:-

Clause 11

"11. Any dispute arising on this Contract shall be referred for settlement to the Arbitration by two Members of this Association's Panel of Arbitrators or their Umpire, being also a Member of this Panel. Each party to appoint one Arbitrator and having the right to reject one nominee. In the event of any party omitting to nominate an Arbitrator within ten days of receipt of notice of appointment of an Arbitrator by the other party, or of the Arbitrators failing to agree on the appointment of an Umpire, the Committee of the London Rice Brokers Association, in either case, shall have power to appoint one forthwith, who shall act on behalf of and as if nominated by the party or parties in default. Claims for arbitration other than Arbitration on quality shall be made and the Claimant's Arbitrator shall be nominated not later than 90 days after the expiry of the contract period of shipment or not later than 90 days from the date of final discharge of the ship at port of destination,

whichever period may last expire. The parties to the Arbitration shall have the right of appealing against any Award (except on questions of law) within thirty days from the date of Award to the London Rice Brokers Association, whose decision shall be final. Any payments arising out of the Award are to be made within 30 days of the date hereof."

Clause 14

"14. Domicile – The Contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English Law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the London Rice Brokers' Association. The serving of proceedings upon any party by sending same to their last known address together with leaving a copy of such proceedings at the office of the London Rice Brokers' Association shall be deemed good service, rule of law or equity to the contrary notwithstanding."

5. The plaintiff asserts that the defendant delivered the full quantity of grains covered by contracts No.9827, 9840, 9855 and 9867. In regard to the other seven contracts, however, the defendant failed to perform contracts No.9844, 9923 and 9924 and nothing was delivered against them, whereas the remaining four contracts were partly fulfilled. As a result of the defendant's breach and default, the plaintiff suffered loss and damages. Resultantly, disputes and differences arose between the parties, and the plaintiff through communications dated 25th September, 1995 and 3rd October, 1995 invoked the arbitration clause contained in Clause 11 of the said LRBA Contracts and referred their claims to the London Rice Brokers Association for arbitration.

Two arbitrators, namely, Mr. A.J. Sear and Mr. J.S. Gainer were appointed as arbitrators and they entered upon the reference.

6. The plaintiff having filed its claim before the said arbitrators, the defendant took the objection that the London Rice Brokers Association had no jurisdiction, as the eleven contracts drawn on the London Rice Brokers Association Contract No.3 (LRBA Contracts) which contained the arbitration clause, were not binding upon them. The defendant also took the stand that the issue of the arbitrators' jurisdiction should be decided as a preliminary issue, before the arbitrators proceeded to consider the claim of the plaintiff on merits, and filed its written submissions on the matter of jurisdiction before the arbitrators.

7. After hearing arguments on the said issue of jurisdiction and considering the written submissions filed by the parties, the arbitrators rendered an interim award, being interim award No.12031 dated 20th June, 1997, inter alia, holding that the formal contracts on the London Rice Brokers Association Contract No.3 (LRBA Contracts), which were sent to the parties by Jackson Son & Co., were the contracts between the plaintiff and the defendant and in terms of Clauses 11 and 14 of the said contracts, all disputes were to be determined by arbitration in accordance with the rules of the LRBA and the arbitrators had jurisdiction to entertain the reference.

8. Thereafter, the arbitrators after considering the evidence and the documents gave their award, being Award No.12031 A dated 29th July, 1997 on the merits of the claims of the plaintiff, awarding a total sum of US$ 65,25,679.81 under different heads of claim with interest at the rate of 6.5% per annum from the various dates specified in the award upto the date of the award. The award having been rendered in favour of the plaintiff, the present petition has been filed by the plaintiff for the enforcement thereof.

WRITTEN STATEMENT

9. The defendant, apart from raising certain preliminary objections to the maintainability of the suit in the written statement filed by it, has submitted that there was no legally executed and subsisting arbitration agreement between the parties for referring any disputes to the LRBA. According to the defendant's version, towards the end of 1994 the plaintiff approached the defendant to supply various quantities of rice, spread over the next few months. The quantity and rate as well as the other specifications for each of the contracts was specifically given by the defendant to the plaintiff as per the prevalent practice. After initial negotiations, the defendant had executed and signed eleven Confirmation of Contracts, being Contract Nos.1121, 1122, 1123, 1125, 1126 of 1994 and 1128, 1205, 1505, 1510, 1510, 1511 of 1995. These contract numbers in seriatim were given by the plaintiff to the defendant

as per the running numbers available in its record and were meant for ready reference. The parties were bound by the terms and conditions of these Confirmation of Contracts unless these were amended or changed with the consent in writing of both the parties. In each case, the plaintiff was obliged to open an appropriate letter of credit so as to ensure the payment of the money to the defendant if the goods were dispatched. The said letters of credit were required to be opened immediately after the contract, but the plaintiff in some cases opened the letter of credit belatedly. In the last two contracts, bearing Contract No.1510 of 1995 and 1511 of 1995 for the supply of 37500 MT and 12500 MT respectively, the plaintiff did not open letters of credit and thus clearly committed breach of its obligations. As a result, pecuniary losses were caused to the defendant. Efforts were made by the defendant to settle the matter which came to naught. On 25.09.1995, the plaintiff got sent to the defendant a communication, in terms of which it communicated its decision to cancel all the contracts and invoke arbitration through the LRBA. The defendant in reply got sent through its lawyer a communication dated 29.09.1995, thereby informing the plaintiff that there was no question of any arbitration since it had no privity with the LRBA. Nevertheless, the plaintiff proceeded with its attempts to seek arbitration through the LRBA and chose to file a detailed claim petition with the LRBA, a copy of which was sent to the

defendant also and that is how, if the defendant is to be believed, the defendant came to know of the alleged LRBA Contracts.

10. The defendant's further stand in its written statement is that M/s. Jackson was never the agent of the defendant nor it had any authority to sign and execute any contract on its behalf. It is submitted by the defendant that there was no question of appointing any foreign person by the defendant for the purpose of sale of its rice to the plaintiff and that at no point of time any authority was given to M/s. Jackson to enter into any contracts of sale with either the plaintiff or anyone else. The said unilateral documents as executed by M/s. Jackson are, therefore, of no legal consequences and do not bind the defendant. Even otherwise, there are wholesale alterations made in the said documents. It might be that in some of the correspondence, the defendant might have quoted the same numbers as there are in the alleged LRBA Contracts, but the same does not bind the defendant nor it leads to the existence of an arbitration clause and/or creation of an arbitration agreement between the parties.

11. According to the defendant, a perusal of the record also shows that M/s. Jackson had been acting as an agent/broker for the plaintiff and it had no authority to bind the defendant. The arbitration was invoked unilaterally by the plaintiff and the LRBA was bent upon continuing with the matter and,

consequently, by a one page fax letter they indicated that they had decided to hold that they had the jurisdiction, without giving any reason for the said finding, which led to the defendant sending a communication dated 14.06.1997 to the LRBA. It was thereafter that an undated communication was received by the defendant on 25.06.1997 alongwith a copy of the interim award. In the said letter, the LRBA also called upon the defendant to file its written submissions within five days in London. This was responded to by the defendant sending a communication dated 02.07.1997, informing the LRBA of the pendency of a suit filed by the defendant, being Suit No.1103/1997 for a decree of declaration to the effect that the alleged eleven LRBA Contracts as executed by the defendant No.3 bearing Contract Nos.9827, 9934, 9840, 9843, 9844, 9855, 9866, 9867, 9914, 9923 were void/voidable and not binding on the defendant herein and not enforceable in law and for cancellation thereof, and a request was also made to defer the proceedings by six weeks. The LRBA, instead of acceding to the said request, proceeded with the matter ex parte and passed a final award dated 29.07.1997, the enforcement of which is being sought by the present suit. The defendant having already challenged the legality and validity of the eleven LRBA Contracts in Suit No.1103/1997, which is pending in this Court, according to the defendant, the award rendered by the LRBA cannot be deemed to have become final.

REPLICATION

12. A replication to the above written statement of the defendant was filed by the plaintiff, reiterating that the issue whether an arbitration agreement had come into existence had been determined with finality by the arbitrators against the defendant, and the defendant not having filed any appeal against the said award, nor having made any application to the English Courts but having participated in the arbitration, cannot be allowed to contend that there was no arbitration agreement between the parties and that no foreign award had come into existence. The plaintiff further reiterated that formal written contracts were sent by M/s. Jackson Son & Co. to the plaintiff as well as to the defendant. It was denied by the plaintiff that the defendant was not given the opportunity of reasonable hearing or that the award was contrary to Indian Law, including the Indian Partnership Act as alleged or otherwise.

ISSUES

13. On the above pleadings of the parties, the following issues were framed on 09.11.2000 for determination:-

> *"1. Whether the petitioner has complied with the provisions contained in Section 47 (1)(a) to (c) of Act, 1996, for enforcement of the award dated 29.7.97?*
> *2. If the issue No.1 is decided in affirmative, whether the respondent has furnished proof as required under Section 48 of the Act, 1996, showing that the enforcement of the said award is liable to be refused under Section 48?"*

14. It deserves to be noted at this juncture that at the time of the framing of the issues, i.e., on 09.11.2000, the statement of the learned counsel for the plaintiff was recorded that Sections 47 and 48 of the Act of 1996 being procedural provisions, the above issues were to be determined on the basis of the material already on record, meaning thereby that no evidence was required to be adduced. Accordingly, this Court proceeded to hear arguments, but on 05.09.2001, the following order was recorded:-

> *"S.No.541/98.*
>
> *Although in this case arguments have been heard at considerable length,* ***it is agreed between the parties that it would be appropriate if parties are allowed to lead evidence by way of affidavits.*** *It may be mentioned that in the order dated 9th November, 2000 it was recorded that following issues arise for determination:*
>
> *1. Whether the petitioner has complied with the provisions contained in Section 47 (a) to (c) of Act, 1996, for enforcement of the award dated 29.7.97?*
>
> *2. If the issue No.1 is decided in affirmative, whether the respondent has furnished proof as required under Section 48 of the Act, 1996, showing that the enforcement of the said award is liable to be refused under Section 48?*
>
> *It may be mentioned that defendant is challenging the existence of legally valid arbitration agreement between the parties. This question is covered by the aforesaid issues and, therefore, would be adverted to while deciding these issues. Learned counsel for the defendant presses for framing of one more issue which is framed as under:*
>
> *3. Whether the present suit is liable to be stayed under Section 10 of the Code of Civil Procedure in view of the pendency of Suit No.1103/97?*
>
> *Affidavit by way of evidence be filed by the plaintiff in the first instance within three weeks. The defendant shall*

file its evidence by way of affidavit within three weeks thereafter.

List on 30th October, 2001."

15. After the passing of the above order, an application, being IA No.11722/2001 was filed by the plaintiff stating that, since some of the documents that were relied upon by the parties in the course of their submissions were not a part of the record of this case, though the same were a part of the record of Suit No.1103/1997 between the same parties, it was deemed proper to file an affidavit in support of the said documents. Accordingly, the plaintiff filed its evidence by way of affidavit, and thereafter even the defendant filed its affidavit.

16. The aforesaid application led to the passing of the following order on 26th August, 2002:-

"IA 11722/2001

After submissions were opened, on this application, learned Sr. counsel for plaintiff submitted that the affidavit, which has been filed in the matter, are not really in the nature of evidence and that, in any case, without going into the controversy regarding the cross examination etc., he is prepared to withdraw the affidavit itself.

Learned counsel for defendant/applicant submits that he has also filed one affidavit and the deponent, who is a partner of the defendant, is present and prepared to stand in the witness box and be cross-examined today itself on the averments made in the said affidavit.

Learned Senior counsel for plaintiff submits that in view of the section 47 & 48 of the Arbitration and Conciliation Act, 1986 he does not wish to cross-examine the witness.

Learned counsel for defendant submits that since he has already filed the affidavit, and even if counsel for the plaintiff feels there is no need of cross-examination, yet formal one line statement of deponent, would be required in law.

Learned counsel for plaintiff thereupon submits that there is no necessity of any such formal statement to be made, since he agrees to the affidavit being exhibited as Ex.D-1, which is exhibited accordingly.

List the matter for hearing and disposal on 28th October, 2002."

17. The matter proceeded for hearing. Elaborate arguments were addressed by both the parties. The findings on the issues raised are recorded hereunder.

ISSUE NO.1

18. I have heard Mr. V.P. Singh, the learned senior counsel for the plaintiff and Mr. Rakesh Tiku, the learned counsel for the defendant. The learned senior counsel for the plaintiff has taken me through the agreements entered into between the parties, the interim award of arbitration No.12031 and the final award of arbitration No.12031A rendered by the LRBA as well as the correspondence between the parties to contend that in view of the provisions of Section 47 of the Arbitration and Conciliation Act, 1996 in the case of an international commercial arbitration held out of India, the party applying for the enforcement of a foreign award is required to discharge the following obligations only:-

(a) to produce in Court the original award or a copy thereof, duly

authenticated in the manner required by the law of the country in which it is made;

(b) to produce the original agreement for arbitration or duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

19. Mr. V.P. Singh, the learned senior counsel for the plaintiff contends that the plaintiff has squarely discharged all the aforesaid three obligations, inasmuch as a bare glance at the copy of the award shows that it has been duly authenticated in the manner required by the law of the country in which it was made; duly certified copies of the agreements for arbitration have been placed on record, which are certified by the Public Notary, Rotterdam; and such evidence as is necessary to prove the award is a foreign award is also on record. My attention was invited, in this context, to the certificate of the Secretary of the London Rice Brokers' Association Michael John George French dated 29th December, 1997, which reads as under:-

> *"**THIS IS TO CERTIFY THAT***
>
> *1. the attached document is a true and correct copy of the Award of Arbitration No: 12-O31A dated 29th July 1997 on the official form of the London Rice Brokers' Association ("LRBA") made by Mr. J. St C Gainer and Mr. A.J. Sear as the arbitrators duly appointed in disputes which had arisen between Glencore Grain Rotterdam B.V. aAnd Shivnath Raj*

Harnarain (India) Co. under various contracts which are referred to in the said Award.

2. *the said Award was made in pursuance of agreements between the said parties for arbitration in accordance with the Arbitration Rules of LRBA in force at the date of the contracts, which agreements are valid under the laws of England by which they are governed;*
3. *the said Award was made by the arbitrators provided for in those agreements and those Rules;*
4. *the said Award was made in respect of matters which may lawfully be referred to Arbitration under the laws of England;*
5. *the said Award has become final in England in which country it was made;*
6. *the said Award is enforceable in England and can be executed."*

20. The aforesaid certificate has been attested and certified to be sworn by the Notary Public of the City of London, Mr. Richard Graham Rosser, on the 30th day of December, 1997, which certificate reads as follows:-

> *"**I, RICHARD GRAHAM ROSSER,** Notary Public of the City of London, England, by Royal Authority duly admitted and sworn, practising in the said City,*
>
> ***DO HEREBY CERTIFY AND ATTEST:***
>
> ***THAT** the signature set and subscribed at foot of the hereunto annexed Document is genuine, such signature having been subscribed thereto by **MICHAEL JOHN GEORGE FRENCH**, whose identity I attest, the Secretary of the **LONDON RICE BROKERS' ASSOCIATION**, with offices c/o Gafta House, 6 Chapel Place, Rivington Street, London EC2A 3DQ, England, and a proper and competent Officer of the said Association to sign such Document on its behalf.*
>
> ***IN TESTIMONY WHEREOF I** have hereunto set my hand and affixed my Seal of Office in the City of London aforesaid, this thirtieth day of December One thousand nine*

hundred and ninety-seven."

21. Mr. V.P. Singh, the learned senior counsel for the plaintiff submitted that though initially the plaintiff had filed an affidavit by way of evidence which is on the record, subsequently, keeping in view the provisions of Sections 47 and 48 of the Act, the said affidavit by way of evidence was withdrawn in order to cut short the proceedings. According to Mr. Singh, no oral evidence was required to be adduced by the plaintiff and in this context Mr. Singh has relied upon paragraphs 5 to 8 of a decision rendered by a learned Single Judge of this Court (Hon'ble Mr. Justice Mukul Mudgal) in ***Sial Bioenergie vs. Sbec Systems AIR 2005 DEL 95***, which reads as follows:-

> *"5. In my view the whole purpose of the 1996 Act would be completely defeated by granting permission to the applicant/JD to lead oral evidence at the stage of objections raised against an arbitral award. The 1996 Act requires expeditious disposal of the objections and the minimal interference by the Court as is evident from the Statement of Objects and Reasons of the Act which reads as follows:-*
>
> > *"4. The main objectives of the Bill are as under:-*
> >
> > *(ii) To make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration."*
> >
> > *x x x x x x x*
> > *x x x x x x x*
> >
> > *(v) to minimize the supervisory role of courts in the arbitral process.*
>
> *6. At the stage of the objections which are any way limited in scope due to the provisions of the Act to permit*

oral evidence would completely defeat the objects underlying the 1996 Act. The process of oral evidence would prolong the process of hearing objections and cannot be countenanced.

7. Furthermore the Supreme Court in FCI v. Indian Council for Arbitration 2003 (6) SCC 564 had summarized the ethos underlying the Act as follows:-

> *"The legislative intent underlying the 1996 Act is to minimize the supervisory role of the Courts in the arbitral process and nominate/appoint the arbitrator without wasting time leaving all contentious issues to be urged and agitated before the arbitral tribunal itself."*

8. Accordingly, I see no merit in these applications and the prayer made therein is rejected."

22. Mr. Singh also forcefully contended that the entire onus, by virtue of the provisions of the Section 48 of the Act, is on the defendant to prove why the enforcement of the award in the instant case ought to be refused. Per contra, Mr. Rakesh Tiku contended that the plaintiff having chosen not to adduce any evidence in support of its case, an adverse presumption must be drawn against the plaintiff under Illustration (g) of Section 114 of the Indian Evidence Act, viz., the presumption that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

23. In my view, there is no question and indeed there cannot be that the plaintiff, who applies for the enforcement of an award has to fulfil the conditions laid down in Section 47(1) of the Act, in that, it has to file duly

certified copies of the original agreements for arbitration between the parties and a duly authenticated copy of the award, authenticated in the manner required by the law of the country in which it is made. This has been done in the present case, the plaintiff having filed certified copies of the original agreements for arbitration and a duly authenticated copy of the award along with the attestation and testimony of the Notary Public and the seal of the First Secretary (Consular), High Commission of India, London. Indeed, Mr. Rakesh Tiku, the learned counsel for the defendant did not seriously contest the position that Section 47 of the Act had been complied with by the plaintiff. He, however, sought to resist the enforcement of the award by placing reliance on the provisions of Section 48(1)(a) and (b) as well as Section 48(2)(b) to which I shall presently refer.

24. Before doing so, however, it is proposed to refer to the dicta laid down by a three-Judge Bench of the Hon'ble Supreme Court in the case of ***Renusagar Power Co. Ltd. vs. General Electric Co.*** reported in ***AIR 1994 SC 860***. In the said case, the first question formulated by the Supreme Court for consideration was:

> *"I) What is the scope of enquiry in proceedings for enforcement of a foreign award under Section 5 read with Section 7 of the Foreign Awards Act?"*

25. Reference was made by the Supreme Court, in answering the aforesaid

question, to the position at common law in the context of enforcement of a foreign award and also to certain treatises dealing with the New York Convention. In paragraph 32 of its judgment, the position in common law was adverted to by the Supreme Court as follows:-

> *"32. With regard to enforcement of foreign judgments, the position at common law is that a foreign judgment which is final and conclusive cannot be impeached for any error either of fact or of law and is impeachable on limited grounds, namely, the court of the foreign country did not, in the circumstances of case, have jurisdiction to give that judgment in the view of English law; the judgment is vitiated by fraud on part of the party in whose favour the judgment is given or fraud on the part of the court which pronounced the judgment; the enforcement or recognition of the judgment would be contrary to public policy; the proceedings in which the judgment was obtained were opposed to natural justice. (See: Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 42 to 46, pp. 464 to 476; Cheshire & North, Private International Law, 12th Edn., pp. 368 to 392.)."*

26. The view of Albert Jan Van Den Berg in his treatise, the New York Arbitration Convention of 1958 was also referred to, which is as follows:-

> *"It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award*

> *would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration. (p. 269)"*

27. The Supreme Court next referred to Alan Redfern and Martin Hunter, who opined as follows:-

> *"The New York Convention does not permit any review on the merits of an award to which the Convention applies and in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted. (Redfern & Hunter, Law and Practice of International Commercial Arbitration, 2nd Edn., p. 46 1.)"*

28. After taking the above treatise into account, the Supreme Court in paragraph 37 of its judgment in the ***Renusagar's case (supra)*** laid down the law as follows:-

> *"37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits."*

29. It is not in dispute that the award in question is a foreign award given after the commencement of the Arbitration and Conciliation Act, 1996 and would be governed by the said Act, although arbitration proceedings had commenced prior to the enforcement of the said Act [***Thyssen Stahlunion***

Gmbh vs. Steel Authority of India Ltd. (1999) 9 SCC 334 and Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd. (2001) 6 SCC 356]. It is also not in dispute that a foreign award under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") is enforceable under Chapter I of Part-II, which relates to the enforcement of certain foreign awards, viz., The New York Convention Awards. The definition of a foreign award for the purposes of Chapter I, as delineated in Section 44, 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."*

30. Section 45 of the Act deals with the power of a judicial authority to refer parties to arbitration. Section 46 of the Act, which in effect re-enacts Section 4(2) of the Foreign Awards (Recognition and Enforcement) Act, 1961 lays down that a foreign award 'enforceable' under this Chapter shall be treated as 'binding' for all purposes on the persons between whom it is made, and once a foreign award becomes binding, it may be relied on by any of such persons

by way of defence, set off or otherwise in any legal proceedings in India and any references in Chapter I of Part II to 'enforcing a foreign award' shall be construed as including references to relying on an award.

31. Section 47, which is the next section, in effect reincarnates Section 8 of the Foreign Awards (Recognition and Enforcement) Act, 1961, with the exception that it adds an explanation which defines the term 'Court' for the purposes of Chapter I. For better appreciation, Section 47 is reproduced hereunder:-

> *"**47. Evidence.–**(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court–*
>
> *(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;*
>
> *(b) the original agreement for arbitration or a duly certified copy thereof, and*
>
> *(c) such evidence as may be necessary to prove that the award is a foreign award.*
>
> *(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.*
>
> ***Explanation.–**In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such*

principal civil Court, or any Court of Small Causes."

32. The aforesaid Section sets forth the formal requirements necessary for applying for the enforcement of a foreign award and is obviously based on Article IV of the New York Convention, 1958, which reads as under:-

> ***"ARTICLE IV***
>
> *1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:-*
>
> *(a) the duly authenticated original award or a duly certified copy thereof;*
>
> *(b) the original agreement referred to in article II or a duly certified copy thereof.*
>
> *2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."*

33. Section 47 read with Article IV of the New York Convention make it amply clear that the burden of proving that the award sought to be enforced is a genuine 'foreign award' and based on a foreign agreement for arbitration, is on the party seeking to enforce it by moving an application for enforcement thereof along with producing the following documentary evidence:-

(i) The original award or a duly authenticated copy thereof;

(ii) The original arbitration agreement or a duly certified copy

thereof;

(iii) Other relevant evidence necessary to prove that the award is a foreign award; and

(iv) Certified English translation of the arbitral award and the arbitration agreement.

34. The aforesaid documents shall form *prima facie* evidence to prove that the award is a genuine foreign award. The applicant, i.e., party applying for the enforcement of a foreign award is not required to produce any further evidence. [See judgment of the Delhi High Court in ***Sial Bioenergie (supra)*** and of the Bombay High Court in ***CETACO SA vs. Bombay Export International 2000 (3) Arb. LR 69 (Bom.)***].

35. If a party against whom the award is sought to be enforced, contests the enforcement he must resort to the next following section, that is, Section 48 of the Act. The said section sets forth seven conditions, required to be proved by the party resisting the enforcement of the award, for refusal to enforce a foreign award. The first five conditions are as contained in Section 48(1) and the remaining two are contained in Section 48(2). In other words, for resisting the enforcement, such party is required to plead and prove one or more of these defences. Section 48 is in the same terms as Article V of the New York Convention as contained in the First Schedule to the Act and reads as follows:-

*"**48. Conditions for enforcement of foreign awards.–**(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that–*

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

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

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

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

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

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

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

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

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

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

36. Section 49, which is encaptioned 'Enforcement of foreign awards' is apposite and reads as follows:

> ***"49. Enforcement of foreign awards.**–Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court."*

37. The enforcement of a foreign award is thus a three-dimensional process as evidenced from Sections 47, 48 and 49 of the Act. A party applying for the enforcement of a foreign award must make an application under Section 47 of the Act accompanied by the documentary evidence delineated in the said Section. The burden of proof on him upon production of the aforesaid documents stands discharged and the onus shifts to the party resisting the

enforcement.

38. Section 48 stipulates that the party against whom the award is invoked may resist the enforcement on one or more of the grounds enumerated in Section 48(1) (a) to (e). If the resisting party furnishes before the Court proof to the satisfaction of the Court that the award suffers from one or more of the defects set out in Section 48(1), the Court may refuse enforcement of the award. The enforcement of a foreign award may also be refused in the two eventualities set out in sub-clauses (a) and (b) of Sub-Section (2) of Section 48. These grounds, viz., non-arbitrability of the subject matter of the award and conflict of the enforcement with the public policy of India, need not be pleaded or proved by the party resisting the enforcement. The Court may *suo moto* refuse the enforcement if it finds existence of any of the aforesaid defects in the award sought to be enforced. If, however, the Court does not find any of the defects enumerated in Section 48 (1) and Section 48(2) in the award sought to be enforced, it will enforce the award by virtue of Section 49 of the Act.

39. In other words, the Court may exercise its discretion, to refuse enforcement of a foreign award, for the first five conditions set forth in this Section only if the party against whom it is invoked, makes a request and furnishes proof to it of the existence of any of the conditions set out in sub-

section (1) of Section 48. The Court may also exercise its discretion, to refuse enforcement of a foreign award on account of the last two conditions, namely, non-arbitrability of the subject matter of the dispute and conflict of the enforcement with the public policy of India [sub-section (2) of Section 48]. This the Court may refuse *suo moto*. It is then for the party seeking enforcement of the award to satisfy the Court that the subject matter of the dispute is capable of settlement by arbitration under the law of India or the enforcement would not be contrary to the public policy of India. The Explanation to Sub-Section (2) further declares that the Court may also refuse enforcement of the award and declare the award to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

40. What emerges quite clearly from a conjoint reading of sub-section (1) and sub-section (2) of Section 48 of the Act is the following:-

(i) Sections 48(1) and (2) both use the expression ***'may'*** in the context of refusing enforcement instead of the mandatory 'shall' or 'must'. In other words, the legislature has left it to the discretion of the Court to refuse enforcement of a foreign award, depending upon the facts and circumstances of a particular case.

(ii) The scope of enquiry before the Court before whom the

application for enforcement of the foreign award is pending is circumscribed by the conditions for refusal set out in Sections 48(1) and (2) of the Act. It is not open to a party seeking to resist a foreign award to assail the award on merits or because a mistake of fact or law has been committed by the arbitral tribunal. Dicey and Morris have even gone as far as to say that the court under this Section is not concerned even if the arbitral tribunal applied no law at all, assuming this is permissible under the law governing the arbitration proceedings (The Conflict of Laws, Volume I, 13th Edition, 2000, pp.622-23, paragraph 16-071). In other words, the scope of enquiry before the Court in which the award is sought to be enforced is limited to the grounds set out in Sections 48(1) and (2) and it is not open to the party resisting the award to impeach the award on merits in such proceedings (***Renusagar Power Co. Ltd. vs. General Electric Co. AIR 1994 SC 860, page 881***).

(iii) The legislative intent regarding enforcement of a foreign award is writ large, in that, the conditions for refusing enforcement are to be narrowly construed, and, as far as possible the Court may exercise its discretion in favour of enforcement of the award as is

clear from the use of the words:-

> "E*nforcement of a foreign award* ***may*** *be refused, ..., **only** if that party furnishes to the Court proof that .....*"

41. Keeping in view the aforesaid, I have no hesitation in holding that the plaintiff has discharged the burden placed upon him of proving that the award sought to be enforced is a genuine foreign award based on a foreign agreement for arbitration and thereby has discharged the obligation placed upon him of complying with the provisions contained in Section 47(a) to (c) of the Act of 1996.

42. Issue No.1 is accordingly decided in favour of the plaintiff.

Issue No.2

43. Adverting to Issue No.2, which deals with the question as to whether the defendant has furnished proof as required under Section 48 of the Act, showing that the enforcement of the award is liable to be refused under Section 48, Mr. Tiku, the learned counsel for the defendant has raised a three-fold contention:-

(i) There was no arbitration agreement between the parties and accordingly the arbitral tribunal had no jurisdiction to arbitrate upon the matter.

(ii) The defendant was not given proper notice of the arbitral proceedings and was unable to present its case.

(iii) The enforcement of the award would be contrary to the public policy of

India.

44. Dealing with Mr. Tiku's contention that there was no arbitration agreement between the parties, Mr. Singh, the learned senior counsel for the plaintiff strongly contended that the defendant was barred from raising the aforesaid plea in view of the fact that the aforesaid question, with the consent of the parties, had been gone into by the arbitral tribunal and the arbitral tribunal having held in favour of the plaintiff, the defendant could not be permitted to re-open the same.

45. Reliance was placed by Mr. Singh to buttress the aforesaid submission on the judgment of the Supreme Court in the case of ***Alopi Prasad & Sons Ltd. vs. Union of India AIR 1960 SC 588***, wherein it was held that where a specific question of law is submitted to the arbitrator and the arbitrator answers the same, in such a case the decision being of an arbitrator selected by the parties to adjudicate upon their disputes, binds the parties even on a question of law.

46. In the present case, it is not in dispute that a specific reference was made on the question of jurisdiction to the arbitrator, the respondent participated in the aforesaid proceedings before the arbitrator, made its submissions and took its chance. A look at the interim award rendered by the LRBA shows that though the claimant's submissions were received by the arbitral tribunal on 3rd

July, 1996 and the arbitrator set down a time-table providing for 28 days in which the respondent was to reply, time was extended at the request of the defendant on several occasions, i.e., on 5th August, 1996, 7th October, 1996, 20th November, 1996, 12th December, 1996, 2nd February, 1997 and 28th May, 1997. Finally, the learned arbitrators after noticing that in the submissions of the defendant of 22nd April, 1997, the defendant's/respondent's reply was restricted to matters of jurisdiction, passed the following order:-

> *"Matters of procedure were discussed immediately prior to the hearing of 28th May 1997* ***whereby it was agreed as recorded in Arbitrators letter of 28th April 1997, issues of Jurisdiction would be dealt with first****. It was subsequently agreed that in the interest of Justice, the Respondents not having submitted a reply on the substantive issues, depending on the determination of Jurisdiction, a further period would be allowed up to 12th June 1997 in which the Respondents would reply. The hearing was adjourned until 19th June 1997. Arbitrators would advise them their determinations in the form of a letter to the parties on 29th May 1997 reserving their reasoning in the event of a finding in favour of Claimants, such reasons to be included in their Award following determination of substantive issues."*

47. Pursuant to the aforesaid agreement, the learned arbitrators first took up the issue of jurisdiction and after duly discussing the respective contentions of both the parties and noticing their submissions, rendered an interim award on 20th June, 1997 unequivocally holding that the LRBA Contract Form No.3 contained the arbitration agreement between the parties, and at no time did the

defendant/respondent raised any objections to the terms of the said agreement nor to the involvement of Jackson as a broker. The relevant portion of the interim award reads as follows:-

> *"**JURISDICTION**:-*
> *On 28th May Arbitrators met to hear submissions from the parties on the question of Arbitrators Jurisdiction. Sellers have raised the question of Jurisdiction in their submissions claiming that the Contract confirmations sent out by the broker Jackson Son & Co. (London) Ltd. (Jackson), which included The London Rice Brokers Association (LRBA) Contract Form No.3 had no legal standing. Sellers submit that Jackson were never the agent of the Seller, nor did Jackson have any authority on Sellers behalf to sign or execute any Contract nor could they have sold the said quantity of rice on behalf of Sellers. The confirmation of Contract dated 25th November 1994 sent by Sellers was signed by both parties and made no mention of any LRBA contract. Sellers further submitted that at no point of time was Jackson given any authority to enter into any Contract of Sale with Buyers or anyone else. The Jackson documents are of no legal consequence and do not bind Sellers. The fact that Sellers occasionally referred to Jackson reference numbers does not lead to the existence of an agreement to refer disputes to arbitration.*
>
> *Sellers maintained that in Law, unless there was a specific agreement to refer the disputes to arbitration by a particular institution, arbitration cannot be invoked by unilateral conduct of any of the parties.*
>
> *Buyers on the other hand submit that Jackson performed the role of normal brokers and were not the agents of either party. The terms of the Contracts were negotiated by the Parties through Jackson as Brokers. Immediately after the conclusion of each business Jackson sent to both parties their contract confirmation notes. These contract notes always included the term "All other terms as per London*

Rice Brokers' Association contract number 3".

Subsequently Jackson prepared formal contracts written on LRBA Contract No.3 which were sent to both parties. Both clauses 11 and 14 make reference to the fact that any dispute arising under the Contract is to be referred to arbitration in accordance with the Rules of the LRBA.

Buyers submit that at no time did Sellers raise any objection that the Contract Notes and formal contracts contained the standard LRBA Arbitration clause. In each occasion when the business was being negotiated both parties knew and understood that they were negotiating on the basis of LRBA Contract No.3 terms.

Sellers therefore cannot now in good faith deny that the Arbitrators have Jurisdiction to hear and determine disputes arising out of the contracts.

***WE FIND THAT** it is perfectly normal for parties to negotiate business through brokers after which the brokers send contract confirmations and contracts to both Parties. In the case with which we are dealing, no objections were raised by Sellers concerning the terms and reference to LRBA Contract Number 3 at the relevant time which incorporated an Arbitration Clause. Additionally, Sellers communicated directly with Jackson on several occasions concerning the execution of the Contracts and was therefore recognising Jackson as being the broker involved. The brokers were not the agents of either party and were performing the normal duties of a broker who had put the parties together and finalised the business on their behalf.*

Apart from those occasions when Buyers and Sellers work directly with each other without brokers, it is fully understood by the trade that brokers perform the function of putting the parties together and subsequently when the business is concluded they need confirmations to both parties outlining the basic details. This is usually followed

up by contracts being sent to the parties showing the terms and conditions in full. These were all received by Buyers. Sellers however maintained that they did not receive any confirmations. Nevertheless, Sellers were aware of the details and executed part of the quantity covered by the contracts. Sellers on several occasions contacted and corresponded directly with Jackson referring to the contracts by numbers as shown on the confirmations. A meeting in Paris on 12th September 1995 was arranged where Mr. Prem Gary of Shivnath, Mr. Pinto of Glencore and Mr. Harper of Jackson discussed the shipment problems. The meeting continued on 14th September where Shivnath produced a document entitled "Various outstanding issues with Glencore." The Contracts mentioned in this document contained inter alia list of Contracts under the heading "Performance of Glencore Contracts" and were all numbered with Jacksons Contract Numbers.

Having carefully considered all the evidence, written submissions and oral submissions ***WE FIND THAT*** *on the balance of probabilities, Sellers must have been fully aware that the usual LRBA Contract Form No.3 containing an expressed agreement to refer all disputes to be determined by arbitration in accordance with the Rules of LRBA applied, and at no time did they raise any objections to the terms nor to Jacksons involvement as a broker.*

Clause 14 provides that the Contract shall be deemed to have been made in England and the validity and performance thereof should be governed by English Law.

WE FIND THEREFORE THAT *Arbitrators have Jurisdiction to deal with the substantive issues.*

The costs, fees and expenses of this Interim Award shall be dealt with in our final Award."

48. Mr. Singh, the learned senior counsel for the plaintiff has also taken me

through the correspondence between the parties to show that there was a valid and subsisting arbitration agreement as embodied in the contracts entered into between the parties and the defendant must be held bound by the same. Reference in this regard was made by him to the following documents:-

(i) Facsimile transmission of letter dated 30th November, 1994 from Jackson Son & Co. (London) Ltd. to the defendant, M/s. Shivnath Rai Harnarain (India) Co. with a copy to the plaintiff enclosing the amended confirmation of business and stating that the same was being incorporated "into the full LRBA contract which is being sent to you (the defendant) by express mail", viz., **Contract No.9827**. Significantly, the said letter after setting out the terms of the contract specifically states **"All other terms as per London Rice Brokers' Association contract number 3"**.

(ii) Facsimile transmission of letter dated 30th November, 1994 from Jackson Son & Co. (London) Ltd. to the defendant M/s. Shivnath Rai Harnarain (India) Co. with reference to **Contract No.9834** seting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **"All other terms as per London Rice Brokers' Association contract number 3"**.

(iii) Facsimile transmission of letter dated 13th December, 1994 from

Jackson Son & Co. (London) Ltd. to the defendant, M/s. Shivnath Rai Harnarain (India) Co. with a copy to the plaintiff with reference to **Contract No.9840** setting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **"All other terms as per London Rice Brokers' Association contract number 3"**.

(iv) Facsimile transmission of letter dated 23rd December, 1994 from Jackson Son & Co. (London) Ltd. to the defendant M/s. Shivnath Rai Harnarain (India) Co. with a copy to the plaintiff with reference to **Contract No.9843** setting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **"All other terms as per London Rice Brokers' Association contract number 3"**.

(v) Facsimile transmission of letter dated 23rd December, 1994 from Jackson Son & Co. (London) Ltd. to the defendant M/s. Shivnath Rai Harnarain (India) Co. with a copy to the plaintiff with reference to **Contract No.9844,** setting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **"All other terms as per London Rice Brokers' Association contract number 3"**. This letter also contains a post-script to the

following effect: **“Please note confirmation 9843 should show shipment in 1995 – not 1994 – sorry for error. The LRBA Contract will be correct.”**

(vi) Facsimile transmission of letter dated 12th January, 1995 from Jackson Son & Co. (London) Ltd. to the defendant M/s. Shivnath Rai Harnarain (India) Co. with reference to **Contract No.9855** setting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **“All other terms as per London Rice Brokers' Association contract number 3”**.

(vii) Letter dated 31st January, 1995 from Jackson Son & Co. (London) Ltd. to the defendant M/s. Shivnath Rai Harnarain (India) Co. with reference to **Contract No.9866** setting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **“All other terms as per London Rice Brokers' Association contract number 3”**.

(viii) Facsimile transmission of letter dated 31st January, 1995 from Jackson Son & Co. (London) Ltd. to the defendant M/s. Shivnath Rai Harnarain (India) Co. with reference to **Contract No.9867** setting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **“All other terms as per**

London Rice Brokers' Association contract number 3".

(ix) Facsimile transmission of letter dated 26th May, 1995 from Jackson Son & Co. (London) Ltd. to the defendant M/s. Shivnath Rai Harnarain (India) Co. with reference to **Contract No.9914** setting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **"All other terms as per London Rice Brokers' Association contract number 3"**.

(x) Facsimile transmission of letter dated 8th June, 1995 from Jackson Son & Co. (London) Ltd. to the defendant M/s. Shivnath Rai Harnarain (India) Co. with reference to **Contract No.9923** setting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **"All other terms as per London Rice Brokers' Association contract number 3"**.

(xi) Facsimile transmission of letter dated 8th June,1995 from Jackson Son & Co. (London) Ltd. to the defendant M/s. Shivnath Rai Harnarain (India) Co. with reference to **Contract No.9924** setting out the terms of the said contract. The said letter after setting out the terms of the contract specifically states **"All other terms as per London Rice Brokers' Association contract number 3"**.

(xii) Letter dated 9th February, 1995 sent by the defendant, Shivnath Rai

Harnarain (India) Co. to the plaintiff with a copy to M/s. Jackson Son & Co. (London) Ltd., setting out the amendments to the Letter of Credits with particular reference to the Contract Numbers under which the said Letter of Credits had been opened:-

"1. L/C No.IMP/1342/94 (CONTRACT 9827) FOR WHITE RICE PANT 4 VARIETY

KINDLY INSERT "PACKING IN P.P. BAGS ALSO ACCEPTABLE"

2. ***L/C No.190057 (CONTRACT 9834)*** *FOR WHITE RICE PANT 4 VARIETY*

KINDLY INSERT

(A) PACKING IN P.P. BAGS ALSO ACCEPTABLE

(B) DELIVERY OF PR-104 VARIETY ALSO ACCEPTABLE

(C) PARTSHIPMENT ALLOWED.

3. ***L/C No.190073 (CONTRACT 9840)*** *FOR BROKEN RICE*

KINDLY INSERT "PARTSHIPMENT ALLOWED"

4. L/C No.190005 (CONTRACT 9844) FOR WHITE RICE

KINDLY INSERT

(A) PACKING IN P.P. BAGS ALSO ACCEPTABLE

(B) AMEND PANT 106 TO ----------

5. ***L/C No.21036411144505 (CONTRACT 9843)*** *FOR WHITE RICE PANT 4 VARIETY*

KINDLY INSERT

(A) PACKING IN P.P. BAGS ALSO ACCEPTABLE

(B) DELIVERY OF PR-106 VARIETY ALSO

ACCEPTABLE

***CONTRACT NO.9866: KINDLY OPEN NEW L/C FOR FIRST CONSIGNMENT** @ US$225.00 OR SUITABLY ENHANCE AMOUNT IN L/C NO.IMP/1342/94, SHIPMENT IN MARCH, DESCRIPTIONS 25% BROKEN."*

(xiii) Letter dated 27th May, 1995 from the defendant Shivnath Rai Harnarain (India) Co. to M/s. Jackson Son & Co. (London) Ltd. with reference to Balance **Contract No.9844**.

(xiv) Letter dated 4th July, 1995 from Shivnath Rai Harnarain (India) Co. to Jackson Son & Co. (London) Ltd. with reference to **Contract Nos.9855 and 9866**.

(xv) Letter dated 21st July, 1995 from the defendant, Shivnath Rai Harnarain (India) Co. to Jackson Son & Co. (London) Ltd. **with regard to Glencore shipments**.

(xvi) Letter dated 27th July, 1995 from the defendant, Shivnath Rai Harnarain (India) Co. to Jackson Son & Co. (London) Ltd. with reference to nomination of vessels.

(xvii) Letter dated 11th August, 1995 from the defendant, Shivnath Rai Harnarain (India) Co. to Jackson Son & Co. (London) Ltd. requesting for increase in the price of rice.

(xviii) Letter dated 18th September, 1995 from the defendant, Shivnath Rai

Harnarain (India) Co. to Jackson Son & Co. (London) Ltd. with reference to the outstanding contracts.

(xix) Letter dated 19th September, 1995 from the defendant, Shivnath Rai Harnarain (India) Co. to Jackson Son & Co. (London) Ltd. **specifically referring to Contract Nos.9843 and 9866**.

(xx) Letter dated 26th June, 1995 from Shivnath Rai Harnarain (India) Co. to the plaintiff **setting out the shipment schedule with reference to Contract Nos.9844, 9866, 9843, 9923, 9924 and 9834**.

(xxi) Letter dated 18th July, 1995 from Jackson Son & Co. (London) Ltd. to Shivnath Rai Harnarain (India) Co. on the question of demurrage claims from the plaintiff **specifically referring to Contract Nos.9914 and 9923.**

(xxii) Letter dated 8th August, 1995 from Jackson Son & Co. (London) Ltd. to the defendant, Shivnath Rai Harnarain (India) Co. with a copy to the plaintiff referring to nomination of vessels.

(xxiii) Letter dated 8th August, 1995 from Jackson Son & Co. (London) Ltd. to the defendant, Shivnath Rai Harnarain (India) Co. regarding shipping schedule.

(xxiv) Letter dated 14th August, 1995 from Jackson Son & Co. (London) Ltd. to the defendant, Shivnath Rai Harnarain (India) Co. with

reference to the price increase claimed by the defendant.

(xxv) Letter dated 18th September, 1995 from Jackson Son & Co. (London) Ltd. to Shivnath Rai Harnarain (India) Co. **specifically referring to Contract Nos.9843 and 9866.**

49. Relying upon the aforesaid documents, Mr. Singh contended that the aforesaid documents leave no manner of doubt that the defendant, who had been corresponding with the plaintiff and with M/s. Jackson Son & Co. (London) Ltd. with specific reference to the Contract Numbers, was fully aware of the 11 LRBA contracts entered into between the parties. In particular, Mr. Singh strongly relied upon the letter of the defendant addressed to the plaintiff dated 26th June, 1995 setting out the following shipping schedule with reference to the Contract Numbers of all the eleven Contracts:-

MONTH	VESSEL	QTY.(MT)	RATE(USD)	CONTRACT
AUGUST	1ST	12500	227+3+4	**9844**
	2ND	12500	232+4	**9866**
	3RD	12500	216+4	**9843**
	4TH	12500	200	**9923**
SEPT.	1ST	12500	227+3+4	**9844**
	2ND	12182.7	232+4	**9866**
	3RD	8507.5	216+4	**9843**
	4TH	12500	237.5	**9924**
OCT.	1ST	12500	237.5	**9924**
	2ND	12500	237.5	**9924**
	3RD	2649.7	208	**9834**

50. Mr. Singh contended that since the defendant itself was corresponding with the plaintiff as well as with M/s. Jackson Son & Co. (London) Ltd. with reference to the LRBA Contract Numbers and opening Letters of Credit with respect to the aforesaid contracts, the defendant cannot now turn around to say that it was unaware of the aforesaid contracts. Reliance in this context is placed by the learned senior counsel for the plaintiff upon the judgment of the Supreme Court in **Smita Conductors Ltd. vs. Euro Alloys Ltd.** reported in ***AIR 2001 SC 3730.***

51. In the aforesaid case, a contract bearing No.S-142 for supply of aluminium rods of 2400 metric tonnes @ 200 MT per shipment was proposed by the respondent to the appellant on 31st August, 1990 containing an arbitration clause. In the letter accompanying the contract, it was stated to sign and return copy for sake of good order. The appellant did not sign nor return the said contract despite reminders sent in this regard from time to time. On 04.02.1991, a letter from the respondent enclosing the amendments to the contract was sent to the appellant but without any result. On 25.02.1991, another contract bearing No.S-336 for the supply of 2,000 MT of aluminum rods @ 500 MT per shipment was sent. In the first contract, initially there was no arbitration clause. However, on 18.03.1991, the contract bearing the same number, i.e., S-142, was sent containing the arbitration clause with certain

amendments for signature and return of the second copy. But the contract was not signed and sent by the appellant. On the basis of certain irrevocable letters of credit opened by the appellant, shipments were made in January, February and March 1991. On the aforesaid facts, it was submitted before the Supreme Court that the correspondence between the parties and the conduct of the appellant clearly established that there existed an arbitration clause between the parties and, therefore, there was full compliance with Article II, paras 1 and 2 of the New York Convention, which forms part of the schedule to the Act. The Supreme Court after noticing that there was no letter or telegram confirming the contracts as such, but there was certain correspondence which indicated a reference to the two contracts in opening the letters of credit addressed to the bank, bearing Nos.S-142 and S-336, in which there were arbitration clauses, opined that the two contracts stood affirmed by reason of the opening of the letters of credit and by the conduct of the appellant as indicated in the letters exchanged, and accordingly it must be held that there was an agreement in writing between the parties providing for arbitration. Paragraph 6 of the judgment of the Supreme Court, which has a direct bearing on the issue involved in the present case, may be referred to. The said paragraph reads as follows:-

> *"6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing.*

What is an agreement in writing is explained by para 2 of Art.2. If we break down para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause, (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing. In the present case, we may advert to the fact that there is no letter or telegram confirming the contract as such but there is certain correspondence which indicates a reference to the contract in opening the letters of credit addressed to the Bank to which we shall presently refer to. There is no correspondence between the parties either disagreeing with the terms of the contract or arbitration clause. Apart from opening the letters of credit pursuant to the two contracts, the appellant also addressed a telex message on 23.4.1990 in which there is a reference to two contracts bearing Nos.S-142 and S-336 in which they stated that they want to invoke force majeure and the arbitration clauses in both the contracts which are set forth successively and thus it is clear that the appellant had these contracts in mind while opening the letters of credit in the bank and in addressing the letters to the bank in this regard. May be, the appellant may not have addressed letters to the respondent in this regard but once they state that they are acting in respect of the contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard."

52. In ***Bharat Starch Industries Ltd. & Ors. vs. Prudent International***

Shipping and Trading Ltd. reported in ***1995 IV AD (DELHI) 343***, an argument was advanced on behalf of the plaintiff that since the plaintiff/appellant was not a signatory of the Memorandum of Understanding or Charter Party, therefore, there was no privity of contract between the plaintiff and the defendant No.1 and, thus, there was no agreement for referring disputes for arbitration. The question arose whether the plaintiff/appellant which transported goods from Kakinada Port in Andhra Pradesh on board the ship of the first defendant could be said to be a party to the Charter Party containing the arbitration clause so that the question of liability of the plaintiff/appellant for demurrage could be subject matter of arbitration at London as per Clause 29 in the Charter Party. It was contended by the learned counsel appearing on behalf of the plaintiff/appellant that the second defendant and its employee Mr. Paul Mc. Gowan had no authority to sign the Charter Party as the agent of the appellant. After referring to the entire evidence on record, a Division Bench of this Court in paragraph 30 of its decision held as follows:-

> *"30. In the light of the above documents, we are clearly of the opinion that the appellant treated itself as the charterer of the vessel. The appellant was so informed and it had not objected to this. The signing of the Charter Party by the 2nd defendant , through its employee Mr. Paul McGowan, who negotiated the same can only mean that the said person signed the Charter Party on behalf of the appellant. The acceptance of the MOU also leads to the inference that the*

appellant admitted that it was the Charterer."

53. In the aforesaid case, the Supreme Court also opined that the appellant having accepted the Charter Party in its correspondence and, therefore, the arbitration clause (Clause 29), the learned Single Judge was right in coming to the conclusion that the dispute was to be settled by the arbitrators at London.

54. Relying upon the aforesaid decision of the Division Bench, the learned senior counsel for the plaintiff submitted that the contention of the defendant that it was not a signatory to the LRBA contracts is wholly without merit, as the defendant was all along aware of the LRBA contracts and the provision therein made for arbitration in case disputes arose between the parties. I see no reason to disagree with this submission, more so, in view of the law laid down by the Supreme Court in ***Smita's case (supra)***. The necessary corollary is that it must be held that there was an arbitration agreement between the parties and the defendant being fully aware of the same, cannot turn round at this stage to urge that it was not so.

55. Next, Mr. Rakesh Tiku, the learned counsel for the defendant relying upon the provisions of Section 48(1)(b) vociferously contended that the defendant was not given proper notice of the appointment of the arbitrator and the arbitral proceedings and was, therefore, unable to present its case. This contention is being noted for the purpose of being rejected for the reason that it

is amply borne out from the contents of the interim award as well as from the contents of the final award that the defendant was afforded more than ample opportunity to present their case before the Arbitral Tribunal. A look now at the relevant portion of the final award No.12031A, which reads as follows:-

> *"4.* ***SELLERS FAILURE TO RESPOND***
>
> *4:1 Sellers failed to respond to Buyers' submissions on the substantive issues dated 3rd July 1996 and 21st August 1996. The Tribunal issued an Order on 7th October 1996 giving Sellers an extension to 28th October 1996 to respond. No reply having been received a Peremptory order was issued on 20th November 1996 for Sellers to serve their defence submissions by 4th December 1996. Sellers' lawyers in a fax dated 12th December 1996 advised that they disputed any liability maintaining that there was no Arbitration agreement between the parties and indicated that they had sent a legal notice to Buyers claiming damages for Rs.6.11 Crores. They submitted that as they disputed the existence of an Arbitration agreement no further action should be taken and that they had advised Sellers to take appropriate legal proceedings.*
>
> *4:2 Sellers maintain that as the Courts in India were closed at the time for the winter vacations and would not be opening again until the first week in January 1997, the lawyers on behalf of Sellers stated that they had been instructed to pay the appropriate Court fees for the necessary legal papers to be submitted and the "Government Treasury and the Court fees etc. would also be shortly made available." Following the opening of the Courts the lawyers would furnish all the necessary legal papers including the notices of the Court.*
>
> *4:3 Since no confirmation had been received of Sellers having proceeded to the Indian Courts in accordance with their stated intention, on 2nd February 1997,*

Sellers were advised by the Tribunal that should no reply be received by 12th February they would meet on 14th February to determine the issues. A fax dated 20th February was received by the Tribunal asking for a further extension of at least four weeks to make submissions and present documents.

4:4 *On 5th March 1997 the Tribunal issued a Peremptory order that reply submissions should be received not later than 17th March 1997. Written submissions on the matter of Jurisdiction only were received by the Tribunal on 26th March 1997 under cover of a letter from Sellers dated 13th March 1997. These contained a formal request that Sellers be heard at an oral hearing at which they were to be represented by Sellers' lawyers.*

4:5 *Accordingly the Tribunal set the hearing down for 28th May 1997 and at the same time issued an Order to Sellers to reply with their defence submissions on all issues by 9th May 1997. However, Sellers' reply at the hearing was restricted only to matters of jurisdiction. At the hearing a further period was granted to Sellers up to 12th June 1997 to reply with their submissions on the substantive issues in the event that the Arbitrators determined they had jurisdiction.*

It was agreed the parties would be advised by letter the following day as to whether the arbitrators determined they had jurisdiction. In the event that they so found, they would reserve their reasoning to be issued in their Award and the hearing would be reconvened on 19th June 1997. If they found that they did not have jurisdiction that would be at the end of the matter and the parties would be advised accordingly.

Arbitrators advised the parties by letter and telex on 29th May 1997 that they had jurisdiction.

Sellers failed to appear at the reconvened hearing but instead tabled a request to the Tribunal as they had given no reasons in their letter of 29th May that the Tribunal should issue an Interim Award relating

> *to the matter of jurisdiction. The LRBA issued this Interim Award on 20th June 1997 and a Final Order was issued giving Sellers until 30th June to put in defence submissions for a reconvened hearing on 4th July 1997. However no further submissions or evidence were received from either party by LRBA or Arbitrators. Therefore the Arbitrators met to determine the issues based on the evidence and documents before them."*

56. It is clear from the above that the defendant's contention that the defendant was not able to present its case before the arbitral tribunal is wholly untenable. The plaintiff's submissions were received by the Arbitral Tribunal on 3rd July, 1996. The award was rendered a year later on 29th July, 1997. During this period, a long rope was given to the defendant to present its case. If the defendant after receipt of the interim award on 20th June, 1997 failed to contest the matter, the blame cannot be laid at the door of the arbitrators for no fault of theirs, more so as the Arbitral Tribunal on the insistance of the defendant agreed to consider the question of its jurisdiction in the first instance and to hear the submissions on the substantive issues in the event that they determined they had jurisdiction to do so.

57. Finally, dealing with the contention of Mr. Tiku that the award cannot be enforced, being opposed to public policy. As already noticed, sub-section (2) of Section 48 declares that the Court may refuse enforcement of the award and declare the award in conflict with the pubic policy of India if it finds that

the enforcement thereof “would be contrary to the public policy of India”. The Explanation to sub-section (2) further declares that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

58. In the instant case, it is not even the contention of the defendant that the making of the award was induced or affected by fraud or corruption. Apart from this, the defendant has failed to clarify as to how the enforcement of the award would be contrary to the public policy of India.

59. In ***Renusagar Power Co. Ltd. (supra)***, the Hon'ble Supreme Court while considering the scope and ambit of the expression “public policy” in Section 7(a)(b)(ii) of the Foreign Awards Act held that since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression “public law” in Section 7(1)(b)(ii) of the Act must necessarily be construed in the sense the doctrine of “public policy” is applied in the field of private international law. Applying the said criteria, the Supreme Court held that enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to:-

(i) fundamental policy of Indian law; or

(ii) the interest of India; or

(iii) justice or morality.

60. Mr. Tiku, the learned counsel for the defendant in the context of public policy merely contended that the impugned award was opposed to public policy for the reason that under Indian law, the partner of a firm cannot bind the partnership firm for referring the disputes to arbitration and, as a matter of fact, there is no such implied authority with the partner of a firm. Therefore, on that score also, assuming that the LRBA contracts in question have any authority, yet the reference to the arbitration would be legally impermissible.

61. I am constrained to hold that the aforesaid contention of Mr. Tiku is on the face of it untenable for the reason that the Supreme Court in ***Renusagar's case (supra)*** has categorically held that the defence of public policy should be construed narrowly and that "***the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required"***. [See paragraph 65 of the judgment in ***Renusagar (supra)***].

62. Apparently with a view to place matters beyond the pale of controversy, the legislature while enacting the Arbitration and Conciliation Act, 1996 deemed it expedient to add an Explanation in order to explain the scope and ambit of the expression "contrary to the public policy of India". Hence the

declaration contained in the Explanation to sub-section (2) of Section 48 of the Act ***"for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption"***. Thus, even assuming that the enforcement of the award would involve any contravention of the law of partnership in India, it cannot be said that the enforcement of the award would be contrary to the public policy of India. The scope and ambit of the expression "public policy of India" must necessarily be construed narrowly to mean the fundamental policy of India and, as clarified by the Explanation to Section 48(2), conflict with the public policy must involve the element of fraud or corruption.

ISSUE NO.3

63. The learned counsel for the defendant though he had pressed for the framing of this issue on 5th September, 2001, did not press the same at the time of hearing. In fact, no reference was made to this issue by the counsel for the parties at the time of hearing. Accordingly, no finding is being returned on this issue as it was not pressed.

CONCLUSION

64. Before parting with the case, one other aspect of the matter deserves to be noticed. The learned counsel for the defendant Mr. Tiku vehemently

contended that the plaintiff having filed an application under Section 66 of the English Arbitration Act in the United Kingdom and having subsequently withdrawn the same by order dated 11th June, 2004 on payment of £ 23,332.50 as costs, the question to be considered is:-

> *"Does the withdrawal of the Section 66 proceedings not amount to the abandonment of the claim for enforcement of the award by the plaintiff?"*

65. Mr. Singh, on the other hand, relying upon the judgment in the case of ***Brace Transport Corporation of Monrovia, Bermuda vs. Orient Middle East Lines Ltd., Saudi Arabia and Ors.*** reported in ***1995 Supp (2) SCC 280,*** submitted that the position of law is now well settled that a party seeking to enforce an award in an international commercial arbitration may have a choice of country in which it is to do so and may be able to go forum shopping. Mr. Singh submitted that this depends upon the location of the assets of the losing party and enforcement of the award may well be sought in a country where the unsuccessful party has assets. If a party has assets in a number of jurisdictions, then enforcement may be sought in a number of countries. A choice exists for the interested party and the interested party is well within its rights to go forum shopping after comparing and weighing the advantages and disadvantages of each jurisdiction.

66. For the aforesaid, apart from relying on the decision of the Supreme

Court in ***Brace Transport Corporation (supra)***, the learned senior counsel for the plaintiff also relied upon the observations made in the *Law and Practice of International Commercial Arbitration* by Redfern and Hunter (1991 Edition), where at page-450 it is observed as under:-

> *"Enforcement of an award is usually directed at the defaulting party's assets. If these assets are situated in more than one country, the party seeking enforcement of the award may have a choice of country in which to proceed; as it is sometimes expressed, the party may be able to go "forum shopping".*
>
> *Legal proceedings of some kind are necessary to obtain title to a defaulting party's assets or their proceeds of sale. Such legal proceedings must usually be taken in the state or states in which the property or other assets of the losing party are located. It would not be useful, for example, to obtain an order in the English courts for seizure and sale of the defaulting party's goods and chattels in England if no such property exists. Nor would it be useful to secure an order for the attachment of the defaulting party's bank accounts in England, if these accounts turn out to be overdrawn.*
>
> *The need to locate the place or places in which a defaulting party has assets (or in which he is likely to have them) is not peculiar to international commercial arbitration. In purely domestic proceedings it may also be necessary to locate the defaulting party's assets in order to enforce a court's judgment or an arbitral tribunal's award."*

67. The observations made in the *Arbitration of Commercial Disputes, International and English Law and Practice* by Tweeddale and Tweeddale, at page 409, in paragraph 13.05, were also relied upon, which are as follows:-

> *"Enforcement of the award will be sought in a country where the unsuccessful party has assets. If a party has*

> *assets in a number of different jurisdictions then enforcement may be sought in a number of countries. The successful party will also want to ascertain which jurisdictions will permit recognition and enforcement of the award. It follows that where the unsuccessful party has assets in two jurisdictions, but only one will recognize or enforce the award, the successful party will be forced to proceed in that jurisdiction."*

68. Relying upon the aforesaid principle of law as enunciated by the various legal authorities and as laid down in the case of ***Brace Transport Corporation (supra)***, in my view, there is no difficulty in holding that the plaintiff, who holds a foreign arbitral award which is executable as a decree, cannot be refused enforcement of the said award by this Court, the withdrawal of similar proceedings in the English Courts notwithstanding I am buttressed in coming to the aforesaid conclusion by a judgment of a learned Single Judge of this Court rendered in ***Motorola Inc. vs. Modi Wellvest Private Limited*** reported in ***2004 (3) Arb. LR 650 (Delhi),*** to the same effect.

69. To conclude, it must be held that the plaintiff is entitled to the relief claimed by him of enforcement of Award No.12031A dated 29th July, 1997 and by virtue of the provisions of Section 49 of the Act, the award shall be deemed to be a decree of this Court. The plaintiff is accordingly held entitled to the award amount with interest till the date of the award as awarded by the arbitral tribunal along with future interest at the same rate from the date of the award till the date of realisation.

70. CS(OS) 541/1998 and IA Nos.5306/1998, 7003/1998, 10962/1998, 10022/2001, 11722/2001 and 10464/2003 stand disposed of in the above terms.

REVA KHETRAPAL, J

NOVEMBER 27, 2008
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) No.1103/97 & IAs Nos.4762/97, 6197/97, 5828/98

DATE OF DECISION: November 27, 2008

SHIVNATH RAI HARNARAIN (INDIA) CO. ..... Plaintiff
Through: Mr. Rakesh Tiku with Ms. Nisha,
Advocates

Vs.

GLENCORE GRAIN ROTTERDAM B.V. ..... Defendant
Through: Mr. V.P. Singh, Sr. Advocate with
Mrs. Anju Bhattacharaya, Mr. Amit Bansal,
Ms. Manisha Singh, Advocates

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

: REVA KHETRAPAL, J.

In view of the findings recorded in connected Suit No.541/98, this suit does not survive and is accordingly dismissed. IAs. Nos.4762/97, 6197/97 and 5828/98 are also dismissed.

REVA KHETRAPAL, J.

NOVEMBER 27, 2008
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