2022:BHC-OS:898

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO.1130 OF 2019

Aircon Beibars FZE
A company incorporated in Sharjah
under the laws of UAE having it's
registered office at P.O. Box 121095
SAIF Zone, Sharjah UAE. .. Petitioner

v/s.

Heligo Charters Private Limited
A body corporate incorporated under
the Indian Companies Act, 1956 and
having its registered office at
Hangar No.3A, Juhu Airport,
Vile Parle (W), Mumbai-400 053. .. Respondent

Dr. Abhinav Chandrachud, a/w Mr. Aman Vachher, Mr. Sajid Mohamed, Mr. Dhiraj, Mr. A. Mukherjee and Mr. Darshil Thakkar, i/by Agrud Partners, for the petitioner.

Mr. Darius Khambata, Sr. Advocate, a/w Mr. Pheroze Mehta, Mr. Nishant Shah, Mr. Abhileen Chaturvedi, Ms. Virangana Wadhawan, Mr. Samarth Saxena and Ms. Sharmin Kapadia, i/b. Economic Laws Practice, for the respondent.

CORAM : A. K. MENON, J.
RESERVED ON : 1ST DECEMBER, 2021
PRONOUNCED ON : 17TH FEBRUARY, 2022

JUDGMENT :

1. The petitioner, a company incorporated in Sharjah, UAE, under the laws of UAE, is engaged in the business of leasing and chartering of aircraft and/or helicopters. The respondent, a private limited company, incorporated under the Companies Act, 1956, is carrying out a business of providing helicopter services to the oil and gas industry in India. By this petition, filed under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996, the petitioner seeks enforcement of the Final Arbitration Award dated 25th January 2017 ***("Award")***.

2. The Award is a foreign award within the meaning of Section 44 Part II of the Arbitration and Conciliation Act made pursuant to an agreement in writing for arbitration to be held in Singapore. The seat of arbitration under the Settlement Deed was at Singapore. The Awards directs the respondent to pay sum of USD 6,563,700/- and SGD 775,462.28.

3. The opposition to enforcement on behalf of the respondent is on five grounds which are briefly as follows;

(i) Foreign Award grants the price of the helicopter under the agreement which had been terminated and hence enforcement of such an award would be contrary to the public policy of India;

(ii) The respondent was unable to defend the petitioner's amended claim which changed the nature of the claim. As a corollary, it is contended that the award contains no discussion and does not render any findings on this objection;

(iii) The award is unreasoned to the extent it relates to amounts awarded under clauses 2(c) and 2(d) of the Settlement Agreement;

(iv) Enforcement of the award would lead to unjust enrichment of the petitioner which would be contrary to the public policy of India; and

(v) The petitioner's contention that the award may be enforced since overall justice has been done, is not justified.

4. Save and except these grounds, no other ground has been pressed into service in the respondent's attempt to oppose enforcement of the award.

Facts in brief :

5. The brief facts giving rise to the present petition are as under :

The petitioner and the respondent entered into a Lease Agreement on 3rd July 2012 in respect of one Bell 412 EP Helicopter. Under the said lease agreement, the respondent agreed to pay to the petitioner a sum of USD 5.5 million and a monthly lease charge of USD 80,000 + variable flying hour charges all which remained unpaid. On 9th September 2014, both the parties entered into a Settlement Deed, which provided for settlement of outstanding sum payable under the lease agreement to the petitioner and for sale of the used helicopter. The respondent having failed and neglected to pay the sum due under the Settlement Deed, despite numerous demands made by the petitioner, the petitioner initiated arbitration proceedings against the respondent. On 8th April 2015, the respondent was served with notice of arbitration. The respondent replied on 4th May, 2015 nominating an arbitrator. On 5th May 2015, Arbitrators nominated by the parties came to be appointed by the President of the Court of Arbitration of Singapore International Arbitration Centre (SIAC). On 2nd June 2015 by consent, Chairman of the Tribunal was then appointed.

6. At a preliminary meeting of the tribunal held on 8th June 2015, a procedural order came to be passed, by which both the parties were directed to serve submissions, file disclosure affidavits and affidavit-of-evidence. Dates of hearing were fixed. These directions were duly complied by the parties on 20th July 2015/23rd July 2016 and 14th September 2015 respectively. Having considered the submissions advanced by both the parties and having perused the documents and evidence on record, the tribunal passed the Award on 25th January 2017. Since there were some typographical errors in the Award, by consent, corrections were carried out and accordingly an Addendum came to be issued on 8th March 2017. Since there was no challenge to the Award in any court in Singapore, on 9th May 2017, the High Court of Republic of Singapore declared the Award, along with the Addendum, as final and binding upon the parties with liberty to the petitioner to enforce the same as a Judgment or Order.

7. The petitioner then filed Commercial Arbitration Petition No.269 of 2017, under Section 9 of the Arbitration and Conciliation Act, 1996, seeking injunctions against the respondent, which came to be allowed on 28th April 2017. On 9th June 2017, pursuant to the

directions of this court, the petitioner filed Commercial Execution Application No.826 of 2018 for execution of the Award. Having fulfilled the conditions prescribed in Section 47 of the Arbitration and Conciliation Act, 1996, it is stated that the Award is enforceable. Apart from considering the evidence on record in detail, the tribunal has also heard the contentions of the respondent in detail, thereby followed the principles of natural justice. Since there was no challenge to the Award on the part of the respondent within a prescribed time, it was declared as final, binding and enforceable against the respondent on 9th May 2017.

8. It was contended by the respondent that on or about April 2014, the petitioner was investigated by the US Bureau of Industry and Security (BIS) and on 18th September 2014, the petitioner was placed on the US Government BIS Entity List, which governs the export, re-export and in-country transfer of items, which are subject to the Export Administration Regulations. In view thereof, the respondent was prevented from performing its obligations under the Settlement Deed and as a result, the Settlement Deed got frustrated. This contention had been rejected by the tribunal.

Petitioner's Submissions

9. In support of the award, Dr. Chandrachud contended that mere misinterpretation of substantive law by ignoring a binding precedent or otherwise would not result in a violation of the fundamental policy of Indian law. In explaining this it is submitted that every violation of substantive law would otherwise constituted a violation of the fundamental policy of India. There would be no difference between violation of the substantive law and violation of the fundamental policy of Indian law. That almost every statute in India has been subject matter of at least one binding judgment of a superior court in India and therefore he submits that a party which terminates a contract can sue for specific performance or sue for the price of the goods. Counsel contends that the principle that a party terminating a contract cannot sue for specific performance or sue for the price of goods is not part of the fundamental policy of Indian law. A mere violation of the substantive law of India will not constitute a breach of the fundamental policy of Indian law.

10. Inviting my attention to the decision in *Associate Builders v/s. Delhi Development Authority*[1] Dr. Chandrachud submitted

[1] (2015) 3 SCC 49

that the Supreme Court did not mean that when an arbitral tribunal ignores a binding precedent of a superior court in India, it necessarily violates a fundamental policy of Indian law. He submits that the judgment in particular paragraph 27 must be understood in the context of the judgment of the Supreme Court in *Renusagar Power Company Limited v/s. General Electric*[2]. He submits that a judgment is not to be read like a statute and this is a fact that has been reiterated by the Supreme Court. In effect therefore, the learned counsel for the petitioner submitted that an arbitral tribunal which penalizes a party for observing a binding order or judgment, would violate the fundamental policy of Indian law but if it merely ignores a binding precedent, it would not violate fundamental policy of Indian law.

11. If an arbitral tribunal correctly invokes a binding precedent but applies it incorrectly to the facts before it, it would not constitute a violation of the fundamental policy of Indian law. To support this proposition, Dr. Chandrachud relies upon the decision of a Single Judge of this court in *Union of India v/s. Recon Mumbai*[3].

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[2]

[3] (2020) 6 MLJ 509

12. My attention is also invited to paragraph 75 of the Award in which the tribunal rejected the respondent's contention that *"following termination as a result of repudiation of a contract, a seller cannot sue for the price of the goods but is relegated to a claim in damages."* The tribunal had proceeded to distinguish the precedents holding that those precedents dealt with a situation in which the property in the goods had not passed prior to the contract being terminated. This could have been an erroneous application of law in facts of the case before the tribunal since it is not in dispute that the property in the helicopter had not passed to the respondent, a fact that is recognized and is undisputed, yet, this would not constitute a violation of the fundamental policy of Indian law.

13. Dr. Chandrachud then submitted that the arbitral tribunal had observed that when property in the goods had passed to the buyer, a seller, in the instant case the petitioner could sue for the price of the goods. This observation was based on Section 49 of the Singapore Sale of Goods Act, 1999. The tribunal may have erroneously applied the said law to the facts of the instant case but this would not have the effect of violation of the fundamental policy of Indian law at enforcement.

14. Dr. Chandrachud submitted that even if there are grounds for interfering or declining enforcement of an foreign award, a court is required to look at whether overall justice has been done between the parties and where the violation is not of a nature such as to prevent enforcement, the pro-enforcement bias of the New York Convention must prevail and the grounds for interfering with an award must be construed narrowly. Adverting to the facts on hand, Dr. Chandrachud submitted that the helicopter had been retained by the respondent since the year 2012 it continued in possession of the respondent. The respondent put it to use and earned USD 2.4 million between September 2014 and July 2015 by using the helicopter. Yet the respondent did not pay any part of the agreed amounts. The award of the tribunal takes into account these facts and it appears on a rough and ready approximation that the award is equivalent to about 3 years revenue that would have been earned by the respondent although the respondent has retained the helicopter for over 9 years. In these circumstances, Dr. Chandrachud submitted that overall justice has certainly been done and invited me to hold in favour of enforcement.

15. Referring to the amendment to the statement of claim, Dr.

Chandrachud submitted that first date of final hearing of the reference was 25th July, 2016 and on that very day, the petitioner sought amendment to the statement of claim. The respondent consented to the amendment. Thus, the amendment had been made prior to the commencement of the trial and in arbitration such as the one hand the trial would commence during the final hearing, even before the cross examination started. The procedure followed was in accordance with the law of India and not in violation of the fundamental policy of Indian law which provided inter alia that no amendment should be allowed to pleadings once a trial is commenced without good reasons. He submitted that the amendment allowed on 25th July, 2016 was before the trial had commenced and in any case the respondent had consented to it and did not seek time to counter the amendment in any manner either at the stage of the amendment being allowed or to deal with the amendment by filing any additional written statement. The counsel submitted that the respondent was able to present its case and therefore the award does not violate section 48(1) (b) of the Act.

16. Referring to the opposition to enforcement and the appellant challenge to the reasoning adopted by the arbitral

tribunal, Dr. Chandrachud submitted that poor reasoning cannot be taken to a ground to prevent enforcement of a foreign award. The tribunal had given reasons for reaching its conclusions inter alia that the amount set out in the contract was not a penalty but a genuine pre-estimate of the loss. Even assuming this reasoning to be poor, enforcement cannot be prevented.

17. Lastly, Dr. Chandrachud submitted that the tribunal has not unjustly enriched the petitioner inasmuch as the tribunal has observed that upon payment of the amount claimed, the petitioner was willing to transfer ownership of the helicopter to the respondent. The respondent had never been prevented from using the helicopter and was entitled to and had utilized the same and continues to retain the helicopter although it may not be airworthy in the present state of affairs. Dr. Chandrachud therefore submitted that the Award is liable to be enforced.

18. Apart from the various decisions cited before me, Dr. Chandrachud invited my attention to the law in Singapore on the aspect of breach of contract and invited my attention to Section 49 of the Contract Act which deals with seller's remedies and laid stress upon the fact that under Section 49(2) where, under a

contract of Sale, the price is payable to the buyer and the buyer wrongfully refuses or neglects to pay the price, the seller can maintain an action to recover the price although the property in the goods had not passed and goods had not been appropriated to the contract. He submitted that this provision of law clearly supports the action adopted by the present petitioner. Even otherwise, he relies upon the remedies of a seller and cites from *Chitty on Contracts* to highlight the rights of unpaid seller against the goods.

19. In support, he relies upon Section 39(1) of the English Sale of Goods Act which provides that notwithstanding the fact, property in goods may have passed to the buyer, the unpaid seller has a lien on the goods and a right to retain it and although the unpaid seller's normal remedy is to sue the buyer for the price or for damages on non-acceptance, the law allows him certain remedies and by exercising these remedies the unpaid seller secures a form of preference over general creditors. However, if the buyer repudiates his obligations under a contract, the seller is entitled to accept repudiation and treat the contract as terminated and to deal with the goods as their owner. The buyer would be treated as having repudiated the contract. These in my view are

aspects that need not be considered at this stage. The fact remains that the respondent is in possession of the helicopter. It has used the helicopter extensively and continues to retain possession and is now prosecuting a suit in this court for transfer of ownership, a material aspect which must be borne in mind.

20. In the present case, possession of the goods has always been with the respondent and the property in the goods has not passed to the respondent and the petitioner would have a lien on the goods only so long as he is in possession of the goods of the helicopter. There is an element of security that is retained by the petitioner and although the commentary on Chitty on Contracts deals with an aspect of insolvency we are not really concerned in the present case with the effects of insolvency on the rights of the petitioner as unpaid seller.

Respondent's Submissions

21. On behalf of the respondent, Mr. Khambata submitted that the award is not enforceable. The award grants the purchase price of the helicopter under a terminated agreement and that enforcement of such an award would be contrary to public policy of India. Apart from the purchase price, the award also grants

certain other amounts contemplated under the Deed of Settlement. Despite the fact that the settlement deed was terminated by the petitioner on or about 13th May, 2015 by accepting an alleged anticipatory repudiatory breach of the settlement deed on behalf of the respondent. The termination of the settlement deed has been recognized by the arbitral tribunal yet the tribunal granted the petitioner a purchase price under the settlement deed and directing the respondent to specifically performance obligations under the settlement deed. Inviting my attention to the purpose of the settlement deed, Mr. Khambata submitted that the settlement provided for the property in the helicopter to pass to the respondent only upon payment of the full purchase price. He has taken me through provisions of clauses 3, 4 & 6 and the fact that the in order to complete the transaction the sale would have to be executed outside the country for which the helicopter would have to be taken out of India and the helicopter would remain the property of the petitioner till the purchase was completed. It is only after payment of the purchase price that the helicopter is to be entered into the account in records of the respondent.

22. Mr. Khambata submits that the intention of the settlement

deed which was to ensure that the property in the helicopter would not pass till completion of the purchase price as aforesaid. He submitted that although the helicopter is physically in the possession of the respondent, it was delivered to the respondent under a Lease Agreement of July 2012 and subsequently the helicopter remains with the respondent at the Juhu Airport in Mumbai and for which the respondent is incurring costs regularly. The seller being the petitioner having terminated the contract, it is Mr. Khambata's case that the seller viz. the petitioner would only be entitled to damages for breach of contract at best for a wrongful repudiation of the contract by the buyer. However, in the instant case the tribunal has awarded the purchase price to the petitioner.

23. In support of his contentions, he has relied upon the commentary on Sale of Goods by Benjamin in the 9th Edition to submit that the seller terminates a contract following the buyer's repudiation of fundamental breach. The seller can no longer sue the buyer for the price but must necessarily claim damages. The contract remains alive for the purpose of assessing the seller's right of action for damages as a result of the buyer's breach as observed in Chitty On Contract 32nd Edition. My attention was

also invited to the decisions of *AG v/s. Pritchard* [4] in which the court had occasion to observe that the facts of that case by resuming possession of furniture abandoned by the defendant. The Crown had disentitled itself to sue for part of the purchase price but could sue for damages for breach of agreement to purchase.

24. Mr. Khambata also relied upon the judgment of the Court of Appeal in *R.V. Ward V/s. Bignall*[5] wherein the court of appeal observed that the payment of the price was of essence of the contract. It requires the buyer to pay the price or tender it within a reasonable time failing which the seller in possession of the goods may treat the bargain as rescinded and resell the goods. A suit for damages becomes comparable to a claim for damages for non-acceptance of the goods where the property has never passed. Rescission of a contract he submits, discharges both parties from further liability to perform. Where rescission occurs as a result of one party exercising his right to treat a breach by the other as a repudiation of contract, it would give rise to a secondary obligation of the party in breach that is to compensate the other party to the loss occasioned to him as a consequence of

[4] 1928 Times Law Report 490 KB
[5] (1967) 1 QB 534

the rescission and this secondary, obligation is enforceable in an action for damages.

25. The short point that was sought to be canvassed in the case at hand is that the arbitral tribunal could not have awarded the purchase price but could only have awarded damages should it have been claimed. Even under the law in Singapore as is the case in Indian specific performance cannot be granted to a party once it had accepted, repudiatory breach of the contract by the other party and had terminated the contract. In this context, Mr. Khambata cited the decision of the Singapore Court of the Appeal in *Lee Christina v/s. Lee Eunice and another*[6].

26. Mr. Khambata then submitted that reliance on 55 (2) of the sale of Goods Act is misplaced since it overlooks section 60 of the Sale of Goods Act which deals with a situation where a contract had been repudiated and thus, not subsisting. For ease of reference, I am reproducing below Sections 55 and 60 of the Sale of Goods Act, 1930.

> ***"55. Suit for price.*** *– (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according*

[6] (1992) 2 SLR (R) 644

to the terms of the contract, the seller may sue him for the price of the goods.

(2) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

60. Repudiation of contract before due date. *– Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach."*

27. In this background, Mr. Khambata submitted that in India enforcement of a Foreign Award could not be permitted when it seeks to recover price of goods under the repudiated contract and the party which treats a contract as rescinded is only entitled to sue for damages for breach. My attention is invited to paragraph 75 of the award, which inter alia considers the submissions made by the respondent that following the termination caused by repudiation, the seller can no longer sue for price but is relegated to a claim in damages. However, the tribunal did not accept this submission as the textbook and the cases relied upon, dealt with a different situation from that in the present case which relates to a simple sale of goods where the property in the goods has not

passed at the date of termination.

28. In the case at hand, however, the Settlement Deed clearly provided for sums to accrue due and those sums had fallen due before the date of termination. The petitioner had contended that a tribunal which correctly invokes a binding precedent but wrongly applies it to the facts of the case does not violate the fundamental policy of Indian law. However, according to the respondent, the tribunal not only was incorrect in its invocation but also misinterpreted the law. It completely disregarded the judgments which were binding on it. In support of this contention, Mr. Khambata relied upon the fact that the ratio of the judgments was to the effect that if the buyer was in wrongful repudiation of a contract for sale of goods and the seller had elected to terminate a such contract, the seller's remedy could only be in damages and the ratio of the judgments had nothing to do with the passing of the property.

29. According to Mr. Khambata, the ratio of the judgments cited by him including that of *Jawahar Lal Wadhwa & Anr. v/s. Haripada Chakraberty*[7] are to the effect that if a buyer is in

[7] (1989) 1 SCC 76

wrongful repudiation of a contract for sale of goods, and the seller has elected to rescind and or terminate the contract, then the sellers remedy will only be in damages. It has nothing to do with whether or not the property in the goods had passed. He submitted that the petitioner's contention that reliance placed on the comments of Benjamin's Sale of Goods and *AG v/s. Pritchard* (supra) which were relied upon by the respondent turns on whether the property in the goods passed or not, was erroneous.

30. The passage in Benjamin's Sale of Goods he would submits contains two different propositions; first of which refers to the sellers' right to resell the goods when the property in the goods has not passed to a buyer; and the second where the sellers' remedy against the buyer when a contract being repudiated. These principles are distinct and the latter is not being subject to the former. Similarly the portion cited from *AG v/s. Pritchard* (supra) by the respondent and sought to be relied upon by the petitioner in its submissions does not form part of the ratio of the judgment but is merely an observation on the facts of the case. On the aspect of the commentary of Chitty on Contracts and the portion relied upon by the petitioner pertains to the sellers' right/ power of resale of the goods and did not pertain to the principle

relied upon by the respondent viz. that upon repudiation a seller's remedy against the buyer was only for damages. Thus, the underlying principle in all these cases is that once the contract has been terminated, the seller's remedy can only lie in damages irrespective of whether the property in the goods has passed or not.

31. On the other hand, Section 49 of the Singapore Sale of Goods Act, 1993 relied upon by the petitioner, Mr. Khambata submits does not deal with a situation where the contract has been terminated. According to Mr. Khambata the conclusion drawn by the tribunal in paragraph 75 has completely disregarded the ratio of the judgments that if a buyer is in wrongful repudiation of a contract and the seller has elected to rescind and terminate the contract, then the seller's remedy will only be in damages. The tribunal had therefore misapplied the judgments and also disregarded the ratio. In these circumstances, it is contended that the Foreign Award is in complete disregard of binding judgments of superior courts therefore leading to a violation of the fundamental policy of Indian law as contemplated in *Associate Builders(supra)*. The petitioner also canvassed the fact that the helicopter is the property of the

petitioner till the purchase was completed. A fact that was specified in the settlement deed in clause 6 thereof.

32. Mr. Khambata then invited my attention to the judgment in the case of *Ssangyong Engineering & Construction Co. Ltd. v/s. National Highways Authority of India (NHAI)*[8] and in particular paragraph 33 & 34 thereof ascertaining the fact that public policy of India whether contained in Section 34 or in Section 48, would now mean the 'fundamental policy of Indian law' as explained in paragraph 18 and 27 of *Associate Builders (supra)* in which the Supreme Court held that in *Renusagar v/s. General Electric* (supra) the Supreme Court had construed Section 7(1) (b) (ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961. According to the respondent and as held in *Renusagar* (supra) violation of Foreign Exchange Regulation Act and disregarding of orders of superior courts in India could be regarded as being contrary to the fundamental policy of Indian law and it could also be stated that the binding effect of a judgment of a superior court being disregarded would equally be a violative of the fundamental policy of Indian law.

[8](2019) 15 SCC 131

33. While the petitioner had relied upon *Renusagar, Sarat Chandra Mishra and Associate Builders,* it sought to contend that the later part of paragraph 27 of Associate Builders ought to be read to mean that it is only disregard of orders inter se parties to the lis, or to similarly situated parties to whom such orders would apply on facts, that would be violative of the fundamental policy of Indian law. The petitioners' interpretation of paragraph 27 of *Associate Builders* (supra), does not so reveal and as evident from the language, it clearly states that the principle that the binding effect of the Judgment of a superior court being disregarded would equally be violative of the fundamental policy of Indian law, is in addition to what has been observed in *Renusagar* (supra). Whereas if the interpretation of the petitioner was accepted, it would have the effect of rendering the later part of paragraph 27 of *Associate Builders* (supra) otiose.

34. Mr. Khambata also contended that the reliance by the petitioner on the decision of Recon (supra) is misplaced because Recon (supra) also recognized the fact that ignoring a binding precedent of a superior court would violate the fundamental policy of Indian law. On this basis, Mr. Khambata submitted that the tribunal had disregarded binding principles of law and

judgments which had been held to be violative of the policy of Indian law and public policy in India and as a result enforcement of the award in question would be in contravention of the fundamental policy of Indian law and the public policy of India.

35. Mr. Khambata's second ground of opposition is that the respondent was unable to respond to the petitioner's belated amendment that foreign award contains no discussion and renders no finding on the objections raised by the respondent. Respondent had prepared its defence vide its written statement on the basis that the petitioner was pressing a claim for damages against it and on 12th July, 2016 counsel for the petitioner had indicated that an amended statement of claim would be pressed into service which was served upon the respondent on 14th July, 2016. He contended that the petitioner had materially altered the claim converting it from one for damages to a claim for the purchase price. This amendment caused material change in the claim and the respondent did not have sufficient time to prepare and respond thereto and was therefore unable to present its case. That an objection to this effect was raised by the respondent's Advocates in their closing submissions on 12th August, 2016 but the award has not considered the objections raised and it

rendered no finding on the objection. Thus a material issue had not been determined and this should shock the conscience of the court and would constitute a violation of the public policy of India.

36. Mr. Khambata submitted that reliance placed by the petitioner in the case of *Mohinder Kumar Mehra v/s. Roop Rani Mehra & others*[9] is misplaced since it pertains specifically to an application under Order 6 Rule 17 and in the facts of that case the parties had an opportunity of leading evidence even on the amended claim and the judgment recognizes the policy of order 6 Rule 17 need not permitting amendments after a trial had commenced. The intention being that when evidence is led on pleadings, no new case ought to be allowed to be set up an amendment.

37. The third ground of opposition canvassed by Mr. Khambata is that the Award does not contain any reasons for awarding claims under clause 2(c) and 2(d) of the settlement agreement that the respondent had specifically highlighted its contention before the tribunal that clauses 2(c) and 2(d) of the settlement

[9](2018) 2 SCC 132

deed cannot be construed as a genuine pre-estimate of the losses that would be suffered by the petitioner if the respondent acted in breach of the settlement deed and therefore the tribunal was expected to render a finding on whether clauses 2(c) and 2(d) of the Settlement Agreement did constitute a genuine pre-estimate of the actual loss suffered. The tribunal has in paragraph 99 observed that clauses 2(c) and (d) are not penalty clauses and are fully enforceable since they arise out of the settlement agreement. This observation is assailed by the respondent as one without any reasons. The arbitral tribunal did hold that clauses 2(c) and 2(d) were not in the nature of penalties but they did not render any finding that these clauses constituted a genuine pre-estimate of damage which is canvassed as a crucial element in establishing in an award for liquidated damages.

38. The fourth ground of opposition canvassed before me is an alternative defence to the effect that enforcement of the award would lead to unjust enrichment of the petitioner which would be contrary to the public policy of India. The award directs the respondent to pay the purchase price of the helicopter under clauses 2(a) and 2(b) of the Deed of Settlement and other

payments due under clauses 2(c) and 2(d) but without any direction to the respondent to transfer ownership of the helicopter as contemplated in the settlement deed.

39. My attention is invited to the fact that following the award the respondent had called upon the petitioner to confirm whether it was ready to complete the transaction. However, the petitioner had reiterated that the settlement deed had been terminated. This stand of the petitioner is said to be contrary to what it had contended before the arbitral tribunal and in this respect paragraph 101 of the award expressly records that the evidence on behalf of the claimant petitioner indicates that on payment of the sum claimed, the claimant was willing to transfer ownership of the helicopter to the respondent. Mr. Khambata submitted that the petitioner cannot approbate and reprobate, on one hand claim the purchase price under the settlement deed and on the other claim that the deed had been terminated while refusing to perform obligations. This is sufficient to shock the conscience of the court and if the award is to be enforced, it would result in the petitioner receiving the purchase price without having to transfer title of the helicopter to the respondent.

40. Reliance was placed on the decision of *Patel Engineering Ltd. v/s. North East Electric Power Corporation India Ltd.*[10] in which the Supreme Court had affirmed a judgment of the Meghalaya High Court inter alia holding that unjust enrichment is contrary to the fundamental policy of Indian law and would be a ground for interference with an award and since *Ssangyong* (supra) had already clarified that the expression 'public policy of India' would mean the 'fundamental policy of Indian law' supports this view.

41. The next submission seeks to deny the petitioners' contention that if overall justice has been done between the parties, the court can brush aside the objections to enforcement and proceed to enforce the award. Mr. Khambata submitted that only in case of minor violations of procedural rules has observed in the case of *Government of India v/s. Vedanta Limited*[11] that a court could proceed and enforce an award on the basis that overall justice had been done. In the present case, it is contended that grounds have been made out for refusing enforcement they are not merely minor violations of procedural rules. In these

10 (2020) 7 SCC 167

11 (2020) 10 sCC 1

circumstances, it is contended that the court ought not to exercise its narrow and limited jurisdiction to enforce the award in question since sufficient ground has been made out for refusing enforcement.

42. Mr. Khambata has invited my attention in his summary to the contentions of the petitioner which he submitted was fallacious and proceeded in utter disregard of the correct factual position and including misrepresentation of facts. It is sought to be contended that the petitioner had sought to exploit the fact that the respondent's witness in the arbitration had disclosed that the respondent had earned revenue of USD 2, 429,190. It was sought to be clarified that this was a gross figure and not the net figure. Furthermore, the amount of USD 2.4 million was not profit since the respondent had incurred considerable expenditure and costs in operating the helicopter. Submissions are sought to be made in respect of the background to the settlement deed, the effect of the Lease Agreement which expired and the requirement of BIS License. These instances were cited by the petitioner as impediments in handing over the helicopter. Mr. Khambata submitted that the respondent used the helicopter until 18th July, 2015 and not thereafter. It is submitted that overall justice had

not been done in the case at hand. Yet, the petitioner was awarded a sum of USD 6.5 million under an award which is contrary to the fundamental policy of Indian law and public policy of India and which also seeks to unjustly enrich the petitioner. It is contended that the respondent had already filed its own suit which is pending in the Hon'ble Court for specific performance of the settlement deed and that complete justice can be done in terms of the respondent's suit. In this view of the matter it is submitted that enforcement be declined and the petition be dismissed.

Conclusions

43. As we have seen from the facts reiterated above, on 9th May, 2017, the High Court of Singapore declared that the final award was binding and that the petitioner was at liberty to enforce it. The award is in a sum of USD 6,563,700 along with a security deposit of 975,462.28. There was no challenge to this award in the Singapore court. The award was thus rendered final. However, the respondent made no payment. Thus, as a Foreign Award under Section 44 of Part II of the Arbitration and Conciliation Act, 1996, the petitioner now seeks enforcement. The differences between the parties are pursuant to a contractual

relationship which I have reiterated above and Singapore was the juridical seat of the arbitration. Singapore being a reciprocating territory it is the petitioner's contention that there is no ground for declining enforcement of the award. Therefore assistance of the court is being sought in terms of the prayers on that basis that the petition complies with Section 47 of the Arbitration Act and it is not falling within any of the exceptions under Section 48. It is contended that the arbitral tribunal was impartial and that a reasonable opportunity was given to the other side.

44. The award is neither illegal nor is it against public policy. More importantly, I find that there is no application made to set aside the award. The respondent is within the jurisdiction of this court. On facts, it is not in doubt that the helicopter was used till 18th July, 2015. Income was generated and appropriated as set out in the award and in the petition. No payment has been made by the respondent. Admittedly, it is not being used after July 2015. However, that is not a fact to be considered in the present petition since we are not concerned with the merits of the award. In Vijay Karia the Supreme Court held that as far as the challenges on the ground of public policy are concerned, it is the same principle that will apply under Section 34 in case of a

Domestic Award and in Section 48 in case of an International Commercial Arbitration and a Foreign Award. Therefore the public policy ground of challenge is the same. The ground of patent illegality appearing on the face of the award are outside the scope of interference in International Commercial Arbitration Awards which are made in India as well as Foreign Awards whose enforcement is sought to be resisted in India.

45. A finding based on documents taken behind the back of parties, is one based on no evidence, being not based on evidence led by the parties and therefore perverse. Jurisdictional errors would include situations when an arbitrator wanders outside the contract and deals with matters which were not referred to him. These may be corrected as patent illegalities but it would not be applicable to International Commercial Arbitration decided under Part II. This principle applies equally to foreign awards under Section 48. In this behalf, paragraph 69 of Ssangyong (supra) is of relevance. The public policy exception must be narrowly viewed and only an award which shocks the conscience of the court would be set aside. A very high threshold would have to be crossed such as *"egregious circumstances like corruption, bribery or fraud which would violate the most basic notions of*

morality and justice." That is not the case in the matter at hand.

46. Considering the general approach to enforcement of a foreign Award and as found by the Supreme Court in Vijay Karia, a public policy defence would have to be narrowly construed as observed in paragraph 45 of Vijay Karia, while referring to the judgment of the US Court of Appeals in *Parcens and Whittemore Overseas Co Inc v/s. Societe Generale de L'Industrie du Papier*, objections that enforcement of Foreign Arbitral Awards may be denied on this basis only where enforcement would violate the forum states most basic notions of morality and justice.

47. The pro-enforcement bias of the New York Convention is also relevant. The New York Convention recognizes that an award may not be enforced where it is predicated on a subject matter outside the jurisdiction of the arbitrator. In the present case, I do not find that the arbitral tribunal has traveled beyond the scope of the reference and beyond the jurisdiction of the tribunal.

48. The New York Convention also provides that only a court in a country with primary jurisdiction over an arbitral award may

annul that award. Courts in other countries and jurisdictions may only decide on whether the award can be enforced in that country. This is the secondary jurisdiction over an award. Vijay Karia observes in paragraph 51 that enforcement of a foreign award under Section 48 should be refused only if the respondent furnishes proof that the watertight grounds in Section 48 are made out. Section 48 as we have seen vests discretion in the court to refuse enforcement. The commentary in Gary Born on International Commercial Arbitration, Redfern and Hunter on International Arbitration and Russell on arbitration are all indicative of discretion vesting in this court. In fact Russell goes on a step further in enhancing the extent of discretion and suggests that the court also has discretion to allow enforcement even in circumstances where one or more grounds are made out.

49. Discretion, however, is not to be exercised where the award reveals a fundamental / structural defect. In my view in the present case, no structural defects or fundamental defects are revealed. Vijay Karia (supra) holds that a foreign award must be read as a whole fairly and without nitpicking. If it does address basic issues and decides claims and counter claims of the parties, it must be enforced. The Award in hand qualifies and passes this

test. Poor reasoning while rejecting a claim does not attract the public policy ground unless it offends the most basic notion of justice. In this behalf, Ssangyong (supra) in paragraph 76 makes it clear that a public policy ground based on violation of the most basic notions of justice will be attracted only in very exceptional circumstances when the conscience of the court is shocked. A court cannot interfere with an award on the ground that justice has not been done in the opinion of that court. Thus, it is not for this court while deciding an application for enforcement to consider whether the arbitral tribunal had taken the correct approach and that the court finds approach to be correct. Even if I come to the conclusion that the tribunal had taken an incorrect approach, this court has no power to modify that award or to refuse enforcement on the basis of this Court's opinion on merits.

50. In this behalf, it would be appropriate to consider the provisions of Section 48 of the Arbitration and Conciliation Act which reproduced below;

> *"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.

(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."

51. Emphasis provided above is to specify the only two grounds set up to resist enforcement. In Vedanta (supra) the Supreme Court held that enforcement may be refused in India even if the Seat Court (In this case Singapore) had upheld an award. The Indian Courts can still examine whether the award was oppose to public policy in India. Vedanta also found that the use of the word "may" in Section 48 indicates that the court retain discretion to overrule objections to an award. If it finds that overall justice has been done, in view of the 2015 amendment, perversity is no longer a ground to set aside an award. Therefore,

Section 48 being in pari-materia to Section 34, this argument must be rejected. In my view, the main reason for a court seeking to refuse enforcement of an award is to ensure that the respondent is not unjustly treated and in this behalf, I find that one of the main grounds of opposition to enforcement is the fact that an amendment was allowed at the instance of the petitioner and that amendment has caused prejudice to the respondent. This in my view is not an argument that can be sustained to oppose enforcement inasmuch as the amendment was proposed by the petitioner and was consented to by the respondent prior to the commencement of the trial. The expressions "trial" and "trial on merits" are defined in Black's Law Dictionary as follows;

> *"Trial:*
>
> *"A formal judicial examination of evidence and determination of legal claims in an adversary proceeding.*
>
> *Trial on merits:*
>
> *"A trial on the substantive issues of a case, as opposed to a motion hearing or interlocutory matter."*

52. In view of the fact that the petitioner had applied for amendment before commencement of trial, it was always open for the respondent to oppose the amendment or seek time instead of

consenting to the amendment and proceeds with the trial. In my view, by consenting to the amendment, the respondent waived all objections to the amendment being carried out. Once an amendment is carried out, it was open for the respondent to seek further time to oppose the grounds of the factual basis set out in the amendment that it chose not to do. It proceeded with the arbitral reference and on merits. If it was later found that pursuant to the amendment, certain reliefs have been granted which it had not envisaged when consenting to the amendment, in my view, it is not open today to resist enforcement on that basis. The amendment was sought before examination of issues by the chosen forum which determined these issues on merits. It was open to the respondent however, to challenge the award in the Seat Court that is in the courts of Singapore, that not having been done and the Singapore court having already found that the award had attained finality as of 2017, in my view, it is of no avail today to contend that the amendment caused prejudice and that the respondent was unable to present its case. This ground of opposition must in any event be seen to have been waived or is deemed to have been waived.

53. In *Union of India v/s. Recon Mumbai* (supra) which also

holds that perversity is a facet of patent illegality but there cannot be re-appreciation of evidence in that context simply because another view is possible. The decision in Recon also takes into consideration the effect of Ssangyong (supra) in paragraph 16 this court has observed that it is necessary to consider to reconcile the permissibility of a challenge on the ground that the award violates fundamental policy of India. With the proscription against entertaining a challenge on erroneous application of law. There is a distinction made between an incorrect invocation of a law citing for instance an overruled decision or a repealed statute or ignoring a binding precedent or law and a correct invocation but an inaccurate application of that to facts of a case. If a law is invoked correctly and but is applied erroneously no challenge can lie, but if the law is incorrectly invoked, despite a binding precedent of a superior court which is ignored then a challenge would lie. This is apparent from Associate Builders (supra) which reiterates Renusagar (supra).

54. In the present case the respondent's contention that given the termination of the Settlement Deed any damages could have been ordered has been considered by the tribunal and negated on the basis that the amount payable was agreed, had accrued prior

to termination and remained due and owing. This assessment is based on an interpretation that only the tribunal was competent to carry out. As observed in paragraph 18 of Associate Builders (supra) taking a view contrary to a statute alone would not amount to contravention of the fundamental policy of Indian law. The Supreme Court has made a distinction between policy embodied the Foreign Exchange Regulation Act (FERA) against that of violation of statutory provisions frowning upon recovery of compound interest and found that contravention of FERA would be contrary to public policy of India since it is a statute enacted in national economic interest and other statutes. Thus violation of every statute would not result in violation of the fundamental policy of Indian law. It goes to hold that disregarding orders of suprior courts could also be a contravention of the fundamental policy of Indian law. Thus, the fundamental policy test is not a formula that can be applied to lead to a predetermined result but would in my view depend on facts of each case. In the facts at hand, nothing shown to me constitutes a violation of the fundamental policy of Indian law.

55. The respondent's opposition to the petition is also based on a contention that the award is contrary to the public policy of

India in the light of Section 48(1)(b), it was *"otherwise unable to present his case"* and under Section 48(2)(d) on the basis that the enforcement would be contrary to the public policy of India. The case that Mr. Khambata has underscored amongst the objections to enforcement is the contention that the award grants the purchase price of the helicopter despite termination of an agreement and that the agreement was embodied in a settlement deed was willfully terminated by the petitioner by accepting anticipatory repudiatory breach on the part of the respondent. The tribunal has thus granted the petitioner price of the helicopter under the settlement deed effectively directing specific performance of its obligations thereunder despite the fact that the agreement had been terminated. According to the respondent, the petitioner could not have been awarded the price of the helicopter specially since the contract intended that the property in helicopter would not pass till the purchase was completed.

56. The respondent seeks to have me believe, this means that the property would not pass until the purchase price was paid. The respondent's interpretation of the contractual intent is therefore clear even according to them, till the purchase price was paid, the property in the helicopter would not pass. Thus

payment of the purchase price of the property would obviously be the first step in that direction. The respondent has contended that if the petitioner rescinded the contract albeit resulting from wrongful repudiation of the contract then in such event the petitioners' only remedy would be the nature of damages and the seller could not recover the price. While reliance has been placed on Benjamin's Sale of Goods and Chitty on Contract in support of the contention that the seller cannot sue for the price, the fact remains that under the Contract Act inforce in Singapore, Section 49 reads thus;

> *"49. – (1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.*
>
> *(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract."*

57. Section 49(2) would come to the petitioner's rescue inasmuch as the petitioner can recover amounts due to it even

before the property in the goods passes and in my view these are aspects which would have been urged and/or considered by the Arbitral Tribunal and or the court hearing an challenge against the award.

58. In my view, it is not open for the respondent to expect the court to consider these arguments on merits. There is no reason to believe that these submissions were not advanced before the arbitral tribunal. The contractual intent of the settlement deed was for the arbitral tribunal to consider and which it did. If this court was to enter upon this debate as to the contractual intent of the settlement deed it would amount to the court to entering upon the merits of the dispute. Undoubtedly, the property in the helicopter was to pass on the price being paid under the settlement deed. The settlement is said to have fructified and therefore the parties were expected to comply. The question is whether non-compliance of the settlement deed to deprive the petitioner from receiving its dues under the settlement. In this connection, the decision in *AG v/s. Pritchard* and *R.V. Ward v/s. Bignall* (supra) will be of no assistance inasmuch as those decisions do not consider Section 49 of the Singapore Act. In *Ward v/s. Bignall* (supra) also the court was concerned with a

buyers' failure to pay the purchase price as a result of which the seller can resell the goods. These are aspects which the arbitral tribunal may have considered. It is not possible to consider these arguments on merits at this stage. Accepting these arguments and evaluating acceptability of the award, on that basis, would amount to reconsideration of the award on merits and is clearly not permissible.

59. In Lee Christina (supra) the purchaser Lee Christina had agreed with her mother, the vendor that the mother would sell her property in which she was living as a tenant for a named price. The title deeds were held by the banking corporation and the mother asked the bank for the title deeds in order to proceed with the sale but before the release of the deeds the mother expired. Despite demands, the property was not sold to Christina and Christina's lawyers wrote to the Executors making time of the essence of the contract, requiring the sale of the property to be completed. The Executors having failed to respond to the demand and Christina contended that the sale contract was now null and void. Later it transpires that property prices having risen in Singapore, Christina changed her mind and her lawyers wrote to the executors seeking completion of the purchase at the earliest.

The executors declined since the contract had been rescinded on behalf of Christina in June 1976. Christina, however, commenced proceedings for specific performance of the oral agreement for sale. The court of appeal has held that the vendor the mother, had been in repudiatory breach by not taking steps to complete the transaction and that Christina, the daughter had accepted the breach vide her lawyers letter dated 14th June 1976. The contract thus having been put to an end, Christina could not resile from her action and insist on proceeding with a contract. The action if at all could be maintained was one for damages and not specific performance of the agreement for sale. The facts in the present case are being equated in a sense to that of Lee Christina. The purchaser being the respondent and the party which had allegedly committed the repudiatory breach and the petitioner which had accepted the breach. This Mr. Khambata submitted was a case which the arbitral tribunal could not have, but did ignore. Mr. Khambata has made reference to the submission made before the arbitral tribunal in this behalf. Reference to Lee Christina (supra) and the orders passed by the Court of Appeals in Singapore, once again is of no avail because these are aspects which could have formed subject matter of the challenge to the

Award in Singapore but it was not so challenged.

60. I am also not in agreement with the contention on behalf of the respondent that reliance on Section 55(2) is misplaced because it overlooks Section 60 of the Sale of Goods Act. Referring to paragraph 75 of the award, it was sought to be contended that the arbitral tribunal has correctly invoked the binding precedent wrongly applied to the facts of the case and that does not by itself violate the fundamental policy of law. The contention on behalf of the respondent is that the tribunal misapplied the law which is correctly invoked. It was open for the respondent to challenge the award in the Courts of Singapore but it did not.

61. In Renusagar (supra), the arbitral tribunal had upheld the claim of General Electric Company (GEC) in a sum of USD 2,130,785.52 towards regular interest which had been withheld by Renusagar. The issue that arose was whether in withholding this amount, Renusagar had acted wrongfully. The tribunal found that withholding or retention of the amount of interest by Renusagar was wrongful since the failure on the part of Renusagar to pay the taxes owed to the income tax department had rendered it impossible for GE to get the US foreign tax credit

to which it would have been entitled to if the amount had been paid. It was found that in the contract nothing authorized non-payment of interest or withholding of taxes for tactical reasons arising out of the litigation and the arbitral tribunal rejected the contention of Renusagar that the claim in respect of regular interest was barred by limitation. The court observed that it is a fundamental principle of law that orders of court must be complied with and any action which involves disregard of such orders would adversely affect the administration of justice thereby destructive of the rule of law and would be contrary to public policy. The question that arose was whether enforcement of an award of a tribunal would involve disregard of any order of a court. It was argued that in the matter of withholding payment of regular interest Renusagar was acting in accordance with interim orders passed by the Delhi High Court in the writ petition filed by Renusagar which had remained in operation from 1972 to1980, and therefore the tribunal was in error in awarding compensatory damages for retention by Renusagar of the amount of income payable on the regular interest during the period the writ petitions pending in the Delhi High Court and that enforcement of the award for compensatory damages on regular

interest was contrary to public policy.

62. The Supreme Court found it difficult to accept this contention. It quoted Renusagar's application filed in the Delhi High court with a prayer that sought to restrain the respondent and its officers from taking steps in proceedings for enforcement of and /or preventing payment by the petitioner of tax free interest at 6% in accordance with approvals granted. The court observed that from the prayer made, it appeared that pending the disposal of the writ petition there would be an injunction restraining the Union of India and its officers from taking steps or proceedings in enforcement pursuant to implementation of or giving effect to the orders passed whereby tax exemption had been withdrawn. The court observed that the orders of the Delhi High Court did not prevent Renusagar from depositing the Income Tax on the amount of regular interest payable in the government treasury. The order instead of preventing Renusagar from remitting the amount, permitted it to make payments to General Electric and therefore it could not be held that in retaining the amount by itself while the writ petition was pending. Renusagar was acting in accordance with orders of the Delhi High Court.

63. In the instant case, the main thrust of the arguments on behalf of the respondent is that in granting the price of the helicopter, instead of damages, despite the property not having passed, it is clearly violative of the public policy and the fundamental policy of Indian law. On the other hand, it is the petitioner's contention that merely because the arbitral tribunal may have misinterpreted substantive law whether by ignoring a binding precedent or otherwise it does not violate the fundamental policy of Indian law. If that was not so, every violation of substantial law would constitute a violation of the fundamental policy of Indian law and there would be no difference between violation of substantive law and violation of the fundamental policy of Indian law, because several provisions of numerous statutes in India would have been applied in at least one binding judgment of the Superior Court in India. Therefore, to lead to a conclusion that the arbitral tribunal had violated a fundamental policy of Indian law by granting the price of the helicopter, would be difficult to accept. I have already found that the Award of the tribunal was not such as to constitute a violation of the fundamental policy of Indian law.

64. One of the other submissions on behalf of the respondent

was that it was unable to fully respond to the belated amendment carried out by the petitioner and the nature of the claims had changed and therefore it was unable to present its case. It is contended that the award contains no discussions and renders no finding on the objection raised by the respondent. I find no merit in this submission. Admittedly the petitioner had filed its statement of claim on 20th July, 2015 and no doubt respondent had filed its written statement. However, on 12th July,2016, the petitioner proposed an amended statement of claim which was received by the respondent on 14th July,2016. According to the respondent, in the guise of clarifying a claim, the petitioner had altered the very nature of the claim converting it from one of damages to a claim for the purchase price and has since claim damages in the alternative.

65. In my view, there is nothing whatsoever on record to indicate that the respondent was prejudiced in any manner. The respondent's counsel Mr. Yang quite clearly conveyed to the tribunal that the respondent had no objection to the amendment being allowed. No request was made for time. The amendment was thus allowed by consent and absent a challenge to the amendment at the material time which the record neither

indicates nor establishes. Moreover the amendment quite obviously was to provide a breakup of the amount claimed. There is no occasion to call this aspect into question in an application which seeks enforcement of the award.

66. I am unable to accept the contention of Mr. Khambata that the claim was materially altered or that the respondent did not have sufficient time to prepare and respond thereto. The attempt here is to bring its opposition squarely within the provisions of Section 48 (1)(b) inasmuch as the respondent wants this court to believe that it was *"otherwise unable to present its case"*. The contention that the respondent was unable to present its case is belied by the fact that its closing submissions had admittedly opposed the proposed alternative claim. The contention that the final award does not contain any discussions and therefore does not determine a material issue, does not commend itself to me. I am unable to find any element in the award or the manner in which the amended claim was considered and a decision rendered, to shock the conscience of this court and thereby constitutes a violation of fundamental policy of Indian law. In my view, no case whatsoever is made out for refusing enforcement on this ground.

67. This brings me to the next ground of opposition viz. the award contains no reasons for awarding amounts claimed under clauses 2(c) and 2(d) of the Settlement Agreement. The contention is that absence of finding or reasons in respect of amounts awarded under clause 2(c) and 2(d) of the Settlement Agreement, should shock the conscience of the court as being in violation of principles of natural justice and against the most basic notions of morality and justice and therefore contrary to public policy. This in my view has no merit since it would require me to examine the merits of the case of parties under the Settlement Deed and something which is beyond the pale of consideration in the case of enforcement of a foreign award and a review of the merits to form a different opinion is what the respondent expects this court to do. Clearly an enquiry on this aspect will be out of line.

68. It is the contention of the respondent that these amounts are in the nature of liquidated damages that under the law of Singapore, it is only if the amount of liquidated damages was a reasonable estimate of damage actually suffered can an award being made. It is contended that the tribunal was required to render a finding that clauses 2(c) and 2(d) constituted a general

pre-estimate of damage suffered. The tribunal had concluded that two clauses were not penalty clauses and were fully enforceable but no reasons were given for these findings. In effect, the award has ignored the respondent's submission on the point and paid heed to determine a material issue and hence enforcement of such an award would shock the conscience of the court since it is against principles of natural justice and in conflict with the basic notions of morality and justice and contrary to public policy, reference being had to the decisions of the Vijay Karia, Campos Bros. Farms (supra) [2019 SSC OnLine Delhi 8350] which was approved in Vijay Karia (paragraph 83).

69. In my view, there is no merit in this ground of opposition to enforcement. The award has considered the claim in paragraphs 82 to 101. I am unable to find any substance in the respondent's contention that it is unreasoned. The extent of quality or sufficiency of reasoning or insufficient reasoning is not within the scope of adjudication by this court. Then this would require the court to enter upon merits of the case and express this court's opinion on the decision of the arbitral tribunal. Sufficiency or insufficiency of reasons cannot be determined on the basis of the mere say so of a party who is not satisfied with the award and it

was always open to the respondent to challenge the award in Singapore which it has consciously avoided to do.

70. The tribunal has clearly observed that it was required to consider whether clauses 2(c) and 2(d) were enforceable and whether they were penalty clauses. The tribunal found that they were not penalty clauses and they are fully enforceable and arose out of the settlement. The tribunal also recorded the fact that the respondent continued to use the helicopter as admitted by its witness. In the settlement agreement therefore the nature of the obligation had already been agreed between the parties. Nothing shown to me would justify this court taking a view that the reasons were insufficient or non-existent. The extent of reasons required to be given, cannot be structured in a straightjacket formula. It is for the tribunal to decide the manner in form or its decision on an issue. There is no dispute as to the fact that the tribunal was required to consider whether clauses 2(c) and 2(d) were enforceable and one of the issues raised to be determine as set out in clauses 29 (b)(ii) is whether the claim was entitled to contractual liquidated damages pursuant to the clauses 2(c) and (d) for breach of its payment obligations under the Settlement Deed. There is no challenge mounted by the respondent in

Singapore as to the non-determination of any issues. In fact, as even today, the respondent does not contend that certain issues that arose had not been identified or framed and not decided. The objection on the ground of the BIS listing has also been considered and the contract was not found to be frustrated. The tribunal has found that all issues had been subsumed in the main issues set out in the award and the respondent has also proceeded on that basis. I am therefore unable to find any merit in the contention that the tribunal failed to decide the material issue going to the root of the matter or that the award would shock the conscience of the court or would be violation of principles of natural justice or in conflict with the basic notions of morality and justice rendering it contrary to public policy.

71. The tribunal was dealing with a Commercial contract and had construed clauses of a settlement agreement which had been arrived at and parties were *ad idem* on the terms thereof. There is no justification in opposing enforcement on the basis that the tribunal rendered no findings or issued an unreasoned award or that the award in respect of clauses 2(c) and 2(d) were without any reason.

72. The next ground of opposition of enforcement was that of unjust enrichment viz. if the awards were to be enforced it would led to unjust enrichment of the petitioner and contrary to public policy of India. This is a ground taken without prejudice and in the alternative to other grounds. The ground is fairly simple in its nature. The petitioner has been found to be entitled to sale price of the helicopter under clauses 2(a) and 2(b) of the Settlement Deed but without a direction to the petitioner to transfer ownership of the helicopter.

73. It is sought to be contended before this court that the petitioner is unwilling to transfer the helicopter. That is certainly is not a valid ground for opposing enforcement inasmuch as the award has been made on the basis of disputes referred to the tribunal and the tribunal has in paragraph 101 observed that it does not make any pronouncement on the status of the helicopter since they have not asked by the either party to do so and hence have no jurisdiction to do so in the reference. The tribunal has, however, observed that evidence reveals that upon the payment of the sums claimed, the petitioner was willing to transfer ownership.

74. There is no dispute as to the scope of the reference. The respondent does not contend that the tribunal was also required to decide the status of the helicopter. If that be so, one cannot accept the contention that the tribunal had not decided a material issue. The jurisdiction of the tribunal is something for the tribunal to decide and if it did not exercise jurisdiction vesting in it, it would be for reasons that this court cannot fathom, if that was a ground of challenge on merits, that challenge would have to be made in the courts for the Republic of Singapore and not at the stage of enforcement. If the respondent attempt to resist enforcement, it is not possible to accept the contention that if the award was enforced, it would lead to unjust enrichment for the simple reason that the award also seeks to grant relief in accordance with settlement deed. It is only to be expected that the petitioner would be obliged to transfer the helicopter in terms upon payments of the sum awarded. I have not heard the petitioner to contend otherwise and while seeking enforcement of the award, petition itself contemplates attachment of the helicopter and it goes without saying that the award could not have directed the parties to deal with the helicopter in a particular way. It stands to reason that if the price is paid the

helicopter would have to be transferred in accordance with the agreement between the parties and it is not apparent that the petitioner is indulging in approbation and reprobation and claiming only the price without transferring the helicopter.

75. Meanwhile, I am informed that in a suit filed by the respondent in this court, being the Commercial Suit no.886 of 2017 it seeks a direction to transfer of ownership of the helicopter to it. This is a material factor to shows that the respondent also seek to retain possession of the helicopter and upon payment of the amounts due under the Award the respondent would probably be entitled to press for a decree in that suit. Surely the respondent would not otherwise have sought that relief.

76. The opposition to the award on this basis has no merit since the award does not even contemplate the manner of transfer or a decision on the status of the helicopter. Unjust enrichment may be contrary to fundamental policy of Indian law but in the present case the factual aspect whether the award amounts to unjust enrichment has not been made out. To hold that enforcement should not be allowed would amount to expanding the scope of the award itself which has held by the tribunal did not

contemplate the status of the helicopter in the reference and the tribunal was therefore not required to decide that issue. This must also be reviewed in the light of the suit pending for Specific Performance of the Sale. Once the payment is made the transfer would have to follow.

77. The last ground to opposition to enforcement is that the petitioner's contention that overall justice has been done or complete justice has been done is not made out. This ground of opposition is based on the petitioner's reliance on the decision in Vedanta (supra). No doubt, Mr. Khambata is right that in paragraph 83.12 the Court has observed that given the mandatory language that enforcement may be refused indicates that even if a party makes out one or more ground for refusing enforcement, the court will have a discretion to overrule the objection if it find the overall justice has been done. The Supreme Court has observed that generally this would be resorted to when the ground of refusal concerns a minor violation of procedural rule applicable to arbitration or the ground of refusal was not raised in arbitration. In the present context, the respondent has contended that complete justice has been done because the respondent had possession of the helicopter since 2012 and

continues to be in possession without paying any amounts to the petitioner for using the helicopter since November 2012.

78. It is further the case of the petitioner that overall justice is done since the respondent had admittedly "earned" USD 2.4 million by using the helicopter and that it would have "made" similar amounts in subsequent years that the award made would be approximately three years revenues considering that helicopter has been with the respondent for nine years and therefore overall justice has been done. This approach is sought to be contested by the respondent by contending that the initial possession of the helicopter was on the basis of lease agreement and thereafter under the Settlement Deed. The earnings that the petitioner contemplates was not really a profit but a gross figure and for want of a BIS license the helicopter could not be released therefore requiring the helicopter to be retained by the respondent and factual that the helicopter was used only till July 2015. The respondent sought to rely upon correspondence inter-partes / Advocates.

79. In this respect, I am of the view that it is not possible for this court in its jurisdiction under Section 48 to enter upon this controversy and that would clearly amount to entering upon the

merits to ascertain whether in the eyes of this court overall justice had been done. The concept of considering whether overall justice has been done, would have to be on a prima facie view and not after in depth analysis of the merits of the case.

80. Vedanta (supra) does make reference to minor violation of procedural rules but that is prefixed by the observation that it is "generally done" for minor violations. It is not only in case of minor violations that the court can exercise its discretion to overrule the objection. The grounds canvassed before this court in the present case are not, according to the respondent, minor violations of procedure but essentially under Section 48(1) (b) and 48 (2)(b) which as we have seen in the facts of this case or that the respondent was *"otherwise unable to present his case and that the enforcement would be contrary to public policy of India*". I am not satisfied that any grounds to obstruct enforcement has been made out and to my mind considering the factual aspects I am clearly on the view that even assuming there is a breach of substantive provisions of a statute, it was not breach of fundamental policy of Indian law and overall justice appears to have been done. Thus, there is no reason whatsoever for preventing enforcement.

81. As a result, the attempt to obstruct enforcement cannot succeed and I therefore pass the following order;

(1) Petition is absolute in terms of prayer clause (a), (b)(i), deposit to be made within four weeks from today.

(2) Petition is also allowed in terms of prayer clauses a-2(i)(ii)(iii).

(3) Interim orders passed in Commercial Arbitration Petition (L)no.208 of 2017 dated 28th April, 2017 shall continue to operate till payment is made in terms of the award.

(4) Failing compliance with prayer clause (a) above, there will be an order in terms of prayer clause a-1.

After pronouncement, Mr. Mehta, the learned counsel for the respondent seeks a stay of this judgment. In view of four weeks time being granted for depositing the amount awarded, the request for stay is declined.

(A. K. MENON, J.)