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

Judgment reserved on: 20.09.2010

% **Judgment delivered on: 11.01.2011**

\+ EX.P. 386/08 & E.A. Nos.451/2010, 704-705/2009 & 77/2010

PENN RACQUET SPORTS ..... Decree Holder
Through: Mr. Darpan Wadhwa, Mr. Rishi Agrawala and Mr. Rajeev Kumar, Advocates

versus

MAYOR INTERNATIONAL LTD .... Judgement Debtor
Through: Mr. Prakash Gautam with Mr.Aman Walesha, Advocates

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? : **No**

2. To be referred to Reporter or not? : **Yes**

3. Whether the judgment should be reported in the Digest? : **Yes**

<u>J U D G M E N T</u>

<u>VIPIN SANGHI, J.</u>

<u>E.A. No.705/2009</u>

This application has been moved under section 148 CPC to seek enlargement of time for filing of objections under section 48. For the reasons stated in the application, the same is allowed.

EX.P. 386/08 & E.A. Nos.451/2010 & E.A 704/2009

1. This execution petition has been preferred under section 49 of the Arbitration and Conciliation Act, 1996 (the 'Act') to seek the enforcement of a foreign award dated 27.3.2008 in case no. 14582/JHN between the parties.

Decree Holder's case:

2. The decree holder is a company based in Arizona, USA while the judgment debtor is an Indian company at New Delhi. On 1.1.2003 decree holder entered into a Trade Mark License Agreement (TLA) with the defendant, whereunder the decree holder had granted the judgment debtor license to use the trademark "Penn" for use in certain territories for certain products. In consideration of the said license, the judgment debtor agreed to pay annual royalty to the decree holder. This agreement was effective initially from 1.1.2003 to 31.12.2005. A second TLA was executed for the period 1.1.2006 to 31.12.2009, on similar terms and conditions.

3. Clause 18 of the said TLAs contained an arbitration clause for settlement of any dispute with regard to construction, meaning and effect of provisions of the agreement by arbitration of the International Chamber of Commerce (ICC), Paris. Clause 17 of the said TLAs provided that the agreement shall be governed by, and in accordance with, the laws of Austria.

4. The royalty was due at the beginning of each year, yet payable in quarterly installments. Default in punctual payment of the royalty attracted penal interest of 1.5% compounded monthly. The judgment debtor failed to pay the installments and accordingly, the decree holder terminated the contract on 13.6.2006 and appointed another licensee. On 20.9.2006, the decree holder invoked the arbitration before the International Chamber of Commerce, Paris to seek the appointment of an independent arbitrator. Ms. Gabrielle Nater-Bass, was appointed as the sole arbitrator.

5. The plaintiff having filed its claim before the said arbitrator, the judgment debtor took the objection that it was not liable to pay royalty since the decree holder had breached both the agreements by granting a license to Nebus Loyalty Limited ("Nebus") on 26.7.2005 for Europe, when Nebus was known to be the judgment debtor's existing sub-licensee.

6. After considering the judgment debtor's defence, the arbitrator, upon interpretation of the contracts, concluded that the decree holder had not breached the contracts by granting the license for loyalty programmes to Nebus, since the grant of such a license was permitted by clause 2.2.2 of the TLAs. The claim for outstanding royalties plus interest, and costs was allowed in the arbitral award. The award having been rendered in favor of the plaintiff, the plaintiff has filed th2e present execution petition to seek the enforcement thereof.

Judgment Debtor’s case:

7. The judgment debtor was granted an exclusive agreement to use decree holder’s aforesaid trademark. The license was to be an exclusive non transferable license, without the right to further sublicense the same. The decree holder had also agreed not to grant a license, exclusive or non exclusive, to any third party with the proviso that the decree holder could, however, grant such a license to a licensee only for the purposes of supplying licensed products to a consumer either free, or at a reduced cost, as a reward in retailer loyalty and continuity programmes.

8. The judgment debtor submits that the trademark “Penn” of the decree holder did not have market recognition in the sector of golf balls and accessories and inflatable balls. The judgment debtor, therefore, had to incur substantial expenditure on advertising and promotional activities to develop markets for the said products.

9. The judgment debtor entered into an agreement with a company called Nebus Loyalty of Netherlands. Nebus was purchasing Footballs, Volleyballs and Basketballs from the judgment debtor. To bypass the role of judgment debtor, Nebus commenced direct liaison and contact with the decree holder, who authorized it to purchase certain quantity of balls from a source other than the judgment debtor.

10. It is further asserted that the decree holder, in contravention of the TLA, granted a license to Nebus effective from 1.1.2005 to

31.12.2007. Due to the said license being granted by the decree holder to Nebus, it stopped purchasing the balls from the judgment debtor and it also raised various disputes as regards the supplies made by the judgment debtor to Nebus. In June 2005 Nebus raised quality issues. As a confidence building measure, a five member team from Nebus corporate office visited India to look into the matter. A joint inspection was carried out in the presence of Nebus representatives and the balls were found to meet the required specifications and the problem was identified as over inflation of the volleyballs. Judgment debtor alleges that while judgment debtor was sorting out the issues with Nebus regarding the quality of its products, the decree holder in an unethical manner entered directly into discussion with Nebus and openly supported the stand of Nebus, without any basis, that the judgment debtor was supplying defective balls.

11. The judgment debtor vide its email dated 2.7.2005 conveyed their grievance to the decree holder. In response to same, the decree holder wrote a letter dated 4.7.2005 in which the decree holder took an unreasonable stand that supply for Loyalty Programmes were excluded from the scope of the license agreement and also informed the judgment debtor of its decision to deal with another entity called Texaco. By granting an independent license to Nebus and Texaco, the decree holder committed breach of the agreement.

12. Judgment debtor further states that various communications were exchanged between the decree holder and judgment debtor and,

finally, in a meeting between the parties held on 28.7.2005, the judgment debtor expressed its concern and also about the adverse effect on judgment debtor's business, owing to grant of direct license to Nebus by the decree holder. However, decree holder responded in a completely uncooperative manner and even showed its ignorance about the judgment debtor's contract with Nebus. On being told that due to the parallel license granted to it by the decree holder, Nebus is defaulting in performing their obligation towards the judgment debtor, the decree holder simplicitor took a stand that the said issue should be sorted out between the judgment debtor and Nebus.

13. It is further stated that the judgment debtor was compelled to stop manufacturing since November, 2005 as Nebus had stopped lifting its orders and the judgment debtor was compelled to sell large number of balls not accepted by the Nebus, at a discounted price to reduce its costs. The judgment debtor at its factory premises had unlifted stock of 60000 balls which were ordered by Nebus and not lifted by it due to grant, by the decree holder, of the direct license to Nebus.

14. The judgment debtor vide its communication dated 2.6.2006 attributed the disruption in the performance of the license agreement on the decree holder, and further claimed that it stood discharged from the obligation under the contract due to the breach committed by the decree holder by granting parallel license to Nebus.

15. The decree holder vide its letter dated 13.6.2006 asserted that the grant of license to Nebus, and the judgment debtor's failure to perform the obligations under the license agreement were separate and unrelated issues. The decree holder terminated the contract between the parties on alleged breach of nonpayment of royalty. The judgment debtor subsequently addressed a letter dated 20.6.2006 to the decree holder denying its liability to pay any to the decree holder.

16. The dispute was referred to ICC and sole arbitrator was appointed. Thereafter, the learned sole arbitrator drew up the terms of reference on 15.5.2007 and the same were forwarded to the parties on 16.5.2007 for their signature. The decree holder signed the same on 21.5.2007 and forwarded them for the signatures of the judgment debtor. However, the judgment debtor did not sign the same. The sole arbitrator made certain amendments to the terms of reference on 27.6.2007 and sent them to the decree holder for signature. Having obtained decree holder's signature, the sole arbitrator sent the terms of reference to ICC for approval and the same were approved on 23.7.2007.

17. It is further asserted that judgment debtor herein also had filed its counter claim before the said arbitrator, who, on account of the want of deposit of heavy amount of fee, declined to entertain the said counter claim. The judgment debtor was also denied the reasonable opportunity to provide its written defense. It was vide order no.5 dated

5.9.2007 that the arbitrator had rejected the request of the judgment debtor to extend time for filing its statement of defense.

Judgment Debtor's Submissions:

18. The judgment debtor opposes the foreign award and has filed E.A. No.704/2009 under section 48 of the Act to challenge the award on the ground that the impugned award is contrary to public policy of India inasmuch, as, it is contrary to the express terms of the contract between the parties. The grounds of challenge also include the ground that the judgment debtor was otherwise unable to present its case.

19. The controversy revolves around the clause 2.2 of the Standard Terms and Conditions of TLA, which reads as under:

> *2.2 LICENSOR hereby grants LICENSEE a non transferrable exclusive license during the term of this Agreement, without the right to sub license, to apply the Licensed Trademarks to the Licensed Products manufactured by or for LICENSEE and to distribute, advertise, promote and sell such Licensed Products bearing the Licensed Trademarks in the Territory. LICENSOR agrees not to grant a license, whether exclusive or non exclusive, to any third party to use the Licensed Trademarks on the licensed products in the Territory, provided that nothing in this Agreement shall prevent LICENSOR from granting such a license:*
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> > *2.2.1 pursuant to LICENSOR'S right to do so under the specific circumstances defined in Section 9.2 of this Agreement; or*
> >
> > *2.2.2 to a licensee for the purpose of supplying Licensed Products to consume either free or at a reduced cost, as a reward in retailer loyalty and continuity programmes approved by LICENSOR.*

20. Counsel for judgment debtor submits that the interpretation given to Clause 2.2.2 by the arbitrator is contrary to the terms of contract in as much, as, the arbitrator has broken the words "Retailer Loyalty" to arrive at its conclusion, which is not permissible, and the intent of the parties while entering the agreement has to be looked into.

21. Mr. Tikku submits that the Supreme Court in ***Venture Global Engineering v. Satyam Computer Services Limited and Anr.***, AIR 2008 SC 1061 has held that even a foreign award is subject to challenge under section 34 of the Act. According to the judgment debtor, the arbitrator has gone beyond her jurisdiction in as much, as, she has gone contrary to the terms of the contract. It is argued that the conclusion drawn by the Arbitrator is totally erroneous and against not only the intention of the parties but also against the express terms of the contract, which renders the award against the public policy of India, as interpreted in ***ONGC v. Saw Pipes Limited,*** (2003) 5 SCC 705. Mr. Rakesh Tikku, learned counsel for judgment debtor submits that the award, being against the terms of contract, is patently illegal.

22. Learned counsel for the judgment debtor submits that the closure of the right of defence by arbitrator was manifestly unjust and against the principles of natural justice. It is further submitted by Mr. Tikku that since the judgment debtor had already suffered huge losses, it could not pay the separate advances on cost, due to which counter claims of the judgment debtor were not entertained by the arbitral

tribunal. The procedural time table was amended by the arbitrator. The judgment debtor is an Indian Company and was undergoing a bad phase due to the breach committed by Nebus as well as the decree holder. For this reason, the judgment debtor could not arrange a counsel who could represent it before the tribunal.

Decree Holder's Submissions:

23. Learned counsel for the decree holder Mr. Darpan Wadhwa submits that the objections have been filed under section 48 of the Act, which is in Chapter I of Part II of the Act dealing with "**enforcement**" of New York Convention awards. There was no challenge raised to the said foreign award by the judgment debtor either in Switzerland, or in India. The scheme of the Act provides that the award would be deemed to be a decree of this court. He submits that the Award cannot be challenged on its merits and the expression 'public policy of India' in relation to Section 48(2) does not permit such a challenge at all. In ***Renusagar Power Co. Ltd. v. General Electric Co.,*** (1994) Supp (1) SC 644, the scope of challenge to a foreign award before the Court has been considered extensively, where it has been categorically held that it is impermissible to assail a foreign award on merits. He refers to paragraphs 31-37 of this judgment which read as follows:

> *I. Scope of enquiry in proceedings for recognition and enforcement of a foreign award under the Foreign Awards Act*

31. During the course of his submissions, Shri Venugopal has assailed the award of the Arbitral Tribunal on grounds touching on the merits of the said award insofar as it relates to the award of compensatory damages on regular interest (item No. 2), delinquent interest (item No. 3), compensatory damages on delinquent interest (item No. 4) and compensatory damages on the price of spare parts (item No. 6). **This gives rise to the question whether in proceedings for enforcement of a foreign award under the Foreign Awards Act it is permissible to impeach the award on merits.**

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.)

33. Similarly in the matter of enforcement of foreign arbitral awards at common law a foreign award is enforceable if the award is in accordance with the agreement to arbitrate which is valid by its proper law and the award is valid and final according to the arbitration law governing the proceedings. The award would not be recognised or enforced if, under the submission agreement and the law applicable thereto, the arbitrators have no justification to make it, or it was obtained by fraud or its recognition or enforcement would be contrary to public policy or the proceedings in which it was obtained were opposed to natural justice (*See* : Dicey & Morris, *The Conflict of Laws*, 11th Edn., Rules 62-64, pp. 558 & 559 and 571 & 572; Cheshire & North, *Private International Law*, 12th Edn., pp. 446-447). The English courts would not refuse to recognise or enforce a foreign award merely because the arbitrators (in its view) applied the wrong law to the dispute or misapplied the right law.

(*See* : Dicey & Morris, *The Conflict of Laws*, 11th Edn., Vol. II, p. 565.)

34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (*a*) to (*e*) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the Court was satisfied in respect of matters mentioned in clauses (*a*), (*b*) and (*c*). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (*See* : Dicey & Morris, *The Conflict of Laws*, 11th Edn., Vol. I, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. **Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (*a*) to (*e*) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (*a*) and (*b*) of clause (2) of Article V. None of the grounds set out in sub-clauses (*a*) to (*e*) of clause (1) and sub-clauses (*a*) and (*b*) of clause (2) of Article V postulates a challenge to the award on merits.**

35. Albert Jan van den Berg in his treatise *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, has expressed the view:

> "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)

36. Similarly Alan Redfern and Martin Hunter have said:

> "**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. 461.)

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. (emphasis supplied.)

24. While considering the question as to whether a 'broad' or 'narrow' meaning to be assigned to the expression "public policy of India", the court held that "*a distinction is drawn while applying the said rule of public policy between a mater governed by domestic law and a matter involving conflict of laws. The application of doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to involve public policy in cases involving a foreign element than when a purely municipal legal issue is involved*". Considering various judgments of the English, US and French courts, the Supreme Court came to the conclusion that in

respect of foreign awards, the defence of "public policy" should be construed "narrowly", and the contraventions should be "*something more than contravention of the law of India*." It was also held that the doctrine must be construed in the sense as applied in the field of private international law, which means, if it is "*(i) contrary to the fundamental policy of Indian law*".

25. This principle was reiterated by the Supreme Court in ***Smita Conductors Ltd. v. Euro Alloys Ltd.,*** (2001) 7 SCC 728, in paras 11 and 12; which read as follows:-

> "*11. This Court in Renusagar case examined the scope of enquiry in proceedings for recognition and enforcement of a foreign award under the Act and after referring to the concepts in private international law, the Geneva Convention of 1927 and the New York Convention on Arbitration of 1958, held that it is limited to the grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.*
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> *12. Shri Venugopal next contended that the award is contrary to public policy of India and Reserve Bank of India had issued certain circulars imposing restrictions on imports and, therefore, attracted the force majeure clause. The question of what is the "public policy" has been considered by this Court in Renusagar case*[6] *by interpreting the words in Section 7(1)(b)(ii) of the Act to mean "public policy of India and not of the country whose law governs the contract or of the country of the place of arbitration" (SCC Headnote). In doing so, this Court took note of the fact that under the Arbitration (Protocol and Convention) Act, 1937 the expression "public policy of India" had been used, whereas the expression "public policy" is used in the Act; that after the decision of this Court in V.O. Tractoroexport v. Tarapore & Co. Section 3 was substituted to bring it in accord with the provisions of the New York Convention on Arbitration of 1958 which seeks to remedy the defects in the Geneva Convention of*

> *1927 that hampered the speedy settlement of disputes through arbitration; that to achieve this objective by dispensing with the requirement of the leave to enforce the award by the courts where the award is made and thereby avoid the problem of double exequatur; that the scope of enquiry is restricted before the court enforcing the award by eliminating the requirement that the award should not be contrary to the principles of the law of the country in which it is sought to be relied upon; that enlarging the field of enquiry to include public policy of the country whose law governs the contract or of the country of place of arbitration, would run counter to the expressed intent of the legislation. Therefore, it was held that the words "public policy" are intended to broaden the scope of enquiry so as to cover the policy of other countries, that is, the country whose law governs the contract or the country of the place of the arbitration. In the absence of a definition of the expression "public policy", it is construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced and this Court referred to a large catena of cases in this regard.* ***Therefore, we will proceed on the basis that the expression "public policy" means public policy of India and the recognition and enforcement of foreign award cannot be questioned on the ground that it is contrary to the foreign country public policy and this expression has been used in a narrow sense must necessarily be construed as applied in private international law which means that a foreign award cannot be recognised or enforced if it is contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality.*** *Shri Venugopal strongly attacked the correctness of the conclusions reached by the arbitrators on the effect of force majeure clause*." (emphasis supplied).

26. In ***Saw Pipes*** (supra), the Supreme Court was faced with the question of the scope of interference for setting aside a domestic award under Section 34 of the Act. The expression 'public policy of India' was considered and it was held that in the context of challenge to the validity of domestic awards, the scope of interference should be broader. It was, therefore, held that "*hence, in our view in addition to*

narrower meaning given to the term 'public policy' in Renusagar case it is required to be held that the award could be set aside if it is patently illegal".

27. Mr. Wadhwa submits that the Supreme Court accepted the submission of Mr. Desai that the expression "public policy" as used in Section 34 has wider scope than that used in Section 48. He refers to the following passage from this decision.

> ***"**20. <u>Mr Desai submitted that the narrow meaning given to the term "public policy" in Renusagar case is in context of the fact that the question involved in the said matter was with regard to the execution of the award which had attained finality</u>. It was not a case where validity of the award is challenged before a forum prescribed under the Act. <u>He submitted that the scheme of Section 34 which deals with setting aside the domestic arbitral award and Section 48 which deals with enforcement of foreign award are not identical. A foreign award by definition is subject to double exequatur</u>. This is recognized inter alia by Section 48(1) and there is no parallel provision to this clause in Section 34. For this, he referred to Lord Mustill & Stewart C. Boyd, Q.C.'s Commercial Arbitration 2001 wherein (at p. 90) it is stated as under:*
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> > *"Mutual recognition of awards is the glue which holds the international arbitrating community together, and this will only be strong if the enforcing court is willing to trust, as the convention assumes that they will trust the supervising authorities of the chosen venue. It follows that if, and to the extent that the award has been struck down in the local court it should as a matter of theory and practice be treated when enforcement is sought as if to the extent it did not exist.*
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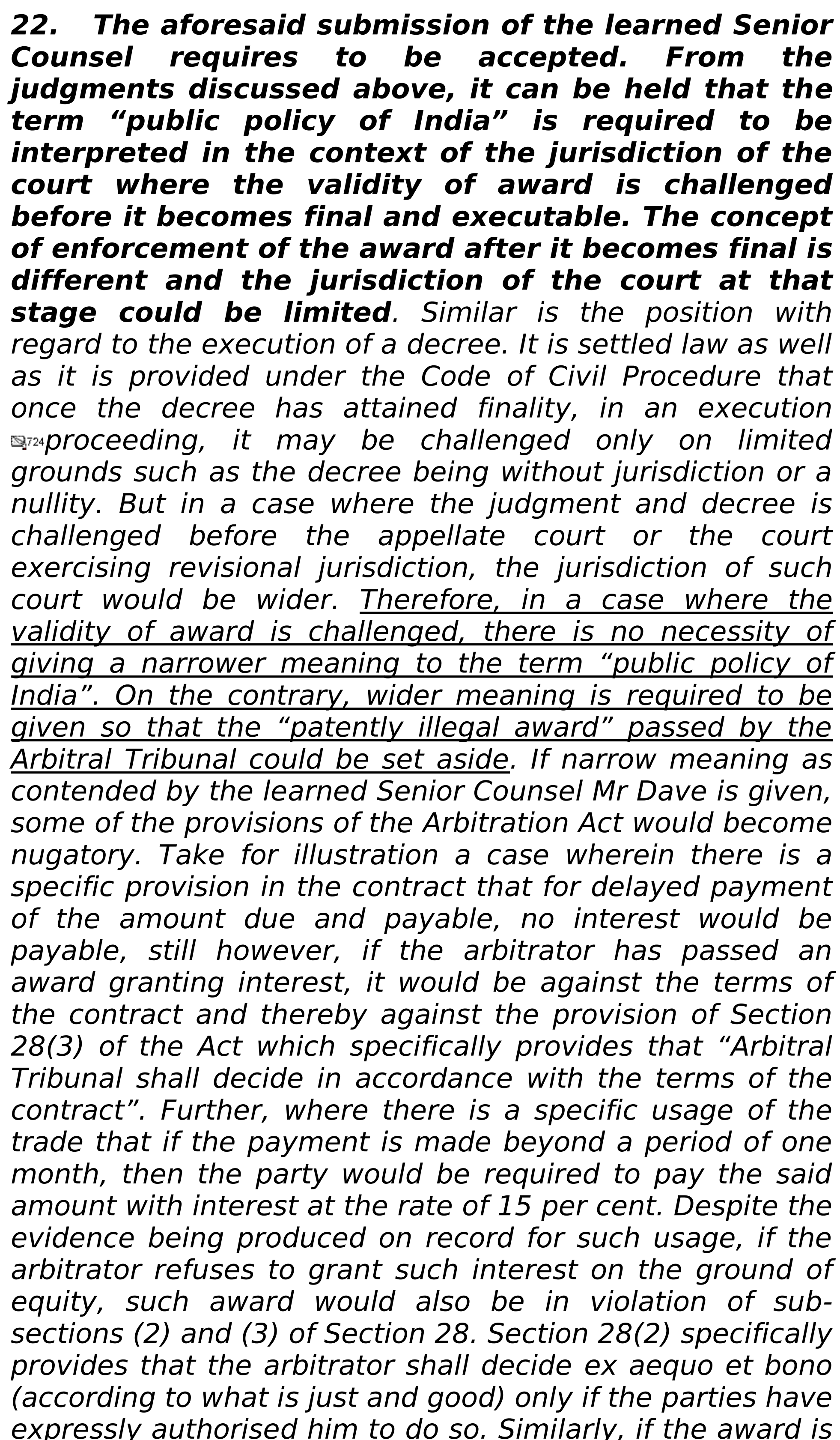
> ***21. He further submitted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in***



the domestic arbitration the only recourse is to Section 34.

22. The aforesaid submission of the learned Senior Counsel requires to be accepted. From the judgments discussed above, it can be held that the term "public policy of India" is required to be interpreted in the context of the jurisdiction of the court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. *Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the Code of Civil Procedure that once the decree has attained finality, in an execution* 724 *proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "Arbitral Tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that the arbitrator shall decide ex aequo et bono (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is*

patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of "patent illegality".

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"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. ***Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal****. The result would be – award could be set aside if it is contrary to:*

a) Fundamental policy of Indian law; or

b) The interest of India; or

c) Justice or morality, or

d) In addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

28. On the basis of the above decision, counsel for the decree holder submitted that the proceedings under Section 48 are distinct from those under Section 34. For proceedings under Section 34, the challenge is to the validity of an award before it becomes a decree under Section 36 i.e. before it becomes final and executable. While Section 48 is for enforcement of an award when the award is final, and the position is akin to execution of a decree. The foreign award could be challenged in the jurisdiction it is made under the laws of that jurisdiction. But if it is not so challenged, or if after such challenge, the same is upheld, it cannot be challenged in the Indian Courts like a domestic award. The Court is therefore precluded from going behind the foreign award, which is akin to a decree. This is also part of India's treaty obligations under the New York Convention to recognize arbitral awards and to enforce the same without hindrance or delay (except to the limited extent provided in Section 48).

29. Mr. Wadhwa further submitted that the Judgment debtor's reliance on ***Venture Global*** (supra) is misplaced. The ratio of that case is that even a foreign award can be challenged under Section 34, if Part I of the Act is not expressly or impliedly excluded by contract. In that context, the wider meaning of public policy would apply, which adds the ground of 'patent illegality'. The said judgment is, in any case, not applicable since the substantive law applicable to the dispute in the present case is Austrian Law, and according to ***Venture Global*** (supra), the challenge to the award on the grounds under Section 34 of

the Act would lie only if the substantive law applicable to contract is the Indian Law. He submits that since parties had agreed to apply the ICC Rules, Part I of the Act, in any case, is impliedly excluded in view of Section 28(1)(b) of the Act. It is submitted that the Judgment debtor has not filed any proceedings under Section 34, and cannot now file the same, since the same would be beyond limitation.

30. He further submits that the Supreme Court has, in ***Furest Day Lawson v. Jindal Exports***, AIR 2001 SC 2293 held, after discussing the old and new Act, that earlier the award was made a rule of the court, and now it is already stamped as a decree and executed accordingly. In this decision, the Supreme Court held:

> *"31**.** Prior to the enforcement of the Act, the law of arbitration in this country was substantially contained in three enactments, namely, (1) the Arbitration Act, 1940, (2) the Arbitration (Protocol and Convention) Act, 1937, and (3) the Foreign Awards (Recognition and Enforcement) Act, 1961. A party holding a foreign award was required to take recourse to these enactments. The Preamble of the Act makes it abundantly clear that it aims at consolidating and amending Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The object of the Act is to minimize supervisory role of the court and to give speedy justice. In this view, the stage of approaching the court for making the award a rule of court as required in the Arbitration Act, 1940 is dispensed with in the present Act. If the argument of the respondent is accepted, one of the objects of the Act will be frustrated and defeated. Under the old Act, after making award and prior to execution, there was a procedure for filing and making an award a rule of court i.e. a decree. Since the object of the Act is to provide speedy and alternative solution to the dispute, the same procedure cannot be insisted upon under the new Act when it is advisedly eliminated.* ***If separate proceedings are to be taken, one for deciding the enforceability of a foreign award and the other thereafter for***

execution, it would only contribute to protracting the litigation and adding to the sufferings of a litigant in terms of money, time and energy. Avoiding such difficulties is one of the objects of the Act as can be gathered from the scheme of the Act and particularly looking to the provisions contained in Sections 46 to 49 in relation to enforcement of a foreign award. In para 40 of Thyssen1 judgment already extracted above, it is stated that as a matter of fact, there is not much difference between the provisions of the 1961 Act and the Act in the matter of enforcement of foreign award. The only difference as found is that while under the Foreign Awards Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus, in our view, a party holding a foreign award can apply for enforcement of it but the court before taking further effective steps for the execution of the award has to proceed in accordance with Sections 47 to 49. In one proceeding there may be different stages. In the first stage the court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award a rule of court/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from the objectives contained in para 4 of the Statement of Objects and Reasons, Sections 47 to 49 and the scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the court. *The submission that the execution petition could not be permitted to convert as an application under Section 47 is technical and is of no consequence in the view we have taken. In our opinion, for enforcement of a foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the court enforcing a foreign award can deal with the entire matter. Even otherwise, this procedure does not prejudice a party in the light of what is stated in para 40 of Thyssen1 judgment*." (emphasis supplied)

31. This Court, in a recent judgment of ***Jindal Exports v. Furest Day Lawson*** (**OMP 29/2003** decided on 11.12.2009) again reiterated that a narrow meaning must be given under Section 48 proceedings for enforcement of a foreign award and affirmed the principle that only when the nation's "most basic notions of morality and justice" are violated, would the public policy doctrine be applied to refuse enforcement. It was also held that such an award cannot be challenged on its merits. The Court held as follows:-

> "*42. Mr. Singh lastly submitted that in the present case the Arbitrator had given no interpretation with regard to Clause 8 of GCC. According to him, there was a complete abdication of the said exercise. Consequently, according to him, the question of substituting the view of the Arbitrator of interpretation did not arise at the first place in the present case. He submitted that judgments cited by respondent with regard to power of this Court to interpret a particular clause of the contract were under the Arbitration Act, 1940 – which did not take into account the new Section 28 of Act, 1996.*
>
> *43. After hearing the parties, I am of the view that all the cases proceed on admitted facts and the legal issues raised by petitioner have to be determined in accordance with the directions given by the Supreme Court in the judgment rendered in the case between the parties. It is pertinent to mention that in para 33 of* ***Fuerst Day Lawson Ltd.*** *(supra), the Supreme Court while remitting the case had directed this Court ―for proceeding with enforcement of the award in the light of the observations made‖**.** Consequently, what I have to first consider is whether the impugned Awards are enforceable or not.*
>
> *44. In my opinion, Part II Chapter I is an integrated scheme which has to be applied to New York Convention awards. Mr. Ramesh Singh"s argument that validity of the arbitration clause between the parties had to be tested under Sections 44 and 47 read with New York Convention de hors Section 48(1)(a) of Act, 1996 is untenable in law. In fact, Section 44 of Act, 1996 has to be read in conjunction*

with Section 48(1)(a) of Act, 1996 and New York Convention as would be apparent from the juxtaposition of the relevant portion of the said two Sections along with the New York Convention which reads as under :-

> ***44. Definition.*** *– In this Chapter, unless the context otherwise requires, ―foreign award‖ means an arbitral award ……. (a) in pursuance of an* ***agreement*** *in writing for arbitration to which the Convention set forth in the First Schedule applies…*
>
> *xxxx xxxx xxxx xxxx*
>
> ***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…*
>
> *xxxx xxxx xxxx xxxx*
>
> *ARTICLE II……. 3. The Court of a Contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said* ***agreement*** *is null and void, inoperative and incapable of being performed. (emphasis supplied)*

45. Consequently, on a conjoint reading of the relevant provisions of Part II Chapter I of Act, 1996, I am of the opinion that any challenge to the validity of the arbitration clause has to be determined with reference to the substantive law governing the contract itself. In fact, the expression "Agreement" in Sections 44 and 48 has to be given the same meaning."

32. Counsel for the decree holder further submits that the challenge raised by the judgment debtor otherwise only relates to the interpretation of the terms of the contract and more specifically of Clause 2.2.2 in the present enforcement proceedings. This challenge is not maintainable for the following reasons: -

(i) Interpretation of contract as done by the arbitrator is final. It is not subject to challenge even under Section 34 of the Act even if it is a domestic award. In the present case, no challenge under Section 34 of the Act has been made, yet the Judgment debtor is seeking to challenge the award and the interpretation of the contract by the Arbitrator under Section 48 of the Act which is impermissible in law.

(ii) The governing law of the contract was Austrian Law. The Judgment debtor, however, is now seeking to interpret the contract as per Indian Law in the present Enforcement proceedings which is impermissible in law. Such application of Indian law after the arbitration award has been passed for interpreting the contract is not permitted even by the contract, and would have been disallowed even by the Arbitrator. The Judgment debtor has not produced any expert witness under Austrian Law to sustain its objection on the point of interpretation of Clause 2.2.2 in its favour. Therefore, the Judgment debtor

cannot be allowed to reopen the arbitration proceedings through the objections.

(iii) The defence of the Judgment debtor even before the Arbitrator as recorded by the Arbitrator itself was only an afterthought.

(iv) The Arbitrator has clearly held that Clause 2.2.2 permitted the decree holder to appoint Nebus. Once the Arbitrator has held that no breach of Clause 2.2.2 had been committed by the Decree holder, the defence of the Judgment debtor before the Arbitrator was liable to fail and now the said defence cannot be reopened in the present enforcement proceedings.

33. Counsel for the decree holder submits that the ground of violation of the principles of natural justice is based on the premise that the ICC arbitrator declined the judgment debtor’s prayer for extension of time to file its statement of defence. Mr Wadhwa submits that the judgment debtor was given ample opportunity to file the defence. In the agreed procedural time table of 15.5.2007, the judgment debtor was to file its statement of defence by 17.8.2007. Even though no extension was sought, the arbitrator extended the time upto 27.8.2007. Only thereafter, the arbitrator rejected this request for further extension. He further submitted that judgment debtor has raised issues of advance costs and an amendment to the terms of reference as being against the principles of natural justice.

However there is no specific ground taken, raising this defence, let alone any "proof" under section 48. No objection was raised before the arbitrator. Judgment debtor abandoned the arbitration and now cannot be heard to say that it had not been given adequate opportunity.

34. Mr. Wadhwa submitted that the judgment debtor did file its reply to the claim, documents in support thereof and gave its views on the Terms of Reference. This establishes that full opportunity was given and duly utilized. He drew the courts attention to page 18/33 of the award para 73 where the judgment debtors arguments were considered by the arbitrator.

> "*73. Mayor argues that clause 2.2.2 STC is not applicable to loyalty companies such as Nebus. Mayor seems to argued that Nebus does not sell their products directly to the final customers but rather to supermarkets, gas stations etc., who then provide the products as part of reward to loyalty programee for free or at a reduced price to their customers. In other words, according to Mayor Nebus does not deliver the products directly to the final customer as would be expected of a licensee in the sense of clause 2.2.2 of STC (cf. explanations in R-Answer, N18)*"

35. Mr. Wadhwa has relied on Supreme Court judgment in ***Sohan Lal Gupta v. Asha Devi,*** (2003) 7 SCC 492 where court has observed that "*each party complaining violation of natural justice will have to prove the misconduct of the arbitration tribunal in denial of justice to them. The appellant must show that he was otherwise unable to present his case which would mean that the matters were outside his control and not because of his own failure to take advantage of an opportunity duly accorded to him*." Counsel for the decree holder has

also placed reliance on Queens Bench decision in ***Minmetals Germany GmbH v. Ferco Steel Ltd.(UK)*** [1999] 1 All ER (Comm) p.315, wherein it had been held in para 12:

> "*In my judgment, the inability to present a case to arbitrators within section 103(2)(c) contemplates atleast that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcee has due to matters within his control not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment bring himself within that exception to enforcement under the convention. In the present case, that is what has happened. I, therefore, reject the submissions of Ferco that it was unable to present its case*."

36. Before I proceed to consider the rival submissions of the parties, I may note that the judgment debtor moved EA No.451/2010 to seek the permission of the Court to lead evidence in support of the objections raised by it. However, by order dated 01.06.2010, the judgment debtor had already been granted final opportunity to place on record whatever documents the judgment debtor desire to rely upon. On 30.07.2010, another opportunity was granted to the judgment debtor to file the compilation of documents. Eventually, they were filed by the judgment debtor on 10.08.2010. As the proceedings conducted before the learned arbitrator are a matter of record, and in the light of the objections raised by the judgment debtor, it was not considered necessary to require the judgment debtor to lead any further evidence.

Discussion & Conclusion:

37. Having heard learned counsels for the parties and considered their submissions, the award in question and the precedents cited by them, I am of the view that there is no merit in the objections raised by the judgment debtor, and consequently E.A. No.704/2009 preferred by the judgment debtor under section 48 of the Act is liable to be dismissed, and the foreign award in question is enforceable under Chapter I Part II of the Act. Consequently, the award is deemed to be a decree of this Court.

38. There is merit in the submission of Mr. Wadhwa that the expression “Public Policy of India” as under in section 48(2)(b) of the Act carries a narrow meaning when compared to the meaning assigned to the same expression in the context of section 34(2)(b)(ii) of the Act. As rightly pointed out by Mr. Wadhwa, proceedings under section 48 and 49 falling in Chapter I Part II of the Act are proceedings for enforcement of foreign awards, namely, the New York Convention Awards. The grounds on which the foreign award may not be recognized, and consequently may not be enforced, are contained in section 48.

39. Pertinently, it is not the case of the judgment debtor that any of the grounds set out in section 48(1)(a) to (e) or under section 48(2)(a) is made out in the facts of the present case. The only ground of challenge is that the enforcement of the award would be contrary to

the Public Policy of India. In support of this submission, Mr. Tikku has submitted that the interpretation to clause 2.2.2 of the agreement in question given by the learned arbitrator goes against the spirit of the contract.

40. Firstly, I may note that the interpretation of a term of the agreement squarely falls within the domain of the arbitral tribunal, and even in the case of domestic awards, the Court would not interfere with the award, unless it can be shown that the said interpretation is contrary to the contractual terms. In the present case, the task of the judgment debtor is even more onerous inasmuch, as, this Court is dealing with a foreign award, and the agreement of the parties was that the agreement would be governed by the Austrian law. Consequently, the interpretation of the contract cannot be done by application of Indian law. Left to itself, this Court would interpret the contractual terms by application of the Indian law. As to what is the Austrian law has not even cited before me. No expert opinion has been led in evidence to controvert the opinion of the learned arbitrator. The endeavour of the judgment debtor has been to interpret the contractual clause in question by application of the Indian law, which is not permissible.

41. In any event, even if the submission of Mr. Tikku were to be accepted that because of the decision of the Supreme Court in ***Venture Global*** (supra), the foreign award can be subjected to challenge under section 34 of the Act, and even if the application

preferred by the judgment debtor under section 48 of the Act were to be treated as objections filed under section 34 of the Act, even so, I find no merit in the submission of Mr. Tikku that the award suffers from a patent illegality. The interpretation given by the learned arbitrator to clause 2.2.2 is a plausible interpretation of the said clause. Under clause 2.2.2 of the agreement, nothing in the agreement prevented the licensor-decree holder from granting a license to a third party "*for the purposes of supplying licensed products to consume either free, or at a reduced cost, as a reward in retailer loyalty and continuity programmes approved by licensor*". Consequently, the licensee could supply the licensed products to another entity which could in turn, consume the said products by free distribution or by distribution at reduced cost, as a reward in retailer loyalty and continuity programmes.

42. The submission of Mr. Tikku that the license could be granted by resort to clause 2.2.2 only to that entity which itself consumes either free, or at reduced costs the licensed products, has not been accepted by the arbitrator, and on a plain reading of clause 2.2.2 of the agreement, it cannot be said that the interpretation given to the said clause by Mr. Tikku is the only plausible interpretation that could be given to the said clause, even on the application of the Indian law.

43. It is pertinent to note that the decree holder had made known to the judgment debtor its interpretation of clause 2.2.2, and the judgment debtor was also aware of the fact that the decree holder

granted a license to Nebus with effect from 01.01.2005 by resort to clause 2.2.2, yet the judgment debtor admittedly entered into a second LTA for the period 01.01.2006 to 31.12.2009.

44. As held by the Supreme Court, the recognition and enforcement of a foreign award cannot be denied merely because the award is in contravention of the law of India. The award should be contrary to the fundamental policy of Indian law, for the Courts in India to deny recognition and enforcement of a foreign award. The other grounds recognized by the Supreme Court to refuse recognition and enforcement of a foreign award are that the award is contrary to the interests of India, or justice or morality. Merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality.

45. The submission of Mr. Tikku that the award in question was made in breach of the principles of natural justice is also meritless. A perusal of award reveals that terms of reference were drawn up by the sole arbitrator and discussed with parties on 15.5.2007. On 16.5.2007 terms were circulated to parties for signing. Decree holder signed and forwarded the terms to judgment debtor on 21.5.2007. The judgment debtor failed to sign them, despite reminders being sent on 5.6.2007 and 13.6.2007. Upon expiry of deadline to sign the terms, amendments were made on 27.6.2007 and sent to decree holder for signing. Thereafter they were sent to ICC court of international

arbitration. ICC court of international arbitration informed the approval on 23.7.2007. Judgment debtor was again invited to sign the terms of reference within 15 days, which it failed to do.

46. The submission of the judgment debtor that it could not otherwise pursue its counter claim before the learned arbitrator also has no merit. A perusal of award reveals that ICC fixed the cost of counter claim as USD 53000 payable by judgment debtor on 29.5.2007. Final opportunity for making payment was granted on 5.7.2007 within 15 days. As per ICC rules, the counterclaims were to be considered withdrawn from the current proceedings, if the fee was not paid. The judgment debtor was supposed to submit its 1st submission, the full statement of counterclaim by 2.7.2007. Due to judgment debtors nonpayment of the advance on costs the ICC decreed on 7.8.2007 that the counterclaims were considered withdrawn. The sole arbitrator sent out revised timetable on 16.8.2007 and judgment debtor was to submit statement of defence by 17.8.2007. After judgment debtor failed to submit the statement of defence, the arbitrator granted final 10 day extension till 27.8.2007, even though the same was not sought by the judgment debtor. The judgment debtor submitted a belated request for extension on 30.8.2007, which was rejected by arbitrator.

47. The judgment debtor having agreed to the resolution of the disputes between the parties by resort to arbitration, to be conducted by ICC, Paris, was bound by the Rules of the said organization. If, for

entertainment of the judgment debtor's counter claim, the ICC costs and fee of the arbitrator had to be deposited in advance, the judgment debtor cannot raise a grievance that merely because the judgment debtor could not afford to make payment thereof, its counter claim ought not to have been left unconsidered.

48. Consequently, I dismiss E.A. No.704/2009 filed by the judgment debtor, and hold that the foreign award in question is enforceable under Chapter I Part II of the Act, and the award is deemed to be decree of this Court.

E.A. NO.77/2010

This application has been moved by the decree holder to require the judgment debtor to deposit the awarded amount in this Court pending the hearing of the application preferred by the judgment debtor under section 48 of the Act. No specific orders were passed in this application and the same remained pending. Now that the objections of the judgment debtor under section 48 of the Act (E.A. No.704/2009) have been dismissed, this application has become infructuous. The same is dismissed as such.

(VIPIN SANGHI)
JUDGE

JANUARY 11, 2011
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