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

Judgment reserved on 24.05.2019

% *Judgment pronounced on 19.02.2020*

\+ **O.M.P.(EFA)(COMM.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015**

CAIRN INDIA LTD & ORS ..... Petitioners

Through: Mr. Akhil Sibal, Senior Advocate with Mr. Anirudh Das, Mr. Parinay Vasandani, Mr. Arjun Pall, Mr. Anirudh Lekhi, and Mr. Aashish Gupta, Advocates.

versus

GOVERNMENT OF INDIA ..... Respondent

Through Mrs. Maninder Acharya, ASG with Mr. K.R. Sasiprabhu, Mr. Somiram Sharma, Mr. Anurag Ahluwalia, Mr. Praveen Kr. Jain, Mr. Aditya Swarup, and Mr. Tushar Bhardwaj, Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J:

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Preface: -

1. I have before me, for adjudication, one enforcement petition, and two applications. The enforcement petition has been filed under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 [hereafter referred to as the "1996 Act"] by Cairn India Limited (in short "CIL"), Ravva Oil (Singapore) Pte Ltd. [in short "ROS"], and Videocon Industries Limited (in short "VIL").

1.1. CIL, ROS, and VIL; wherever necessary, will collectively be referred to as petitioners.

1.2. The enforcement petition is numbered as OMP (EFA) (COMM.) 15/2016 [originally numbered as OMP 1269/2014][1].

1.3. The petition seeks enforcement of a unanimous final foreign award dated 18.01.2011 (in short "award").

1.4. First of the two applications i.e. I.A. 20459/2014 has been preferred by the petitioners to seek condonation of delay in filing OMP (EFA) (COMM) 15/2016.

1.5. The second application is I.A. 3558/2015. This application has been preferred by the Government of India (in short "GOI"). The GOI, *via* this application, has preferred its objections *qua* the award under Section 48 of the1996 Act.

1.6. For the sake of convenience, the petitioners and GOI will be collectively referred to as parties unless in the context of the discussion they are required to be referred to separately.

2. The dispute between the parties revolves around the recovery of development costs by petitioners beyond the cap provided for Base

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1 "***ORDER***
% ***19.12.2016***
O.M.P. 1269/2014 &IA Nos. 20459/2014 & 3558/2015

1. The petition be renumbered as a Commercial Enforcement petition.
2. The learned Additional Solicitor General representing the Respondent is stated to be in some personal difficulty. List on 15th February 2017."

Development Cost (in short "BDC") under Article 15.5(b) read with proviso to Article 15.5(c) of the Production Sharing Contract (in short "PSC") executed between the parties. The PSC was entered into between the parties herein and Oil and Natural Corporation Limited [hereafter referred to as "ONGC"] to work what is known as the Ravva Oil and Gas Field.

3. Broadly, it is the stand of GOI that petitioners were not entitled to recover development costs above 105% of the amount at which BDC had been capped. The BDC, under Article 15.5 of the PSC, has been capped at USD 188.98 million. Therefore, according to the GOI, in terms of the provisions of Article 15.5(b), the petitioners could recover development costs incurred after the effective date in connection with development operations, an amount which was not more than 5% of the BDC. As noted above, BDC was pegged at USD 188.98 million. In a nutshell, as per the GOI, the total development cost that the petitioners could recover was USD 198.43 million.

Background: -

4. Thus, the core issue, which has been etched out hereinabove, is required to be examined in the backdrop of the following broad facts.

5. On 28.10.1994, the petitioners executed the PSC with the GOI concerning the Ravva Oil and Gas Field.

5.1. Since disputes erupted between the parties with regard to recovery of development costs beyond USD 198.43 million, CIL on behalf of itself as also ROS and VIL, issued a Notice of Arbitration (in short "NOA") dated 18.08.2008 under the provisions of Article 34.3 of the PSC. In this notice, the petitioners set out the name of its nominee-arbitrator, one, Mr. Andrew Berkeley.

5.2. Having received the NOA, the GOI, on 05.03.2009 appointed Hon'ble Dr. Justice Adarsh Sein Anand, former Chief Justice of India, as its nominee-arbitrator.

5.3. The third and the presiding arbitrator was appointed on 07.04.2009 by the aforementioned nominee-arbitrators. The nominee-arbitrators chose Rt. Hon'ble Sir Anthony Evans as the chairperson of the arbitral tribunal.

5.4. Between 07.07.2009 and 12.01.2011, eight (8) procedural orders were issued by the arbitral tribunal. In the interregnum, pleadings were completed by the parties not only *qua* the claims preferred by the petitioners but also *vis-à-vis* the counter-claims preferred by the GOI.

5.5. The record shows that the parties in support of their respective stands offered the testimony of witnesses of fact as well as expert witnesses. The petitioners cited four (4) witnesses of fact, and three (3) expert witnesses, while the GOI cited one (1) witness of fact, and two (2) expert witnesses. The arbitral tribunal not only heard oral submissions advanced by counsel appearing for the petitioners and the GOI but also permitted them to file written submissions. Having received evidence and heard submissions advanced on behalf of the parties, the arbitral tribunal delivered the award, as noted above, on 18.01.2011.

5.6. On 15.04.2011, the GOI assailed the award before the Malaysian High Court. Having received the award, CIL on behalf of itself as also ROS and VIL wrote to the GOI on 29.04.2011 that it was revising its cost recovery statements and the calculation of Post Tax Rate of Return (in short "PTRR") in line with declaration "J" made in the award for the period spanning between 1997-1998 and 2009-2010. Accordingly, a revised statement of accounts was submitted to GOI along with this communication.

5.7. The Malaysian High Court *vide* judgement dated 30.08.2012 repelled GOI's challenge to the award. The GOI preferred an appeal to the Malaysian Court of Appeal against the judgement dated 30.08.2012. The Court of Appeal *vide* its judgement dated 27.07.2014 rejected the GOI's appeal and, thus, sustained the judgement dated 30.08.2012.

5.8. Interestingly, on 10.07.2014, the GOI served a notice on the petitioners calling upon them to show cause within 30 days as to why the Oil Marketing

Companies (in short "OMCs"), to whom the product extracted from the Ravva oil and Gas Field was sold, should not be directed to recover the GOI's share in the Profit Petroleum along with interest which, according to it, was short paid. In this behalf, reference was made to Article 8.3 and Article 16.1 of the PSC.

5.9. In response to the show cause notice, VIL sent two replies which are dated 23.07.2014 and 31.07.2014. Likewise, CIL and ROS sent two separate replies dated 08.08.2014. In their responses to the show cause notice, both CIL and VIL, while denying the assertion of the GOI that they had short paid GOI's share in the Profit Petroleum asserted that any instruction given to OMCs to deduct amounts from the sale proceeds would be violative of Article 14 and 300 A of the Constitution and against the contractual scheme of the PSC. It was emphasized that OMCs were third parties to the contract and, hence, could not be instructed to make illegal deductions.

6. While the parties were exchanging communications on the issue as to whether the GOI could order OMCs to deduct amount towards alleged short paid profit petroleum, on 24.07.2014, the GOI moved the Malaysian Federal Court to seek leave to appeal against the judgement of the Court of Appeal.

6.1. While this application of the GOI was pending, the petitioners, on 15.10.2014, filed their enforcement petition under Section 47 and Section 49 of the 1996 Act i.e. OMP (EFA) (COMM) 15/2016. This petition was accompanied by a condonation of delay application i.e. I.A. 20459/2014.

6.2. While pleadings were being completed in this petition and application for condonation of delay, the GOI preferred its objections under Section 48 of the 1996 Act *via* I.A. 3558/2015.

Submissions of Counsel: -

7. In support of the objections filed by the GOI, arguments were advanced by Mrs. Maninder Acharya, learned ASG. Insofar as the petitioners were concerned, submissions were advanced by Mr. Akhil Sibal, Senior Advocate

instructed by Mr. Anirudh Das, Mr. Parinay Vasandani, Mr. Arjun Pall, Mr. Anirudh Lekhi, and Mr. Aashish Gupta, Advocates.

Submissions on behalf of the GOI: -

8. Mrs. Acharya, in the course of her arguments, raised both preliminary issues concerning the maintainability of the enforcement petition filed on behalf of the petitioners as also arguments on the merits of the case.

8.1. Mrs. Acharya's submissions can, thus broadly, be paraphrased as follows.

(i) That the petition filed for enforcement of the award ought to be dismissed on the ground of delay as it was barred by limitation. The petitioners had not articulated a sufficient cause which would propel this Court to condone the delay in instituting the enforcement petition. The petitioners did not approach this Court for enforcing the award up until GOI served a show cause notice dated 10.07.2014 on the petitioners. The award is dated 18.01.2011. The enforcement petition was filed only on 15.10.2014, *albeit*, after the period of limitation.

(i)(a) The period of limitation which would be applicable would be that which is prescribed under Article 137 of the Limitation Act, 1963 [in short "Limitation Act"] and not Article 136 of the Limitation Act. The enforcement petition is akin to an application which can only be slotted in the residuary provision i.e. Article 137 of the Limitation Act. The award does not metamorphose into a decree till the Court is satisfied that it is enforceable. Satisfaction of the Court *qua* enforceability of the award is dependent on the outcome of the objections preferred under Section 48 of the 1996 Act.

(ii) The arbitral tribunal acted beyond its jurisdiction in quantifying the increase in cost beyond BDC as this aspect fell exclusively within the domain of the management committee constituted under the PSC. In this behalf, reference was made to the proviso to Article 15.5(e)(iii). The relevant portion of the same reads as follows.

"*then the Management Committee shall, at the request: of the Operator, in a meeting convened under, Article 6.7, promptly consider what, if any, increase should be made to the Contractor's Base Development Costs to fairly reflect the circumstances in question PROVIDED THAT in the case of delays referred to in Article 15.5(e) (iii) (aa) the Management Committee shall not be obliged to consider any increase where such delay has been caused by the Contractor's failure to act in a diligent manner*."

(ii)(a) Furthermore, in this behalf, it was submitted that even though parties had unanimously agreed to deduct USD 2.7 million, the said amount was not reduced from the recovery cost of USD 278 million quantified by the arbitral tribunal for the period between 2000 and 2008. In support of this plea, reference was made to the management committed resolution dated 07.02.1996 and paragraph 71(g) of the award.

(ii)(b) It was contended that since the management committee had not taken a decision either way as to whether any increase in cost beyond BDC should be awarded, no dispute had arisen between the parties which could have been validly adjudicated upon by the arbitral tribunal. The arbitral tribunal, as a matter of fact, after recording that an Article 15.5(dd) event had occurred should have left the quantification of the increase in cost beyond BDC to the management committee. Such quantification of the cost was an "excepted matter" which fell within the domain of the management committee and not the arbitral tribunal.

(iii) OMP (EFA) (COMM) 15/2016, preferred by the petitioners, is premature, in the sense that, unless the Court condones the delay and deals with the objections filed by the GOI, the award cannot be enforced. As per Section 49 of the 1996 Act only when the Court is satisfied that the foreign award is enforceable under Part-II Chapter I does the award morph into a decree making it amenable to enforcement by the Court.

(iv) The award being contrary to the express terms of the contract, it conflicts with the public policy of India. The public policy of India has been interpreted

to, *inter alia*, mean an award which is against the fundamental policy of Indian Law, interests of India, justice or morality or is patently illegal. A deliberate departure from the express terms of the contract has imbued the award with patent illegality. Under Article 15.5(c) the PSC expressly provides that development operations would be executed *qua* Ravva Development Plan (RDP) at a price not exceeding the contractors' BDC by more than 5%. The petitioners were prohibited under Article 15.5 from claiming development costs in connection with development operations under the RDP which exceeded USD 198.43 million. This cost cap included costs incurred by the petitioners in relation to the facilities and matters set out in Clause (i) to (xiv) of Article 15.5. In particular, this cost cap under Clause (xi) of Article 15.5 obliged the petitioners to drill 19 development wells and 2 gas production wells. The circumstances and events in which the petitioners could have sought an increase in cost beyond the BDC i.e. the capped cost was provided in Article 15.5(e)(iii)(aa) to (ff).

(iv) The arbitral tribunal should have held that parties were bound by the terms of the contract, and not, by an interpretative process which distorted the plain terms of the contract.

(iv)(a) The arbitral tribunal, erroneously, held that the petitioners had met their obligation of implementing the RDP for existing discoveries even when they had drilled only 14 of the 21 that they were obliged to drill as per Article 15.5(c)(xi) of the PSC. For the arbitral tribunal to hold that the capped cost of USD 198.43 million was required to be paid only *qua* 14 wells which were drilled up until 1999-2000 and that it did not include the cost which was incurred towards drilling the remaining 7 wells between 2000 and 2008 was clearly erroneous as it was contrary to the plain terms of contract.

(iv)(b) The arbitral tribunal awarded, for the period spanning between 2000 and 2008, an additional amount of USD 278.87 million, *albeit*, after due adjustments without having regard to the fact that increase in the BDC could be

awarded only *qua* events adverted to in Article 15(e)(iii)(aa) to (ff) and that too by the management committee.

(iv)(c) The arbitral tribunal, by adopting a flawed interpretative process, had caused a loss to the GOI in as much as its share in the Profit Petroleum was reduced to the extent of USD 212.92 million.

(iv)(d) The award was, thus, contrary to the interests of India in as much as paragraph 4 of the PSC required the GOI to exploit petroleum resources in the contract-area with the utmost expedition in the overall interest of the country. The award is, therefore, also in conflict with the fundamental policy of the Indian Law and Justice and morality.

(v) The arbitral tribunal had committed a fundamental error in deciding an issue that was beyond the scope of the submission. In this behalf, it was pointed out that the arbitral tribunal had awarded USD 278.87 million by taking recourse to Article 15.5(e)(iii)(dd) of the PSC. This provision permitted a contractor (in this case the petitioners) to claim BDC beyond the capped cost if the range of physical reservoir characteristics found at the site were materially different from the range for such characteristics on which the RDP was based. The arbitral tribunal, erroneously, held that petitioners were entitled to an increase in BDC, as *qua* 7 out of the 21 wells there was a material change in the range of the physical reservoir characteristics found at the site as against those on which RDP was based. The arbitral tribunal in reaching this conclusion ignored the fact that the development cost *qua* the 7 wells which were part of the 21 wells was covered under Article 15.5(c)(xi) of the PSC.

(vi) The arbitral tribunal should have taken note of the fact that the petitioners had lodged two principal claims: First, to enhance the BDC by USD 48.96 million. Second, to grant additional development cost of USD 278.87 million. Insofar as this part of the claim was concerned, it was alternatively pleaded that BDC is enhanced as asserted in paragraphs 1 and 2 on page 57 of the Statement of Claim (in short "SOC"). The arbitral tribunal in the context of the aforesaid

claims failed to notice that insofar as the claim for USD 278.87 million was concerned, in the SOC, the same was not related to the provisions contained in Article 15.5(e)(iii)(dd) of the PSC. In other words, there was no assertion that the reservoir was larger than defined in Article 11.1 of the PSC. The petitioners had, infact, claimed USD 278.87 million by invoking the provisions of Article 15.5(e)(iii)(dd) of the PSC on the ground that a variation of the RDP had been approved by the managing committee. Reference in this behalf was made to paragraph 115 of the SOC.

(vi)(a) Furthermore, noticeably, the entire claim amounting to USD 48.96 million which included a claim amounting to USD 38.63 million relatable to the provisions of Article 15.5(e)(iii)(ee) was rejected by the arbitral tribunal. The claim amounting to USD 38.63 million had been made by the petitioners in respect of 14 wells drilled up to 1999-2000. It was the assertion of the petitioners that there was a material change in the range of physical reservoir characteristics in as much as they were different from the range for such characteristics on which the RDP was based. This conclusion was reached by the arbitral tribunal by relying upon the testimony of both expert and fact witnesses.

(vi)(b) Besides this, the arbitral tribunal did not agree with the petitioners that the claim in respect of 7 wells dug after 1999-2000 amounting to USD 278.87 million could be sustained under the provisions of Article 15.5(e)(iii)(ee). Having held so, the arbitral tribunal on its own awarded the petitioners the very same amount i.e. USD 278.87 million under the provisions of Article 15.5(e)(iii)(dd). This was a patent error as no such assertion was made by the petitioners.

(vii) The arbitral tribunal failed to appreciate that it was the petitioners' stand that they were entitled to an amount equivalent to USD 278.87 million as there was variation brought about in the RDP which was approved by the management committee. It is for this reason that the petitioners had relied upon

Article 15.5(e)(iii)(ee). The arbitral tribunal, however, went on to re-delineate the reservoir which stood already defined under Article 11.1 of the PSC.

(vii)(a) The arbitral tribunal failed to appreciate that as per the provisions of Article 1.57 and Article 6.5 of the PSC the delineation of the reservoir could only be done by the management committee. The arbitral tribunal neither had the technical know-how nor informed background information to carry out such re-delineation of the reservoir.

(vii)(b) Thus, the findings of the arbitral tribunal, contained in paragraph 109 and paragraph 111 of the award were beyond the submission made by the parties. The arbitral tribunal, therefore, wrongly concluded that petroleum was found "outside the limits of fault blocks defined in Article 11.1" and that "development operations continued thereafter, and were approved by the management committee following the discovery that oil-bearing rocks extended beyond the fault blocks defined in Article 11.1 of the PSC".

(vii)(c) There was no document on record which would show that the petitioners had claimed before the management committee or in the arbitration that they had discovered petroleum beyond the fault blocks described in Article 11.1 of the PSC. More importantly, there was no claim made by the petitioners that the 7 wells *qua* which the claim amounting to USD 278.87 million was made were drilled in the reservoir extending beyond the fault blocks. The arbitral tribunal, thus, re-delineated the reservoir using its common sense without regard to the submissions made by the parties.

(viii) The arbitral tribunal had completely re-drafted the PSC in the guise of interpretation by holding that the capped cost and 35,000 barrels per day (BOPD) i.e. plateau production rate was governed by the plan as agreed in August 1993 and not as provided in the RDP. This interpretation led to the petitioners recovering a claim amounting to USD 278.87 million.

(viii)(a) The anomaly in this interpretation is that the capped cost provided in Article 15.5(b) was restricted to 14 wells which were dug up until 1999-2000

and was done away *qua* 7 wells dug after 2000 on the ground that they were meant to extract petroleum from A/D block and, hence, were not covered under Article 15.5(c).

(viii)(b) Inconsistency in approach *vis-à-vis* the applicability of RDP plan is evident if one were to cross-reference the findings made in paragraph 81 and paragraph 99-100 of the award. The findings returned in paragraph 100 curiously treat the RDP as the plan agreed upon in August 1993. Therefore, the arbitral tribunal by this strained reasoning rejected the contention of the GOI that the cost cap imposed by the provisions of Article 15.5(b) in connection with development operations under the RDP would apply to all works listed in Article 15.5(c) even though the production target beyond 35,000 BOPD was achieved at an earlier date. Noticeably, the RDP used the expression plateau production rate. The arbitral tribunal ignored this expression and instead used the expression "target production" to divide the works into those that were carried out between 1994-1995 and the ones which were executed during the period spanning between 2000 and 2007. As a consequence of this methodology followed by the arbitral tribunal, 7 wells which were drilled during the plateau period that was to last 6-8 years were set free of the cost cap provided in Article 15.5(b) of the PSC.

(viii)(c) The arbitral tribunal failed to appreciate that it had denied additional cost of USD 22 million which the petitioners had claimed on account of creation of additional facilities to reach the target production rate of 35,000 BOPD by invoking the cost cap provided in Article 15.5(b) and Article 15.5(c) of the PSC – a measure which was not employed in respect of 7 wells which were dug between 2000-2007 as per the RDP and the provisions of Article 15.5(c). Thus, the rejection of the GOI's stand that the cost cap applied to USD 213 million (i.e. USD 278 million – USD 65 million) was wrongly rejected contrary to the terms of the PSC. Likewise, the GOI's counter-claim on account of cost petroleum illegally recovered by the petitioners over and above USD

198 million + USD 65.5 million was also incorrectly rejected by the arbitral tribunal.

(ix) In support of her submissions, Mrs. Acharya relied upon the following judgements.

a) ***Centre for Public Interest Litigation & Anr. vs. UOI***, (2000) 8 SCC 606.

b) ***Cruz City Mauritius Holdings vs. United Limited***, (2017) SCC OnLine Del 7810.

c) ***Reliance Natural Resources Limited vs. Reliance Industries Limited***, (2010) 7 SCC 63.

d) ***Associated Engineering Co. vs. Government of Andhra Pradesh & Anr.***, (1991) 4 SCC 83.

e) ***Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises and Anr***, (1999) 9 SCC 283.

f) ***Madanlal vs. State of MP***, 1954 SCC OnLine MP 109

g) ***Princeton Niketan Pvt. Ltd. v Faiz Murtaza***, 2010 SCC OnLine Del 4214.

h) ***Esha Bhattecharjee vs. Managing Committee***, (2013) 12 SCC 649.

i) ***Lanka Venkateshwarlu vs. State of AP***, (2011) 4 SCC 363.

j) ***Compania Naviera 'SODNOC' vs. Bharat Refineries Ltd.***, 2007 SCC OnLine Mad 223.

k) ***Hindustan Petroleum vs. Videocon Industries Ltd.***, 2012 SCC OnLine Del 3610.

l) ***Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd.***, (2001) 6 SCC 356.

m) ***ONGC Ltd. vs. Western Geco International Ltd.***, (2014) 9 SCC 263.

Submissions on behalf of the petitioners: -

9. Mr. Akhil Sibal, learned Senior Counsel rebutted the contentions made by the learned ASG and in defence of the issues raised by way of the objections filed by the GOI relied upon the award.

9.1. Mr. Sibal's contended that if the submissions of Mrs. Acharya and the assertions made by the GOI in the objections filed on its behalf were to be accepted, it would amount to re-examining the award on merits which was not this Court's remit, in law, while exercising jurisdiction under Section 48 of the 1996 Act.

9.2. *Qua* the objection raised by GOI that the enforcement petition was barred by limitation, Mr. Sibal pointed out that the petitioners had made adjustments in line with the declarations and the reliefs granted to them *via* the award up until disruption was caused with the issuance of a show cause notice dated 10.07.2014. It was pointed out that even before GOI had issued the said show cause notice, CIL had submitted the revised statement of accounts concerning cost recovery and calculation of PTRR for the years spanning between 1997-1998 and 2007-2010 along with its letter dated 29.04.2011.

9.3. It was only after the GOI decided to issue the show cause notice dated 10.07.2014 whereby it threatened issuance of directions to the OMCs and ONGC to recover its share in the Profit Petroleum which, according to it, had been allegedly short-paid did the petitioners feel the need to approach this Court with an enforcement petition.

9.4. The GOI, in fact, took this step of issuing the aforementioned show cause notice when, it had already had its action in the Malaysian High Court rejected and the consequent appeal made to the Court of Appeal dismissed.

9.5. Furthermore, the petitioners were also under the impression that in line with the view taken by the Madras High Court in ***M/s. Compania Naviera 'SODNOC' vs. Bharat Refineries Ltd. &Anr.***, AIR 2007 MADRAS 251, the period of limitation for filing an enforcement petition was 12 years as prescribed in Article 136 of the Limitation Act.

9.6. However, even if this Court were to take the view that Article 137 of the Limitation Act were to apply, the right to file the enforcement petition accrued only when the show cause notice dated 10.07.2014 was issued by the GOI. The

instant petition having been filed on 15.10.2014, it was, therefore, within the period of limitation prescribed under Article 137 of the Limitation Act.

9.7. The application for condonation of delay had been filed by way of abundant caution only to meet a possible view of this Court that the period of limitation commenced from the date of the award i.e. 18.01.2011.

9.8. Given the facts and circumstances obtaining in this case including the fact that the petitioners in line with the declarations and reliefs granted in the award to both petitioners and the GOI had made suitable adjustments, as indicated above, this court ought to, in any event, condone the delay.

9.9. Insofar as adjustments made by the petitioners were concerned towards cost recovery, my attention was drawn to declaration "J" contained in the award whereby the petitioners were obliged to credit an amount equivalent to USD 22,307,381 in favour of GOI in relation to development cost incurred between 1994-1995 and 1999-2000. This amount, as noted hereinabove, was over and above the capped cost i.e. USD 198.43 million.

10. On the aspect concerning the jurisdiction of the arbitral tribunal in awarding increase in BDC cost under Article 15.5(e)(iii)(dd), Mr. Sibal contended that both sides had vested this jurisdiction on the arbitral tribunal as parties had, admittedly, failed to agree on the appointment of a sole expert. *Qua* this aspect, my attention was drawn by Mr. Sibal to paragraphs 161 to 168 of the award.

11. On merits, *dehors* the preliminary submission that this was a no-go area for the Court, Mr. Sibal, broadly, made the following submissions.

(i) It was submitted that the petitioners had put forth their stand in three different ways. First, that the cost cap (i.e. BDC cost) ceased to apply once the production profile of 35,000 BOPD was achieved and that all costs incurred thereafter were fully recoverable.

(ii) Second, the cost incurred over and above the cost cap i.e. USD 198.43 million was outside the cost, to which, the aforementioned cap applied. These

costs, according to Mr. Sibal, were relatable to those which were provided in Article 15.5(e)(ii).

(ii)(a) In other words, the petitioners had contended before the arbitral tribunal that these costs were an exception to the cost cap provided in Article 15.5(b) and (c). A perusal of Article 15.5(e)(ii) would show that costs which a contractor (in this case the petitioners) could hope to recover were those costs which were incurred in developing reserves and/or potential reserves and/or satellite fields referred to in Article 15.5(d)(ii).

(iii) Third, the cost cap provided in Article 15.5(b) and (c) should be increased by an amount equivalent to the costs incurred by the petitioners over and above USD 198.43 million. This argument was propounded by the petitioners based on its contention that an increase was mandated in view of one or more conditions stipulated in Article 15.5(e)(iii) being satisfied.

(iv) Mr. Sibal took me through the relevant parts of the award, in particular paragraph 81, to emphasize the point that the petitioners had achieved production of 35,000 BOPD in consonance with the RDP by 1999-2000 with the help of 14 drilled wells. It was stressed that the arbitral tribunal had found as a matter of fact that the oil reserves in Ravva Oil and Gas Field were far greater than at the time when PSC was executed, and which is why, based on the efforts made by the petitioners, the production profile was increased from 35,000 BOPD to 50,000 BOPD.

(v) Likewise, the argument concerning the alleged lack of approval of the management committee for increasing the production profile to 50,000 BOPD between 1999-2000 and 2007-2008 with the help of further seven drilled wells was met by relying upon the findings of fact returned by the arbitral tribunal in paragraph 81(viii) and (ix)-(xi), paragraphs 101 to 103, and paragraphs 112 to 114.

(vi) Similarly, the argument advanced on behalf of the GOI that 7 wells drilled between 1999-2000 and 2007-2008 were part of the list of facilities

provided in Article 15.5(c) and, hence, were covered by the cost cap incorporated in Article 15.5(b) and (c) – was met by relying upon findings returned by the arbitral tribunal in paragraph 100 of the award.

(vi)(a)It was contended that the arbitral tribunal had rightly ruled that the list of facilities provided in Article 15.5(c) were not mandatory but were at best guess-estimates as to facilities that were necessary to achieve a production profile of 35,000 BOPD.

(vi)(b) It was contended that because the arbitral tribunal held this view, it rejected its claim for an amount of USD 22 million as it pertained to those costs which were incurred in achieving the production profile of 35,000 BOPD. Mr. Sibal pointed out, according to the arbitral tribunal, this element of the claim fell within the ambit of the cost cap i.e. BDC cost.

(vii) Likewise, Mr. Sibal pointed out that the arbitral tribunal had rejected the petitioners claim for cost recovery as the increased reserves formed part of existing discoveries i.e. RDP and not part of either satellite field or reserves/potential reserves as alluded to in Article 15.5(e)(ii) of the PSC.

(viii) According to Mr. Sibal, the arbitral tribunal allowed the cost incurred towards 7 wells between 1999-2000 and 2007-2008 as material changes had been found in the physical reservoir characteristics as against those which stood incorporated in the RDP. Thus, according to the arbitral tribunal, the material change in the physical reservoir characteristics triggered the provisions of Article 15.5(e)(iii)(dd), and thus, allowed the recovery of cost incurred after the initial production rate of 35,000 BOPD had been reached. Reference in this behalf was made to paragraph 111 and 112(h) to (i) of the award. Insofar as the quantification of this cost was concerned, reference was made to paragraphs 145 and 146 of the award.

(ix) In support of his submissions, Mr. Sibal relied upon the following judgements.

a) ***Cruz City Mauritius Holdings vs. United Limited***, (2017) SCC OnLine Del 7810.

b) ***Associate Builders vs. DDA***, (2015) 3 SCC 49.

c) ***Shri Lal Mahal vs. Progetto Grano SPA***, (2012) 2 SCC 433.

d) ***Mst. Rukhabai vs. Lala Laxminarayan and Ors.***, (1959) SCR.

e) ***Balwant Singh and Ors. vs. Gurbachan Singh and Ors.***, (1993) 1 SCC 442.

f) ***Brace Transport Corporation of Monrovia vs. Orient Middle East Lines Ltd.***, 1995 Supp (2) SCC 280.

Analysis and Reasons: -

12. I have heard learned counsel for the parties and perused the record. To my mind, the following issues arise for consideration.

ISSUES: -

12.1. First, is the enforcement petition barred by limitation and, in construing the period of limitation, whether Article 136 or Article 137 of the Limitation Act would apply? [Issue No. I]

12.2. Second, whether the arbitral tribunal acted beyond its jurisdiction in awarding USD 278.87 million to the petitioners by ignoring the provisions contained in the proviso to Article 15.5(e)(iii) of the PSC? [Issue No. II]

12.3. Whether the objections filed on behalf of the GOI under Section 48 of the 1996 Act are merited? [Issue No. III]

13. Before I proceed further, the following undisputed facts need to be brought to fore and kept in mind.

13.1. The PSC which was executed, as noted above, on 28.10.1994 amongst, GOI, its nominee i.e. ONGC, and the petitioners had a specified purpose behind it, which was, the development of the Ravva Oil and Gas Field.

13.2. Upon the execution of the PSC, the first management committee meeting took place on 29.11.1994. The petitioners immediately thereafter [i.e. in the

early part of 1995] took over the Ravva Oil and Gas Field from ONGC. At that juncture, the rate at which oil was produced was 3,000 BOPD.

13.3. The petitioners between 1994-1995 and 1999-2000 increased the production profile from 3,000 BOPD to 35,000 BOPD. During this period, the petitioners drilled 14 out of the 21 wells (which included 19 oil wells and 2 gas wells) as adverted to in Article 15.5(c)(xi).

13.4. The production profile was further increased by the petitioners from 35,000 BOPD to 50,000 BOPD in the period spanning between 1999-2000 and 2007-2008. In this period, the petitioners drilled 7 wells and claimed *qua* them costs amounting to USD 278.87 million.

13.5. It is this cost that has become the bone of contention between the petitioners and the GOI. The GOI claimed that petitioners were not entitled to the aforementioned amount, save and except, USD 65.95 million – an amount which GOI accepts is payable to the petitioners.

13.6. Thus, in effect, the GOI resists the net-claim *qua* 7 drilled wells amounting to USD 212.91 million (USD 278.87 million – USD 65.95 million). Importantly, the claim amounting to USD 278.87 million was relatable to "existing discoveries" (as defined in Article 1.39 and Article 11.1 of the PSC) which was part of the approved development plan i.e. RDP and was annexed as Appendix F to the PSC. Annexed to the PSC is also an addendum dated August 1993 and October 1993.

13.7. In December 1996, the RDP was updated to provide information about existing discoveries, the petitioners had, since then, been engaging with GOI and the representatives of ONGC on the management committee to increase the production profile to 50,000 BOPD.

13.8. The decision, in this behalf, was taken by the management committee on 25.03.1998 and by GOI on 01.04.1999.

13.9. As noted above, it was thereafter i.e. between 1999-2000 and 2007-2008 that the remaining 7 wells out of the 21 wells were drilled, since by 31.03.1999, the petitioners had already attained a production profile of 35,000 BOPD.

14. As parties could not agree on a sole expert, the matter was referred to the arbitral tribunal upon an NOA being issued by CIL on 18.08.2008 by taking recourse to Article 34.3 of the PSC in respect of recovery of development cost as provided in Article 15.5 of the PSC.

14.1. It is this dispute which culminated in the award dated 18.01.2011 and, thereafter, issuance of letter dated 29.04.2011 by the petitioners for adjustment of recovered cost up until that stage and calculation of PTRR in line with the reliefs granted under the award.

15. Before I proceed with the discussion on the issues, I may only refer to an argument which was advanced by Mrs. Acharya as to how preliminary objections concerning limitation and maintainability are to be dealt with.

15.1. Mrs. Acharya had contended, with much vehemence, that the objections concerning limitation and maintainability should be decided in the first instance before the objections on merits are taken up for adjudication by the Court.

15.2. I had declined this request, principally, for the reason that any order passed by me would lead to the escalation of the dispute to the appellate court(s), thus, keeping the other objections articulated in Section 48 application filed on behalf of GOI in limbo.

15.3. The approach adopted by me, finds support in the view taken by the Supreme Court in the judgement rendered in ***LMJ International Ltd. vs. Sleepwell Industries Co. Ltd.***, (2019) 5 SCC 302 : 2019 SCC OnLine SC 242. The Supreme Court, in ***Sleepwell Industries***, has held that given the purpose of the 1996 Act, the issues regarding maintainability should not be dealt with in a piecemeal manner i.e. segregated from other issues.

Issue No. I: -

16. As noticed hereinabove, prior to the issuance of the show cause notice dated 10.07.2014, the GOI had taken two-shots at having the award set aside.

16.1. In the first instance, it approached the Malaysian High Court; a challenge which was repelled *vide* judgement dated 30.08.2012.

16.2. In the second instance, it preferred an appeal to the Malaysian Court of Appeal which was rejected on 27.06.2014.

16.3. Thus, till July 2014, the petitioners had no cause for concern and, therefore, perhaps, did not think it was necessary to move an enforcement petition. This was, especially so, as the GOI had accepted the adjustment made in its favour in terms of declaration "J" made in the award whereby USD 22,307,381 was credited to its account.

17. Thus, quite clearly, if one were to accept Mrs. Acharya's contention that Article 137 of the Limitation Act were to apply, the petitioners have, broadly, explained the reasons for the delay in approaching the Court with an enforcement petition.

17.1. The record shows that the enforcement petition was filed on 15.10.2014, and if, the period of limitation provided under Article 137 of the Limitation Act is made applicable from the date when the award was passed, the petitioners had time to move this Court by way of an enforcement petition till 18.01.2014.

17.2. The delay between January 2014 and October 2014 is explained by the conduct of the GOI in not objecting to the adjustments made, in April 2011, as noted above, till July 2014. Besides this, it has been correctly argued on behalf of the petitioners that there was uncertainty as to the state of the law.

17.3. The petitioners contended that since the Madras High Court in ***Compania Naviera*** had taken the view that a foreign award is a decree and a party seeking enforcement of a foreign award could do so within 12 years, they were under a *bona fide* belief that the limitation had not expired.

17.4. Therefore, even if I were to accept the contention of Mrs. Acharya that an application for enforcement had to be filed within 3 years from the date of the award, which, according to her, is the date when the right to apply accrued, as opined by a Single Judge of the Bombay High Court in ***Noy Vallesina Engineering Spa vs. Jindal Drugs Limited***, 2006 SCC OnLine Bom 545, I would, in the given circumstances, condone the delay as I am unable to persuade myself that the purported delay on the part of the petitioners in filing the enforcement petition only in October 2014 was a dilatory tactic as alleged or at all.

17.5. The petitioners, who had to their credit an award would ordinarily be assumed to be interested in enjoying the fruits of the same. The petitioners cannot be imputed with the motive of delaying the award's enforcement and/or execution without relevant material being placed before the Court. The GOI has not been able to demonstrate that the, purported, delay in moving the enforcement petition was *mala fide*.

17.6. Therefore, in my view, once the delay is condoned, whichever way one looks at the issue i.e. the issue of limitation, the enforcement petition cannot be rejected on the ground that it is time-barred.

18. This brings me to the second limb of this issue that, which of the two Articles i.e. Article 136 of Article 137 of the Limitation Act would apply *qua* a petition filed to enforce and/or to execute a foreign award.

18.1. As noticed above, there were two diametrically opposite views holding the field at the relevant time. A Single Judge of the Madras High Court in ***Compania Naviera***, after, *inter alia*, noticing the judgement of the Supreme Court in ***Furest Day Lawson Ltd. vs. Jindal Exports Ltd.***, 2001 (6) SCC 356 concluded as follows.

> "***42.*** *I am unable to accept this submission also. Under the Act, 1996, the foreign award is already stamped as a decree and the party, having a foreign award can straight away apply for enforcement of it and in such circumstances, the party having a foreign award has got 12 years time*

like that of a decree holder. Therefore it cannot be said that the present petition is barred by limitation."

19. On the other hand, a Single Judge of the Bombay High Court in ***Noy Vallesina***, after a detailed discussion, held that when an application for enforcement and/or execution of a foreign award is filed, it will be governed by the provisions of Article 137 of the Limitation Act (i.e. the residuary provision) if, at that stage, the Court has not recorded its satisfaction that the award is enforceable.

19.1. In other words, according to the learned Single Judge, such an application, at that stage, would not be an application for execution of any decree or order of a civil court which is the requirement under Article 136 of the Limitation Act, although, it will be an application for execution of an award which is capable of being converted into a decree. Therefore, such an application, as per the learned Single Judge, would have to be made within 3 years from the date when the right to make such an application accrues. The relevant observations made by the Court in this behalf are extracted hereafter.

"***31.*** *... Now under the Act on the Court being satisfied that the Award is enforceable the Award itself operates as a decree. But it is clear from the provisions of section 49 of the Act which are quoted above, the Award operates as a decree only on the Court recording its satisfaction that it is enforceable and it is only at that point of time that the Award becomes a decree of that Court which has recorded its satisfaction that it is enforceable. As observed above Article 136 of the Schedule of the Limitation Act becomes applicable for execution of any decree or order of any Civil Court. Till the Court records satisfaction contemplated by section 49 of the Arbitration Act the foreign Award is not deemed to be a decree of that Court. Therefore, when an application is filed before the Court, before the Court has recorded its satisfaction that the foreign Award is enforceable, it will not to be an application for execution of any decree or order of any Civil Court. It will be an application for execution of an Award which is capable of being converted into a decree and obviously therefore, Article 136 of the Schedule of the Limitation Act would not apply to such an application. There is no period of limitation provided by any of the Article in the Schedule of the Limitation Act specifically for making an application for execution of a foreign Award which is capable of being converted into a decree of the Civil Court, and*

therefore, such an application would be governed by the residuary Article 137 and therefore, an application for execution of a foreign Award which has not become a decree, has to be made within a period of three years from the date on which the right to make such an application accrues. In my opinion, placing such interpretation would also be in favour of the persons who are holding foreign awards in their favour, because they can apply for recognition of the foreign award within a period of three years of the right to apply accruing to them and after the Court records satisfaction contemplated by section 49 of the Act, the Award becomes a decree and they get further period of 12 years under Article 136 to apply to the Court for execution of that Award. In any case, the judgment of the Supreme Court in the case of "Thyssen Stahlunion GMBH" or in the case of Furest Day Lawson Ltd. cannot be taken to mean that it is compulsory for a person who is holding a foreign award in his favour to make an application for execution. All that the Supreme Court says is that such a person can make an application for execution even before the Court has recorded its satisfaction as contemplated by section 49 of the Act. It is always open to a person who is holding a foreign Award in his favour to make an application only for recognition of the foreign Award and thereafter to make a separate application for execution of the Award which has become a decree after the Court records its satisfaction. ...."

19.2. Interestingly, as would be evident upon perusal of the aforesaid extract in ***Noy Vallesina***, the learned Single Judge has also considered the judgement of the Supreme Court in ***Furest Day Lawson*** and ***Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd.***, 1999 (9) SCC 334.

19.3. Pertinently, since then, another Single Judge of the Bombay High Court in a more recent judgement rendered in ***Imax Corporation vs. E-City Entertainment (I) Pvt. Ltd. and Ors.***, 2020 (1) ABR 82, has taken a contrary view, that is, Article 136 of the Limitation Act would be applicable. While taking this view, the learned Single Judge, *inter alia*, has noticed the earlier judgement of his own Court (i.e. in the ***Noy Vallesina***) as also the judgement of the Madras High Court in ***Compania Naviera***. Besides this, the learned Judge has also noted observations of the Supreme Court in ***Shriram EPC Ltd. vs. Rioglass Solar Sa,*** (2018) 18 SCC 313. This apart, there is also a reference to

the judgements of the Supreme Court rendered in ***Furest Day Lawson*** and ***Thyssen Stahlunion***. [See: Paragraphs 22, 26-28]

20. Having considered the three judgements, one of the Madras High Court in ***Compania Naviera*** and the two judgements of the Single Judges of the Bombay High Court in ***Noy Vallesina*** and ***Imax Corporation***, I am of the view that if the purpose and the object of the 1996 Act is to be effectuated, which is, speedy and robust disposal, it would make sense to read the relevant provisions pragmatically rather than in a pedantic manner.

20.1. To my mind, the execution of a foreign award could, broadly, be divided into three stages. First, access; second, recognition; and, third, enforcement.

20.2. Section 47 of the 1996 Act deals with the first and second stage i.e. access and recognition. To gain access to courts in India, as set forth in Section 47 of the 1996 Act, the party seeking enforcement of a foreign award should have his/her petition accompanied with the following.

a) The original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made.
b) Original arbitration agreement or duly certified copy thereof.
c) Such evidence as may be necessary to prove that the award is a foreign award.

20.3. In case, the award or the arbitration agreement is in a foreign language, the party seeking enforcement of the award would have to have it translated in English which is required to be certified as correct by a diplomatic or consular-agent of the country to which the party belongs or certified as correct in such other manner which is treated as sufficient according to the law in force in India.

20.4. It is to be borne in mind, as noted above, that the access granted to courts in India for enforcement of a foreign award under Section 47 dovetails in it aspects concerning recognition. The provision made in Clause (c) of Subsection (1) of Section 47 makes that amply clear. Section 47(1)(c) provides that

wherever the Court finds its necessary it can require the party seeking enforcement of a foreign award to place before it – evidence to prove that the award is a foreign award. The discretion, in this behalf, vests entirely with the Court.

20.5. A foreign award which passes the gateway of Section 47 is, at that stage, treated as being equivalent to a foreign decree whose enforcement can be refused at the request of the party against whom it is invoked only if it falls within the provisions of clauses (a) to (e) of Subsection (1) of Section 48 or under Subsection (2) of Section 48.

20.6. The argument put forth by Mrs. Acharya that the foreign award morphs into a decree only after objections under Section 48 of the 1996 Act are dealt with and found unsustainable, is sought to be pigeonholed in the provisions of Section 49 of the 1996 Act. Section 49 of the 1996 Act reads as follows.

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

20.7. A plain reading of Section 49 would show that it does not contain anything which would relate it to Section 48 of the 1996 Act. Pertinently, Section 48 of the 1996 Act opens with the expression "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 …".

20.8. The provision, to my mind, presupposes that a foreign award is a decree whose execution can only be impeded by a party against whom it is sought to be executed if it is able to discharge its burden that its objections can be sustained under one or more clauses of Subsection (1) and/or Subsection (2) of Section 48 of the 1996 Act.

21. In my view, the word "enforcement" is used interchangeably with the word "execution" and satisfaction which is spoken of in Section 49 is relatable to the conditions stipulated for gaining access and recognition of the appropriate court in India as provided in Section 47.

21.1. Any other view would, in my opinion, delay the arbitration proceedings and, in a sense, by a judicial fiat put in place conditions which are more onerous than those which obtain in the context of the execution of a domestic award.

21.2. The view expressed in ***Noy Vallesina*** that a petition which is filed for enforcement of a foreign award, *albeit*, prior to the Court having the opportunity of dealing with objections preferred under Section 48 of the 1996 Act would be, in substance, a petition for executing an award which though capable of morphing into a decree, is at that stage not a decree, would result in a strange situation, which is, that if the petition for enforcement of a foreign award is filed beyond 3 years from the date when the right accrues to institute such petition, it would be dismissed on the grounds of limitation even though once objections under Section 48 are dealt with, the foreign award-creditor could then approach the Court in the second round for enforcement, *albeit*, within 12 years of such date as the award would have morphed into a decree. This would, in effect, mean that if the person against whom the award is passed chooses not to file objections under Section 48 of the 1996 Act, the Court based on this reasoning would have no occasion to arrive at satisfaction in terms of Section 49 of the 1996 Act.

21.3. Thus, as indicated above, the more pragmatic view would be to treat the word "enforcement" in Section 48 in the context of the 1996 Act as execution and foreign award as a decree whose execution, if at all, could only be refused on the grounds given in subsection (1) and (2) of Section 48 of the 1996 Act. Such an interpretation, in my opinion, would align with the principle of purposive construction, and, in a sense, strengthen the objectives of the 1996 Act, that is, least interference, speedy and effective enforcement of foreign awards.

21.4. In my opinion, this reasoning also melds with the provisions of Section 46 of the 1996 Act which, *inter alia*, provides that a foreign award would be enforceable under Chapter I Part II of the 1996 Act and shall be treated as

binding for all purposes on the persons as between whom it is made and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India.

21.5. The provision goes on to say that any references in this Chapter (i.e. Part II Chapter I of the 1996 Act) to enforce a foreign award shall be construed as including references to "relying" on an award.

21.6. This provision, to my mind, *inter alia*, takes into account, to cite an example, a situation where a foreign award is partially in favour of one party and, for whatever reason, the other party does not wish to challenge the award. In a fresh action filed by the other party, the party which is possessed of a foreign award (i.e. foreign-award creditor), which is, partially in its favour can rely upon the same if such an action is instituted against it. However, if the argument put forth by Mrs. Acharya is accepted, it would create an anomaly, which is, till such time the partial award is challenged by way of a Section 48 proceedings or an enforcement petition is filed, it cannot be used by way of defence, set-off or otherwise in any legal proceedings in India. Such an interpretation would needlessly impose costs and cause delay, bringing to naught the purpose of the 1996 Act.

22. Thus, in my view, the provisions of Article 136 of the Limitation Act would apply to an enforcement petition. This conclusion, I have arrived at *dehors* the reasoning given in ***Imax Corporation.*** That a foreign award is enforceable on its own strength and not necessarily dependent on whether or not it goes through the process of Section 48 proceedings emerges from the principle enunciated in international arbitration conventions that there are no limits on the forums in which recognition and/or enforcement of such awards

can be sought. Petitioners can, in fact, seek recognition and/or enforcement of the instant award wherever the assets of GOI are located and/or available.[2]

Issue No. II: -

23. The issue of jurisdiction raised by Mrs. Acharya is tied-in with the argument that the increase in BDC cost i.e. the capped cost could only have been ascertained, if at all, and quantified by the management committee. It was contended that the arbitral tribunal while awarding increased costs under Article 15.5(e)(iii)(dd) should have taken note of the following proviso.

> "*then the Management Committee shall, at the request: of the Operator, in a meeting convened under, Article 6.7, promptly consider what, if any, increase should be made to the Contractor's Base Development Costs to fairly reflect the circumstances in question PROVIDED THAT in the case of delays referred to in Article 15.5(e) (iii) (aa) the Management Committee shall not be obliged to consider any increase where such delay has been caused by the Contractor's failure to act in a diligent manner.*"

23.1. In this context, it was also contended that no such issue was referred to the arbitral tribunal for adjudication. As correctly pointed out by Mr. Sibal, this

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[2] "***[A] NO LIMITS IN INTERNATIONAL ARBITRATION CONVENTIONS ON FORUMS FOR SEEKING RECOGNITION OR ENFORCEMENT OF ARBITRAL AWARDS***

In general, international arbitration conventions do not limit the forums where enforcement or recognition of an award may be sought. That is true under the New York Convention, as well as under the other leading international arbitration conventions.

There is nothing at all in the text or structure of the Convention that limits the forums in which an award may be recognized or enforced. In particular, there is no requirement that an award-creditor first (or ever) seek recognition or confirmation of an award in the arbitral seat. Moreover, as discussed elsewhere, a fundamental objective of the Convention was ensuring the broad enforceability of international arbitral awards. Consistent with this objective, the Convention should not be construed as limiting the forums in which a party may seek to enforce an award in its favour, but should instead be read to facilitate the maximum enforceability of awards in all available forums."

[See: Page 2980, Chapter 22.03[A]; Gary B. Born, International Commercial Arbitration, 2nd Edition, Volume III International Arbitral Awards, Wolters Kluwer Law & Business (2014)]

precise aspect has been dealt with by the arbitral tribunal in paragraphs 162-168[3] of the award.

23.2. A careful perusal of the said paragraphs of the award would show that since parties were unable to agree on the sole expert, the matter had to be adjudicated upon by the arbitral tribunal. More importantly, the arbitral tribunal notes that neither party contended that it did not have jurisdiction to determine

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[3] "*162. We have identified a further issue which might be said to affect the jurisdiction of the Tribunal, with regard to the claim that the amount of the Article 15.5 cap should be increased pursuant to sub-Article (e)(iii)(dd). We have held that this claim succeeds in respect of the period from 1999/2000 until 2008/9.*

163. Article 15.5(f) provides-
"(f) In the event that:
(c) there is any dispute between the Parties whether or to what extent a circumstance referred to in Article 15.5(e) has arisen or resulted in the Contractor's Base Development Costs being
exceed by more than five per cent (5%);or
(d)the Management Committee is unable to agree whether an increase should be made to the Contractors Base Development Costs or is unable to agree on the amount of any such increase;
then .... any Party shall be at liberty to refer the matter to a sole expert for decision in accordance with the provisions of Article 34.2."

164. Article 34.2 concludes "If the Parties are unable to agree on a sole expert, the matter may be referred to arbitration", and Article 34.3 (already quoted) provides that "any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably may be submitted to an arbitral tribunal for final decision as hereinafter provided". The present reference has taken place pursuant to these provisions.

165. The question arises, when the Tribunal has held that the amount of the cap should be increased due to a circumstance within subparagraph (e)(iii)(dd) ofthe PSC, whether it should also determine what the amount of that increase should be.

166. We note that both issues are spelled out in Article 15.5(f)(i), quoted above, in relation to a reference to a sole expert, and that when the Parties are unable to agree on a sole expert, Article 34.2 provides for a reference to arbitration. Article 34.3 defines "Unresolved Disputes" in wide terms, quoted above.

167. Neither party has contended that we do not have jurisdiction to determine, not only whether the amount of the cap should be increased, but also what the amount of any such increase should be. Both parties have quantified the amounts in issue in their submissions to us, and the Respondent counterclaims payment of specific amounts which, it alleges, were wrongly cost-recovered by the Claimants during the period in question.
168.We hold, for the avoidance of doubt, that the Tribunal has jurisdiction in relation to Article 15.5(e)(iii) over both issues stated in Article (f)(ii), namely, whether an increase should be made to the Contractor's Base Development Costs and as to the amount of any such increase."

either as to whether or not the capped cost should be increased or that what should be the amount of such an increase.

23.3. Therefore, the argument of Mrs. Acharya, in this context, cannot be accepted. In this behalf, I may only advert to the findings of fact returned in paragraphs 81(v) to 81(xi)[4] of the award.

23.4. A perusal of the aforementioned paragraphs would, *inter alia*, show that the proposal to increase the production rate to 50,000 BOPD was approved by the management committee on 25.03.1998 and by the GOI on 01.04.1999. The 7 wells which were drilled between 2000-2001 and 2007-2008 was an exercise,

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[4] "***FINDINGS***

81. Against this background, we make the following findings of fact –

xxx xxx xxx

(v) In December 1996 the Contractors produced a Ravva Development Plan - Status and Update ("the 1996 Update"). This contained further and more detailed information about the Existing Discoveries, in particular the Fault Block described by reference to Well R17 in Article 11.1(b) of the PSC. It was established that the fault line to the north-west of this block was not sealed, as was previously supposed. Instead, the sand was found to be porous and in pressure communication with a further large area of oil-bearing sandstone forming part of the same reservoir. The Update described the combined area as the "RA/D Block". The inter-connection made it necessary to increase the capacity of the facilities intended for the Fault Block and to extend their operation to the whole of the larger area.

(vi) The increased volume of oil reserves and the greater-than-expected pressure in the production wells together extended the length of the production plateau at the then production rate of 35,000 bopd and they also made it possible to increase the rate to 50,000 bopd without reducing the total recovery from the field as it was found to exist.

(vii) From December 1996 the Contractors were pressing the Government and ONGC representatives on the Management Committee to permit the projected increase to a production rate of 50,000 bopd. This was finally approved by the Management Committee on 25 March 1998 and by the Government on 1 April 1999.

(viii) By 31 March 1999 the Contractors had constructed and established such facilities as were necessary to produce, process, store and transport Petroleum from within the Existing Discoveries in order to enable Crude Oil production of 35,000 in accordance with the Rawa Development Plan as annexed to the PSC. The said facilities included 14 (fourteen) production and development wells.

(ix) During the year 1999/2000 and in subsequent years the Contractors carried out further development work in connection with the Ravva Field and in accordance with Work Programme and Budgets approved annually by the Management Committee.

(x) During the years 2000/2001 to 2007/2008 the Contractors drilled seven more development and production wells in the relevant area, so completing the total of twenty one wells specified in Article 15.5(c) of the PSC.

(x) Throughout the said period the Management Committee was constituted as set out in Article 6.2 of the PSC so that it included representatives of each of the Contractors and of the ONGC and of the Government."

carried out when the constitution of the management committee was in line with the provisions of Article 6.2 of the PSC which mandated inclusion of representatives of the petitioners, the ONGC, and the GOI.

23.5. Therefore, as concluded by the arbitral tribunal, the further development work which was carried out after 1999-2000 in connection with Ravva Oil and Gas Field was aligned with the work programme and budgets which were annually approved by the management committee. The argument to the contrary is completely baseless.

Issue No. III: -

24. As regards the arguments advanced by Mrs. Acharya on merits of the dispute pertaining to the BDC costs are concerned, I agree with Mr. Sibal that while dealing with objections under Section 48 of the 1996 Act, the scope of enquiry by Court is narrow.

24.1. The Court, in my view, is required to keep away from the merits of the dispute as those aspects fall within the domain of the supervisory Court. In this case, the GOI has exhausted its remedies in the supervisory courts by carrying the challenge to the award right up to the Malaysian Federal Court.

24.2. Having lost in three courts in Malaysia, the GOI, to my mind, cannot draw this Court into deciding the merits of the dispute merely because it disagrees with the interpretation rendered by the arbitral tribunal *vis-a-vis* Article 15.5(e)(iii)(dd) of the PSC given facts and circumstance of the case and the evidence on record. Whether or not, in this case, provisions of Article 15.5(e)(iii)(dd) could be triggered was entirely in the province of the arbitral tribunal.

24.3. The GOI seeks to question the arbitral tribunal's conclusion, which is, that given the evidence on record and the facts and circumstances obtaining in the instant case, the petitioners were entitled to recover development costs *qua* the 7 wells drilled between 2000-2001 and 2007-2008 on account of a material

change in the characteristics of the physical reservoir, as against those, which were provided in the RDP.

24.4. The arbitral tribunal's view that the petitioners were not mandatorily obliged to drill all 21 wells once a profile production of 35,000 BOPD had been reached after drilling only 14 out of a total of 21 wells, in my view, is an aspect which lay completely within the domain of the arbitral tribunal.

24.5. The GOI's insistence that because there was a reference in Subclause (xi) of Clause (c) of Article 15.5 of the PSC to 21 wells (which included 19 oil wells and 2 gas wells) the aforementioned 7 wells came within the ambit of capped cost as provided in Article 15.5(b) and (c), is not an aspect which I would subject to re-examination while deciding objections under Section 48of the 1996 Act.

24.6. The arbitral tribunal dealt with these very issues in paragraphs 107-115. For the sake of convenience, the same are extracted hereafter.

> "***D. Article 15.5(e)(ii)- "reserves and/or potential reserves"***
> *107. We have held that these words have to be construed in their context in this sub-paragraph. They are not qualified by the reference back to Article 15.5(d)(ii) which follows "Satellite Field".*
> *108. In order to give them any effective meaning in this context, the words must refer to "reserves and/or potential reserves" that are distinct from "Satellite Fields". The latter are defined as "hydrocarbon pools adjacent to the Existing Discoveries" (Article 11.4(a)). The increased reserves do not fall within that definition because they form part of the same reservoir as the Fault Block identified as an Existing Discovery in Article 11.1(b).*
> *109. Their status therefore can best be defined as reserves which are not a Satellite Field and are part of the Existing Discoveries, but they are outside the limits of the Fault Blocks defined in Article 11.1.*
> *110. Article 15.5 was carefully, if sometimes obscurely drafted, and if the reserves in question were due to "materially different physical reservoir characteristics" within sub-Article (e)(iii)(dd), which we shall consider below, so enabling the Contractors to request an increase in the amount of the cap as quantified in sub-Article (c), it is unlikely that this single reference to "reserves" in sub-Article (e)(ii) was intended to disapply the sub-Article (b) cap altogether, and we so hold.*

E. Article 15.5(e)(iii)(dd) – "materially different physical reservoir characteristics"

111. We accept the evidence of Mr. Crouch, an expert witness called by the Claimants, that the enlarged reservoir known as Block A/D which we have called the increased reserves showed a range of physical characteristics that was materially different from those of the Fault Blocks defined in Article 11.1 on which the Plan was based. We go so far as to say that that seems correct as a matter of commonsense. The range of relevant characteristics that were different from what was anticipated included the fault line on the north-west boundary which was found not to be sealed but to be porous and to provide a pressure connection to substantial further reserves beyond; the sub-surface depths of the upper and lower limits of the oil-bearing rocks, even within the originally defined area; the permeability of the rocks was greater, leading to increased production pressures; the oil/water contact levels were different; and there were significant changes in the facies.

Conclusions

112. Our conclusions as to the application of Article 15.5 in the circumstances which have arisen are these -

(a) The Contractors undertook to make the capital investment necessary to develop the Ravva Field in accordance with the Plan;

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(b) The Plan as agreed in August 1993 provided for immediate development of the reserves later defined in the PSC as 'Existing Discoveries';

(c) The PSC gave effect to the Contractors' undertaking to limit their right to recover their capital investment from Cost Oil to the agreed figure of $188.98 million plus 5 percent;

(d) That limit was to apply to their costs of Development Operations in relation to the Existing Discoveries, which were to commence at once;

(e) The draftsman of the PSC gave effect to this agreement by providing in Article 15,5(b) that the right to recover Development Costs incurred in connection with the Plan would be limited to their Base Development Costs plus 5 per cent;

(f) Base Development Costs were defined in Article 15.5(c) by reference to -

(i) the object of the Plan as agreed in August 1993 (in short, production at 35,000 bopd from the Existing Discoveries);

(ii) the facilities which the parties contemplated at that time would be required for that purpose; and

(iii) the agreed figure of $188.98 million. In this connection, we note that the figure related expressly to the Plan as it was agreed in August 1993 ;

(g) The limit never applied to development costs incurred outside the Existing Discoveries; the PSC draftsman provided separately for these under the headings 'Satellite Fields' and 'New Discoveries';
(h) The PSC also provided for the possibility that the Contractors might incur Development Costs in connection with the Existing Discoveries which were greater than they anticipated when the Plan and the PSC were agreed. In certain events, listed in sub-Articles (d) and (e), the agreed figure might be increased (by the Management Committee). That would be because the costs actually incurred, in relation to the Existing Discoveries) had exceeded the amount of the cap ($188.98 million plus 5 per cent equals $198.43 million).
(i) When the Management Committee permits an increase under sub-Article 15.5(e) it is an increase to the amount of the BDC. The consequence is that the cap continues to apply, but the limit has been increased by the amount of the increase.
(Note The question might arise whether the cap under (b) is then increased, not simply by the amount of the increase approved by the Management Committee, but by that amount plus 5 per cent. On the strict wording of (b) and (e), the Management Committee has power to increase the amount of the Base Development Costs as agreed under (c), and the limit becomes that increased amount plus 5 per cent. This is not an issue in the present case, but it might arise in future.)
(j) All development costs incurred in relation to the Existing Discoveries and under the Plan are therefore subject to the limit imposed by sub-Article (b), but the agreed figure in sub-Article (c) was taken from the Plan "as indicated in the August 1995 addendum". When the Management Committee approves an increase in the figure pursuant to sub-Article (e) which "fairly reflects the circumstances in question", it can be said either that the cap remains in place, butthe limit has been raised, or that the Contractors are entitled to cost-recover the amount of the increase notwithstanding that it was in excess of the original cap;
(k) When it was found that the "range of the physical reservoir characteristics" of the Existing Discoveries was materially different from those on which the Plan was based, in the respects we have found above, the Contractors became entitled to request an increase in the agreed figure for Base Development Costs under sub-Article (e)(iii)(dd). If that increase is granted, the Contractors are entitled to recover the amount of the increase within, or notwithstanding, the limit imposed by sub-Article (b);
(l) At the date of the August 1993 Addendum and in the PSC, the parties estimated that a total of 21 wells would or might be required to achieve the production target stated in sub-Article (c), namely, a production rate of 35,000 bopd from the Existing Reserves, together with the surface and

on-shore facilities listed therein. That target was achieved by 1999/2000 at the cost of drilling only 14 wells. Further wells were drilled subsequently, not for the purposes of the August 1993 Plan, but to take account of the changed physical characteristics (of the Existing Reserves) which were encountered in fact, Sub-Article (c)(xi) was not an undertaking by the Contractors to drill 21 wells when only 14were required, nor were the costs of drilling nos. 14-21 incurred in connection with the August 1993 Plan. They were incurred because circumstances arose which fall within sub-Article (e)(iii).

113. The fact that there might be a material change in circumstances was foreseen by the draftsman of the PSC, not merely by the inclusion of sub-Article (e)(iii) but also in Article 11.3 which provides

"11.3 Revision of Ravva Development Plan

Any proposed revisions of the Ravva Development Plan shall, if they constitute a material change, be submitted to the Management Committee for approval, together with any proposed consequential amendments to the Approved Work Programme and Budget, through the Operating Committee. Such proposed revisions shall be considered by the Management Committee and to the extent same are approved, the Ravva Development Plan together with the amendments to the relevant Work Programme and Budget shall be amended accordingly."

114. That was not how it was done. When the full extent of the Existing Discoveries and the changed physical characteristics of the reservoir were appreciated, the Contractors submitted Work Programmes and Budgets annually which in fact included work that was necessary in order to develop the reserves as they were found, and outside the scope of the August 1993 Plan. These were approved by the Management Committee and the relevant costs were incurred but, it seems, no attempt was made formally to amend the Plan, as Article 11.3 envisaged it would be.

115. In these circumstances, there were defacto revisions of the Plan, and we hold that that was a sufficient compliance with Article 11.3 to enable the Claimants to contend that the Plan was amended accordingly. It follows that costs so incurred after 1999/2000 were within Article 15.5(b) – they were incurred in connection with the Plan as so amended - but they remain subject to the agreed limit, unless an increase is permitted under sub-Article (e). If there had been a formal revision of the Plan, it might well have been possible for them to establish that there was "a Variation to [the Plan] approved by the Management Committee!' within sub-Article (e)(iii)(ee), but we hold that the defacto revisions which took place do not fall within those words. It therefore remains necessary for the Claimants to establish that sub-Article (e)(iii)(dd) applies, and we have held that it does."

25. I may also indicate that the objection taken by Mrs. Acharya that no reduction of an amount equivalent to USD 2.78 million was made by the arbitral tribunal was also an aspect which was raised before the arbitral tribunal which has been dealt with in paragraphs 125-126 of the award[5].

26. That being said, this is not a case where the arbitral tribunal has not decided the dispute obtaining between the parties on merits. It is also not a case, contrary to the claim of GOI, of "no evidence". Interpretation of a contract, *sans* perversity, and appreciation of evidence are in the exclusive domain of the arbitral tribunal. As to what approach is to be adopted in fretting out the intention of parties when the contract was first executed is also within the sole ambit of the adjudicatory powers vested in the arbitral tribunal by the parties.

27. Which approach is best, that is, intention of parties brought forth by taking recourse to plain words of the contract or otherwise are not errors which the Court would correct while exercising the jurisdiction under Section 48 of the 1996 Act. The arbitral tribunal, once vested with jurisdiction by the parties to

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[5] "***(i) Reduce by $2.78 million?***

125. The Plan attached to the PSC as Appendix F shows the history of the negotiations which led to the inclusion of the cap in Article 15.5(b) and to the agreed figure of$188.98 million in Article 15.5(c). We heard evidence about the negotiations from Mr. Padmanabhan called by the Claimants and from Mr. Nath called by the Respondent, which was to the same effect as what the documents reveal. In summary, the Contractors agreed to limit their right to recover development costs from Cost Petroleum, so far as they fell within the definition of "Base Development Costs" in Article 15.5(c), to the agreed figure, thus transferring to themselves the risk that such costs might exceed that figure. The figure of $188.98was made up as follows –

"Development of R-10 and R-17	*$166.42*
3D Seismic reprocessing	*$ 0.30*
Gas project	*$ 14.57*
Gas lift	*$ 7.69*
	$188.98

126. We find that the Contractors' offer to undertake the risk of an overrun in these costs was a powerful inducement to the Government to accept their bid, and that the offer was made and accepted in general terms, not by reference to individual items, the amounts of which were of no concern to the Government so long as the total was not exceeded."

adjudicate their *inter se* disputes has the right to make both right and wrong decisions as these are errors which fall within their jurisdiction.[6]

28. Furthermore, only to reemphasize, a close perusal of Section 48 of the 1996 Act would show that the grounds of objections available to a party against whom the foreign award is sought to be enforced does not pertain to the merits of the dispute. Notably, this position has been made explicit by the legislature with the incorporation of explanation 2 to Subsection (2) of Section 48 of the 1996 Act which provides as follows.

> "*Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."*

28.1. The position of the law as declared by the Supreme Court in ***Shri Lal Mahal Ltd. vs. Progetto Grano Spa***, (2014) 2 SCC was no different even prior to the aforesaid amendment being brought about under Act 3 of 2016 w.e.f. 23.10.2015 as is evident from the following observations.

> ***26****. From the discussion made by this Court in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] in para 18 ["18. Further, in Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644, this Court considered Section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which inter alia provided that a foreign award may not be enforced under the said Act, if the court dealing with the case is satisfied that the enforcement of the award will be contrary to the public policy. After elaborate discussion, the Court arrived at the conclusion that public policy comprehended in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is the 'public policy of India' and does not cover the public policy of any other country. For giving meaning to the term 'public policy', the Court observed thus: (SCC p. 682, para 66)…." (Saw Pipes case [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] , SCC pp. 721-22)] , para 22 ["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 the award is*

[6] "***15.*** *... An authority having jurisdiction to decide a matter has jurisdiction to decide wrong as well as right, and the protection afforded by Article 265 is not destroyed, if its decision turns out to be erroneous. ...*"
[See: ***Shrimati Ujjambai vs. State of Uttar Pradesh and Another***, (1963) 1 SCR 778.]

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 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 'the 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%. 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'." (Saw Pipes case [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] , SCC pp. 723-24)] and para 31 ["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, 1994 Supp (1) SCC 644, 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." (Saw Pipes case [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] , SCC pp. 727-28)] of the Report, it can be safely observed that while accepting the narrow meaning given to the expression "public policy" in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] in the matters of enforcement of foreign award, there was departure from the said meaning for the purposes of the jurisdiction of the Court in setting aside the award under Section 34.

***27**. In our view, what has been stated by this Court in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must apply equally to the ambit and scope of Section 48(2)(b) of the 1996 Act. In Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it has been expressly exposited that the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression "public policy" used in Section 7(1)(b)(ii) was held to mean "public policy of India". A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . For all this there is no reason why Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] should not apply as regards the scope of inquiry under Section 48(2)(b). Following Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , we think that for the purposes of Section 48(2)(b), the expression "public policy of India" must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by*

one of the three categories enumerated in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . Although the same expression "public policy of India" is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of "public policy in India" is same in nature in both the sections but, in our view, its application differs in degree insofar as these two sections are concerned. The application of "public policy of India" doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

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

29. The view taken in ***Renusagar Power Co. Ltd. v. General Electric Co.***, 1994 Supp (1) SCC 644, which was reiterated in ***Shri Lal Mahal*** has been again approved by the Supreme Court with greater emphasis in ***Vijay Karia and Others vs. Prysmian Cavi E Sistemi SRL and Others***, 2020 SCC OnLine SC 177[7].

[7] "***38.** It will be noticed that in the context of challenge to domestic awards, Section 34 of the Arbitration Act differentiates between international commercial arbitrations held in India and other arbitrations held in India. So far as "the public policy of India" ground is concerned, both Sections 34 and 48 are now identical, so that in an international commercial arbitration conducted in India, the ground of challenge relating to "public policy of India" would be the same as the ground of resisting enforcement of a foreign award in India. Why it is important to advert to this feature of the 2015 Amendment Act is that all grounds relating to patent illegality appearing on the face of the award are outside the scope of interference with international commercial arbitration awards made in India and foreign awards whose enforcement is resisted in India. In this respect, it is important to advert to paragraphs 30 and 43 of Ssangyong (supra) as follows:*

"30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken

29.1. Thus, apart from merely making an averment that public policy of India is violated or the award is against the fundamental policy of Indian Law and/or justice or morality, nothing has been shown that would persuade me to hold so.

29.2. The relationship between parties was contractual in nature and as to how development cost had to be recovered, having regard to the terms of the PSC and the evidence on record, cannot, by any stretch of imagination, lead to purported violation of public policy of India or the fundamental policy of Indian law.

29.3. Likewise, conclusions arrived by the arbitral tribunal in that behalf *via* its award cannot be said to be against justice or morality.

Conclusion: -

30. Thus, for the foregoing reasons, as indicated above, I.A. 20459/2014 i.e. petitioners' application for condonation of delay is allowed. However, the GOI's objections contained in I.A. 3558/2015 are dismissed.

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behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

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

***39.** This statement of the law applies equally to Section 48 of the Arbitration Act.*"

31. Resultantly, the declaratory prayer made by the petitioners in OMP (EFA) (COMM.) 15/2016 is allowed.

RAJIV SHAKDHER, J

FEBRUARY 19, 2020