Reserved On : 21/04/2026
Pronounced On : 24/06/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 3694 of 2018
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2018
In
R/FIRST APPEAL NO. 3694 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL

and

HONOURABLE MR.JUSTICE D.N.RAY

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Approved for Reporting	Yes	No
	✓	

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ASEAN LNG TRADING CO. LTD., NOW KNOWN AS PETRONAS LNG LTD
Versus
NISHU TOURS AND TRAVELS LTD.

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Appearance:
MR DEVANG NANAVATI, SENIOR ADVOCATE with MR PARINAY VASANDANI, ADVOCATE with MR KARTIK YADAV, ADVOCATE with MR MEGHESH KHANDELWAL, ADVOCATE with MR VINAYAK GOSWAMI, ADVOCATE with MR MANAV SHROFF for MR APURVA R KAPADIA(5012) for the Appellant(s) No. 1
MR MIHIR JOSHI, SENIOR ADVOCATE with MR AYAN PATEL, ADVOCATE with MR AYUSHRI M. THAKKAR for SINGHI & CO(2725) for the Defendant(s) No. 1

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CORAM:**HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**
And
HONOURABLE MR.JUSTICE D.N.RAY

CAV JUDGMENT

(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

[I] Introduction :-

1. This is an appeal filed under Section 50 of the Arbitration and Conciliation Act' 1996 *(in short 'the Act' 1996'),* directed against the judgment and order dated 05.07.2018 passed by the learned Single Judge refusing to enforce a foreign award under Section 48 of the Act' 1996. In the judgment and order dated 05.07.2018, subject matter of challenge herein, the learned Single Judge records in paragraphs '75' to '81' as under:-

> "75. Upon considering the submissions made by both the sides and examining the findings and on perusal of the findings arrived at by the learned Arbitral Tribunal and keeping in mind the aforesaid narrow jurisdiction of this Court under section 48 of the Act, and only to examine whether the objections raised by the opponent falls within the scope and ambit of explanation 1 to section 48 of the Act in particular, the following facts narrated hereinbelow are necessary to be noted and appreciated.
>
> 76. That admittedly, the Master Agreement executed between Malasia LNG SDN and Adani Energy Ltd. on 02.08.2006. It is inter alia provided that such agreement shall be served as Master LNG Sale and Purchase Agreement and shall cover transactions between parties,

which shall be described more specifically by each confirmation notice, in general form attached as Schedule C.

77. The confirmation notice which is part and parcel of the said master agreement as Annexure-C contained details such as LNG ship, receiving terminal, date range, scheduled unloading date range, quantity, plant, loading port, contract sale price, payment, payment security, quality, demurrage and notices. As the record unfolds, the parties agreed to keep the master agreement as it is, however, voluntarily, agreed and divided original confirmation notice into confirmation notice and delivery notice. Such confirmation notice was subject of meeting held on 21.03.2007.

78. Whereas, the proposed format of delivery note includes details such as LNG Ship, Receiving Terminal, Scheduled Unloading date range, quantity, quality and payment security.

79. The aspects which are highlighted by both the sides are on the aspect of price and receiving terminal in particular.

80. The confirmation notice prescribes for LNG ship, receiving terminal, scheduled unloading date, range, quantity, plant, loading port, contract sale price, payment, payment security, quality, demurrage, force majuere, buyers first right of refusal, diversion right, notices. Such confirmation notice was thus composite notice for four cargoes as can be seen from clause 4 of the said confirmation notice which provides for scheduled unloading date range. The said confirmation notice also provides as under -

> “For the purposes of this Confirmation Notice, the term “Delivery Notice” means a notice by Seller to Buyer which shall not be later than two (2) weeks prior to loading date of the LNG at the Loading Port, confirming the necessary details pertaining, including but not limited to, LNG Ship, Schedule Unloading Date Range, Plant,

> Loading Port, Quantity and Contract Sales Price, for the successful delivery of each of the four (4) LNG cargoes under this Confirmation Notice. The form of Delivery Notice is attached herewith as an exhibit."

The delivery notice prescribes for parties, LNG ship, receiving terminal, Scheduled unloading date range, quantity, quality and payment security.

81. Thus, the confirmation notice duly signed by both the parties on 12.03.2007 envisaged a separate delivery notice. It appears from the record that details such as receiving terminal was not fixed and price was alternatively provided, i.e.,Henry Hub Price + USD 1.85 or the price to be offered by the seller. Broadly speaking, the April cargo was loaded from the port of Trinidad. However, the same was sold on 06.04.2007 before the cargo reached the Hazira terminal. Similarly, the record indicates that May cargo was sold before the loading date and June and August cargo were never loaded. The record also indicates that receiving terminal was not agreed between the parties and the opponent as buyer inspite of intimating the exact receiving terminal, on the contrary informed the petitioner that slots are not available. In spite of such factual position, the learned arbitral tribunal came to the conclusion that there is a concluded contract and that the opponents are liable for TOP obligation for April, May and June cargo and damages for August cargo.

Master agreement provided for TOP clause as under -

> "12.1 Sellers and Buyer's Obligations Seller agrees to sell and deliver to Buyer at the Receiving Terminal, and Buyer agrees to purchase, take and pay for, or pay for if not taken, LNG in quantities, the quality and at the prices determined in accordance with this Agreement and the relevant Confirmation

Notice.

12.2 Buyer's obligation to Take or Pay

If Buyer fails to accept delivery of any LNG cargo under the Agreement, unless excused by Force Majeure or Seller's material failure to perform, Buyer shall be liable to pay Seller, in accordance with this clause 12.2, an amount equal to such LNG quantity as specified in the Confirmation Notice multiplied by the LNG Price as specified in the Confirmation Notice in respect thereof (“Take or Pay Amount”)

Notwithstanding the above, if Seller is able to find and complete sale transaction of such LNG cargo to a third party purchaser and Buyer has paid Seller, Buyer shall be entitled to receive the net proceeds of such sale realized by Seller from such third party, being the following (the “Net Proceeds”)

(a) the total proceeds received from the sale to such third party plus any shipping costs saved, less

(b) all fees, commissions, duties, expenses and costs of sale, additional bunkering and other LNG Ship expenses over and above those costs which would have been incurred in transporting the cargo to Buyer's Facilities on the Scheduled Unloading Date Range (Including but not limited to demurrage for any delays resulting from such alternative sale);

provided, however, that if the Net Proceeds exceed the amount paid or payable by Buyer in respect of such LNG cargo, the difference between such Net Proceeds and the amount paid or payable by Buyer shall be retained by Seller for its own account.”

2. The conclusion in paragraphs '82' to '84' in the judgment impugned are as under:-

> "82. Even at the cost of repetition, it is provided that the aforesaid facts are noted and taken into consideration in order to test whether the findings arrived at by the Tribunal falls within the scope and ambit of explanation 2 of section 48. In the aforesaid factual background and following the judgment of the Apex Court in the case of Renusagar Power Co. Ltd. (supra) & Lalmahal (supra), even while exercising very limited and narrow jurisdiction under section 48, this Court finds that the learned arbitral tribunal has come to a finding that there is a concluded contract and that the details which were to be mentioned in delivery notice were operational in nature and post contract obligations and on such main plank, liability of the opponent is decided. On one hand, the master agreement provides that it would be a basic agreement for sale and purchase of LNG and accompanied by confirmation notice of each transaction. As per the conduct of the parties mutually, the original confirmation notice is given a go by as far as each transaction is concerned and a composite notice of all the four cargoes came to be executed as observed hereinabove on the finding that Henry Hub price was the alternative price, the claim is decided in favour of the petitioner by the learned arbitral tribunal. Even without touching the merits involved in the matter, with respect, the findings arrived at by the learned arbitral tribunal are perverse and irrational. The price aspect remained undecided till the last moment and admittedly, the receiving terminal was not fixed at all. Only because there are two terminals available in India, i.e., Dahej and Hazira, the same can neither be presumed one way or the other and it cannot be termed as operational aspect. In a commercial transaction, if the goods are sent by the seller to the purchaser and that too at a distance like in the case on hand, to believe that the destination was operational in nature itself is perverse and irrational. The facts clearly and establish that the delivery notices

sent by the petitioner was a unilateral act on the part of the petitioner and the same are never signed by the opponent and that too without any SBLC being provided by the opponent, without determination of price and even without fixing the place of receiving the goods. In opinion of this Court, in any commercial transaction, the price segment and place of delivery are important segments for execution of a binding contract. Such notice is not signed by the opponent is an admitted fact and in such circumstances, with respect, the findings arrived at by the learned arbitral tribunal defies logic as rightly contended by the opponent. Even at the cost of repetition, it is provided that this Court has not endeavored to examine the award on merits as this Court lacks jurisdiction. However, on the aforesaid facts, it is clear that the findings are based on assumption that there is a concluded contract. The original confirmation notice was changed and the delivery notices not having been signed and also considering the fact that there was no agreement on price and no fixation of the receiving terminal, in such circumstances finding that there was a concluded contract is a perverse finding and the same defies logic. The confirmation notice dated 12.03.2007 also provided for details like receiving terminal, price, contract price and right of the buyer to refuse delivery etc. as well as clause of SBLC. The facts clearly establish that no security was provided by the opponent and that the opponent had informed the petitioner that no slots are available. In addition to that, the facts reveal that in fact, the cargoes for May, June and August were not loaded at all for its shipment and even April cargo though loaded was sold before it reached its destination which was fixed by petitioner to be delivered at Dahej. Even as per the findings arrived at by the learned Tribunal, there is no finding to the effect that the delivery was physically brought at the doorstep of the terminal and it was refused by the opponent and therefore, the finding that the liability of take or pay is triggered defies logic in facts of this case.

83. In light of the aforesaid therefore, this Court is of the opinion that the findings arrived at by the learned arbitral tribunal are perverse, irrational and are as such

that it shocks the conscience of this Court. Even the basic ingredients of take or pay are also not coming out from the bare reading of the record as well as conclusion arrived by the learned Tribunal as mentioned herein above, still however, a huge claim of take or pay is allowed by the arbitral tribunal and the same in opinion of this Court, with respect, is based on irrelevant consideration and perverse, irrational, defies logic and it shocks conscience of the Court and therefore, even within the limited jurisdiction of section 48 of the Act, the same is against fundamental public policy which falls within explanation 2 of section 48(2).

84. Even considering the binding decisions of the Apex Court and this Court, as well as the judgment rendered in petition no.2/17, there is no blanket bar that a foreign award cannot be examined even within the limited scope of explanation 2 of section 48(2). Having examined the same within that limited scope, the impugned arbitral award is perverse, irrational and is against fundamental public policy and is such that it shocks conscience of this Court and therefore, the execution of the award in question is refused. The application stands dismissed. However, there shall be no order as to costs."

3. The refusal to enforce the foreign award, as per the opinion of the learned Single Judge, is within the limited scope of Explanation 2 of sub-section (2) of Section 48 of the Act' 1996, while holding the arbitral award to be perverse, irrational and against the fundamental public policy, and is such that it shocks the conscience of the Court.

[II] Summary of Facts :-

4. Before adverting to the arguments of the learned Senior Counsels for the parties, brief facts and circumstances of

the present case are relevant to be noted hereinunder:-

(a)The appellant herein namely, Asean LNG Trading Co. Ltd. now known as Petronas LNG Ltd. had entered into an agreement with the respondent namely, M/s. Adani Energy Ltd., as a Master agreement for LNG sale and purchase on 02.08.2006. The Master agreement has been executed between Malaysia LNG SDN BHD (for an on behalf of Malaysia LNG Companies) and Adani Energy Ltd. (respondent herein) for sale of Liquified Natural Gas (LNG) for a period of three years. Malaysia LNG Companies, referred to as 'MLNG' in the agreement is the seller and Adani Energy Ltd. 'Adani' is the buyer as described in the agreement.

(b)Relevant Clauses 1.1, 1.5, Clause 2, 6.1, 6.2, 6.5, 6.6, 7.1, 9.1, 12.1, 12.2, 20.1, 20.3, 20.9, Clauses 21 and 26 and 27.2 of the agreement placed before us by the learned Senior Counsels for the parties are relevant to be extracted hereinunder:-

> **"1.1.** The terms and expressions in this Agreement and any effective Confirmation Notices hereof, unless the context otherwise requires, shall have the meanings respectively assigned to them as follows:
>
> **Affiliate**
> Means a company, partnership or other legal entity which directly or indirectly controls, or is directly or indirectly controlled by, or which is directly or indirectly controlled by an entity which directly or indirectly controls Seller.
> For the purposes of this definition, "control" and its derivatives means the ownership directly or indirectly of more than fifty (50) percent of the shares, interests or

voting rights in a company, partnership or other legal entity.

Agreement
This Master LNG Sale And Purchase Agreement, including Schedules A, B, C and D (the provisions contained in any effective Confirmation Notices).

Allowed Laytime
Has the meaning assigned to it in Clause 9.3.

Btu
British thermal unit, being that amount of heat which is equal to 1,055.06 joules.

Buyer's Facilities
The berthing unloading, receipt, storage, regasification and regasified LNG processing and delivery facilities at the Receiving Terminal to be mutually agreed in the relevant Confirmation Notice.

Confirmation Notice
The notice to be executed by the Parties substantially in the form set out in Schedule C in relation to the sale and purchase of a cargo of LNG pursuant to this Agreement.

Day
A period of twenty-four (24) consecutive hours starting 00:00 hours and ending at 00:00 hours of the next following day in the country of the Unloading Port.

Expert
means an individual appointed pursuant to Clause 27.1 to resolve certain disputes between the Parties as designated therein.

Force Majeure
As defined in Clause 22.1.

Full Cargo Lot
A cargo of LNG which fills an LNG Ship to its fully loaded capacity or to the fullest extent that the LNG Ship can safely load, carry, discharge and leaving

reasonable quantity for heel.

Gross Heating Value (Mass Based)
When expressed in megajoules or MJ, the quantity of heat produced by the complete combustion of 1 kilogram mass of anhydrous gas in anhydrous air, and the condensation of all the water formed, with the initial and final temperature and pressure being 15 degrees Celsius and 1,013.25 milibars respectively; when expressed in Btu, the quantity of heat produced by the complete combustion of 1 kilogram mass of anhydrous gas in anhydrous air, and the condensation of all the water formed, with the initial and final temperature and pressure being 60 degrees Fahrenheit and 14.696 pounds per square inch absolute respectively.

Gross Heating Value (Volume Based)
When expressed in Btu, the quantity of heat produced by the complete combustion of 1 Standard Cubic Foot of anhydrous gas in anhydrous air, and the condensation of all the water formed, with the initial and final temperature and pressure being 60 degrees Fahrenheit and 14.696 pounds per square inch absolute respectively.

Independent Inspector
As defined in Clause 15.2.

LNG
Liquefied Natural Gas, being a product obtained from liquefying Natural Gas and consisting predominantly of methane.

LNG Heel
The quantity of LNG, as determined by Seller, remaining on the LNG Ship after a discharge of the cargo required for the LNG Ship to proceed from the Receiving Terminal to the Loading Port, or dry-dock or other port, and arrive at such facility with sufficient LNG to meet the required arrival temperature.

LNG Ship

A ship provided by Seller for the transportation of LNG to Buyer at the Receiving Terminal in accordance with this Agreement and the relevant Confirmation Notice.

Loading Port
The port for loading of LNG into LNG Ship located at Bintulu, Sarawak, Malaysia and/or other ports as specified in the relevant Confirmation Notice.

Malaysia LNG Companies
Any one of the companies organized and existing under the laws of Malaysia which at the date hereof comprise Malaysia LNG Sdn. Bhd., Malaysia LNG Dua Sdn. Bhd., Malaysia LNG Tiga Sdn Bhd and Asean LNG Trading Company Ltd.

MMBtu
1,000,000 Btu.

Month
A Gregorian calendar month.

Natural Gas
A mixture consisting mainly of hydrocarbons that exist either in the gaseous phase or in solution with crude oil in natural underground reservoirs.

Notice of Readiness (NOR)
A notice sent by the master of the LNG Ship or its agent to Buyer or Buyer's agent by letter, telegraph, facsimile, radio or telephone upon arrival of the LNG Ship at the customary place at the Unloading Port where the first pilot boards the LNG Ship at the Unloading Port indicating that the LNG Ship is ready to discharge LNG, berth or no berth.

Plant
The liquefaction trains and associated facilities at Bintulu, in the State of Sarawak, Malaysia (or such other locations as may be specified or reasonably inferred from the relevant Confirmation Notice), including the facilities in the Loading Port used by Seller to produce and load the LNG to be delivered hereunder.

Quantity Delivered
Quantity of LNG in MMBtu delivered by Seller to Buyer at the Unloading Point in the Receiving Terminal of the Unloading Port as specified in the relevant Confirmation Notice.

Receiving Terminal
The regasification and associated facilities which Buyer has confirmed in the relevant Confirmation Notice that it will use to unload the LNG purchased under the Agreement (if any).

Rounding or Rounded
To eliminate unrequired digits in order to establish a required number by using the following method: if the first of the digits to be discarded is 5 or more, the last of the digits to be retained is increased by 1; if the first of the digits to be discarded is 4 or less, the last of the digits to be retained is unaltered. The following example is given to illustrate how a number is to be established in accordance with the above.

Number before Rounding	Number after Rounding to 1 decimal place
6.74	6.7
6.749	6.7
6.750	6.8
6.76	6.8

Scheduled Unloading Date Range
As defined in Clause 6.1.

Seller's Facilities
All facilities in connection with the production, storage and transportation of the LNG to be delivered in accordance with this Agreement and which shall include,

without limitation, the Natural Gas wells and production facilities, pipelines and utilities, Natural Gas treatment, liquefaction and related facilities, LNG storage facilities and loading port facilities located either onshore or offshore the state of Sarawak, Malaysia (or such other locations as may be specified or reasonably inferred from the relevant Confirmation Notice) and including all modifications, alterations or additions thereto as they may be made from time to time, whether owned or not owned and/or controlled by Seller.

Ship Owner
The owner of the LNG Ship.

Standard Conditions or SC
The reference conditions of 15 degrees Celsius and 1,013.25 millibars absolute.

Standard Cubic Foot or SCF
In relation to gas, the quantity of anhydrous gas which occupies i cubic foot of space at a temperature of 60 degrees Fahrenheit and a pressure of 14.696 pounds per square inch absolute.

Unloading Port
As assigned to it in the relevant Confirmation Notice.

Unloading Point
The point at the Receiving Terminal at which the flange coupling of the LNG unloading manifold on board an LNG ship joins the flange coupling of Buyer's receiving arm.

Working Day
A day, other than a Saturday or Sunday upon which banks are open for general business (a) in the country of Buyer's nominated bank and (b) in Malaysia or the country of Seller's nominated bank (if Seller's nominated bank is not in Malaysia).

1.5. This Agreement comprises this Master LNG Sale and Purchase Agreement, Schedules A, B and the relevant effective Confirmation Notice following the format set out in Schedule C hereto. If any inconsistency

appears between the provisions contained in the Master LNG Sale and Purchase Agreement, Schedules A, B and the provisions of the relevant effective Confirmation Notice, the documents shall prevail in the following order of priority:

(a) the relevant effective Confirmation Notice;
(b) this Master LNG Sale and Purchase Agreement; and
(c) Schedules A and B

CLAUSE 2 - DURATION

2.1 This Agreement shall come into force and effect as of the date above written and shall continue in force and effect for a period of three (3) years. For the avoidance of doubt, this Agreement shall expire on the 3rd Anniversary of effective date.

2.2. The duration of this Agreement may be extended on such terms and conditions as may be mutually agreed. The Party requesting to extend this Agreement shall give written notice to the other Party not later than three (3) months prior to the expiry of this Agreement pursuant to Clause 2.1 above.

2.3. Although it is the intention of the Parties to enter into contracts for sale and purchase of cargoes of LNG from time to time, the execution of this Agreement by the Parties shall not oblige either Party at any time to enter into any contract with the other Party for the sale and purchase of LNG. Seller may, in its absolute discretion, at any time offer to sell quantities of LNG to Buyer on the terms and conditions contained herein. If Buyer accepts such offer, the Parties shall negotiate and execute a Confirmation Notice, substantially in the form set out in Schedule C. Any contract that may be entered into by the Parties for the sale and purchase of any cargo or cargoes of LNG shall be in accordance with the terms of this Agreement and the relevant Confirmation Notice, which shall be mutually agreed, relating to each contract. The execution of any Confirmation Notice by the Parties shall constitute an individual and several

contract whereby Seller agrees to supply, sell and deliver a cargo or cargoes of LNG to Buyer and Buyer agrees to purchase, receive and pay Seller for such cargo or cargoes of LNG in accordance with this Agreement and the relevant Confirmation Notice.

6.1. Prior to loading of any cargo of LNG under this Agreement, Seller and Buyer shall consult each other and agree in the Confirmation Notice terms that are to be applicable to a cargo or cargoes of LNG to be loaded, including a two (2) Day date-range (or other date-range as mutually agreed) for arrival of the LNG Ship to deliver a Full Cargo Lot of LNG at the Receiving Terminal (the **"Scheduled Unloading Date Range"**) taking into consideration Seller's LNG Ship's operation and its commitment on long term contracts as well as Buyer's berth schedule, the name of the LNG Ship to be utilized (which Seller shall have the right but not the obligation to substitute if necessary prior to loading subject to compliance with Clause 17.1), LNG Ship's estimated fully laden draft and estimated quantity of LNG to be delivered.

During such consultation between Buyer and Seller, Buyer shall also use all reasonable endeavours to provide Seller with information about the requirements of the proposed Unloading Port, Receiving Terminal and for the shipment concerned.

Seller shall send to Buyer the notice by letter, telex, facsimile, electronic mail or other electronic method of written transmission within twenty four (24) hours after loading completion. Buyer shall, on receipt of the above advice, provide Seller with full documentation requirements for the shipment concerned.

6.2. The LNG Ship referred to in Clause 6.1 shall be any of the LNG Ships having the specifications and dimension as mentioned in Clause 17.1.

6.5. Seller shall give or cause to be given to Buyer:
(a) not less than seventy-two (72) hours notice of the estimated time of arrival of the LNG Ship at the

Receiving Terminal;

(b) a notice of not less than forty eight (48) hours prior to the estimated time of arrival of the LNG Ship at the Receiving Terminal;

(c) an additional notice of not less than twenty four (24) hours prior to the estimated time of arrival of the LNG Ship at the Receiving Terminal;

(d) prompt notice of any alteration of more than three (3) hours to the time contained in the notice given under Clause 6.5(c); and

(e) any other or further notice as may be proposed by Buyer in order to meet with the additional requirements of the Unloading Port and included in Buyer's delivery instructions.

6.6. Seller shall cause the information of the latest temperature of the liquid cargo and pressure of the LNG tanks of the LNG Ship to be provided to Buyer within twenty-four (24) hours (and at such other time as may be mutually agreed) before the estimated time of arrival of the LNG Ship at the Receiving Terminal. If the latest temperature of the liquid cargo and pressure of the LNG tanks and the LNG Ship should change due to circumstances discovered after transmission of such a notice, the master of the LNG Ship shall give prompt notice thereof to Buyer amending the information previously given to Buyer.

7.1. Upon arrival of an LNG Ship at the customary anchorage or waiting place at the Unloading Port, as advised by Buyer, where the first pilot boards the LNG Ship, the master of the ship shall cause the Notice Of Readiness to be sent. After the LNG Ship has cleared the necessary formalities with the relevant authorities. Seller shall cause the LNG Ship to be berthed safely and expeditiously at Buyer's berth and Buyer shall cooperate where reasonably practicable in the LNG Ship being safely and expeditiously berthed.

9.1. Buyer shall accept discharge of LNG at a berth which Buyer shall provide or cause to be provided free of charge and which the LNG ship can safely reach, lie at and depart from, always safely afloat.

12.1 Seller's and Buyer's Obligations
Seller agrees to sell and deliver to Buyer at the Receiving Terminal, and Buyer agrees to purchase, take and pay for, or pay for if not taken, LNG in the quantities, the quality and at the prices determined in accordance with this Agreement and the relevant Confirmation Notice.

12.2 Buyer's Obligation to Take or Pay
If Buyer fails to accept delivery of any LNG cargo under the Agreement, unless excused by Force Majeure dr Seller's material failure to perform, Buyer shall be liable to pay Seller, in accordance with this Clause 12.2, an amount equal to such LNG quantity as specified in the Confirmation Notice multiplied by the LNG Price as specified in the Confirmation Notice in respect thereof ("Take or Pay Amount").

Notwithstanding the above, if Seller is able to find and complete sale transaction of such LNG cargo to a third party purchaser, and Buyer has paid Seller, Buyer shall be entitled to receive the net proceeds of such sale realized by Seller from such third party, being the following (the "Net Proceeds"):

a) the total proceeds received from the sale to such third party plus any shipping costs saved, less

b) all fees, commissions, duties, expenses and costs of sale, additional bunkering and other LNG Ship expenses over and above those costs which would have been incurred in transporting the cargo to Buyer's Facilities on the Scheduled Unloading Date Range (including but not limited to demurrage for any delays resulting from such alternative sale);

provided, however, that if the Net Proceeds exceed the amount paid or payable by Buyer in respect of such LNG

cargo, the difference between such Net Proceeds and the amount paid or payable by Buyer shall be retained by Seller for its own account.

20.1. For any sale of LNG pursuant to this Agreement and the relevant Confirmation Notice, the price for the LNG expressed in United States Dollars as per MMBtu shall be specified in the Confirmation Notice (the Contract Sale Price").

20.3. The amount payable by Buyer to Seller for the LNG cargo(es) sold, or any other amounts payable pursuant to this Agreement shall be calculated by multiplying the Quantity Delivered by the Contract Sale Price specified in the relevant Confirmation Notice.

20.9. Credit Support

a) Buyer shall if requested by Seller in accordance with, and as specified in, a Confirmation Notice provide to Seller either (i) a parent company guarantee, substantially similar to the form set out in Form II of Schedule D; provided, however, that the company giving such guarantee is reasonably acceptable to Seller, or (ii) an irrevocable standby letter of credit, substantially similar to the form set out in Form I of Schedule D provided by a first class international bank having a debt rating of at least A- by Standard & Poor's or the equivalent by Moody's.

b) If during the term of any Confirmation Notice, Buyer's (or its guarantor's) financial condition materially deteriorates to such a degree that Seller has reasonable grounds for believing that Buyer either will cease to have the financial resources to meet its financial obligations or that Buyer's (or its guarantor's) financial circumstances have deteriorated to an unacceptable level, Seller may by giving notice to Buyer (including details of Seller's reasonable grounds) request that Buyer promptly provide additional financial security, as specified in such notice, to secure Buyer's performance. Upon receipt of such notice, Buyer shall within five (5) Business Days provide Seller with the requested financial security. In the event Buyer fails to provide the

requested financial security within the requested time period, Seller shall have the immediate right upon notice to Buyer to suspend deliveries of LNG until Seller receives such financial security and/or draw any amount due on the credit support documents provided by Buyer under this Agreement. Such suspension shall not constitute a failure by Seller to make such quantities available for sale pursuant to the terms of this Agreement, but shall be deemed a failure by Buyer to accept under Clause 12.2. Buyer shall have no rights in respect of such suspended deliveries while such financial security has not been provided but shall be obligated to make all payments that become due and payable pursuant to Clause 12.2 in relation to such suspended deliveries.

c) If Seller does not request credit support in accordance with Clause 20.9(a) above then, if during the term of any Confirmation Notice, Buyer's (or its parent's) financial condition materially deteriorates to such a degree that Seller, in its sole opinion, has reasonable grounds for believing that Buyer either will cease to have the financial resources to meet its financial obligations or that Buyer's (or its parent's) financial circumstances have deteriorated to an unacceptable level, Seller may by giving notice to Buyer (including details of Seller's reasonable grounds) request that Buyer promptly provide additional financial security, as specified in such notice, to secure Buyer's performance. Upon receipt of such notice, Buyer shall within five (5) Business Days provide Seller with the requested financial security. In the event Buyer fails to provide the requested financial security within the requested time period, Seller shall have the immediate right upon notice to Buyer to suspend deliveries of LNG until Seller receives such financial security. Such suspension shall not constitute a failure by Seller to make such quantities available for sale pursuant to the terms of this Agreement, and Buyer shall have no rights in respect of such suspended deliveries while such financial security has not been provided but shall be obligated to make all payments which become due and payable pursuant to Clause 12.2 in relation to such suspended deliveries.

Any claim by the Seller on any credit support provided by the Buyer in accordance with this Clause 20.9 and the applicable Confirmation Notice shall be deemed to be a payment of the relevant amount by the Buyer.

CLAUSE 21 - DELIVERY, TRANSFER OF TITLE AND RISK

21.1. Delivery of LNG shall be on an Ex-ship basis and, unless otherwise agreed in the Confirmation Notice, the point of delivery of every LNG sale under this Agreement shall be at the Unloading Point. Title and risk of LNG delivered hereunder shall pass from Seller to Buyer at the points where the outlet flanges of the unloading lines of the LNG Ship connected with the inlet flanges of the receiving lines of the Unloading Point.

CLAUSE 26 APPLICABLE LAW

26.1 This Agreement and every Confirmation Notice executed hereunder shall be governed by and construed in accordance with the Law of England and Wales. The United Nations Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention) and the Convention on the Limitation Period in the International Sale of Goods shall not apply.

27.2 Any dispute arising out of or in connection with this Agreement, which cannot be resolved amicably by discussion in good faith between the Parties (but excluding any dispute that must be referred to an Expert pursuant to Clause 27.1(a), shall upon written request by one Party, be settled by arbitration in accordance with the London Court of International Arbitration (LCIA) Rules as in force at the date of such arbitration. Any arbitration commenced pursuant to this Clause shall be administered by the LCIA. The number of arbitrators shall be three (3). Each Party shall appoint an arbitrator and the two (2) arbitrators shall appoint a third arbitrator who shall be the presiding arbitrator, in case either Party fails to appoint an arbitrator or the two (2)

arbitrators appointed by the Parties fail to agree on the choice of the presiding arbitrator, the appointing authority shall be the LCIA. Unless otherwise agreed, the place of arbitration shall be London, the United Kingdom. The language to be used in the arbitration shall be English. Any award shall be final and binding upon the Parties. Judgment on any award rendered by arbitrators may be entered in any court having jurisdiction over the Parties."

(c) Schedule 'C' containing the sample confirmation notice, ex-ship sale and purchase of LNG reads as under:-

SCHEDULE C

CONFIRMATION NOTICE (SAMPLE)
EX-SHIP SALE & PURCHASE OF LNG

PARTIES

Buyer :
Attn :
Telephone :
Telefax :

Seller :
Attn :
Telephone :
Telefax :

The following Confirmation Notice confirms the agreement made between Buyer and Seller as Identified herein. This sale is subject to the terms and conditions of the existing Master Agreement executed between Buyer and Seller on…….. ("Agreement"). The execution of this Confirmation Notice by the Parties shall form a valid, individual and several contract whereby Seller agrees to sell a cargo or cargoes of LNG to Buyer and Buyer agrees to purchase and pay Seller for such cargo or cargoes of LNG in accordance with the Agreement and this Confirmation Notice.

2. **LNG SHIP**

Name of Ship :_____
Designed Draft (moulded) :_____
Estimated Fully Laden Draft :_____
Length Overall Service Speed :_____

Gross Cargo Tank Capacity :_____
Name of Ship Owner :_____
Name of Ship Operator :_____
Flag :_____
Vessel's Current Position :_____

3. RECEIVING TERMINAL

Unloading Port :_____
State :_____
Country :_____

4. SCHEDULED UNLOADING DATE RANGE

Date of unloading expected to commence :_____
Targeted period of unloading :_____

5. QUANTITY

Number of Full Cargo Lots :_____
Estimated Quantity Loaded in MMBtu :_____
Estimated Quantity to be Unloaded in MMBtu :_____
Estimated Quantity of Heel in cubic meters to be retained at Unloading Port :_____

Quantity Delivered: Will be ascertained using the method mentioned in Clause 13 of the Master LNG Sale And Purchase Agreement.

6. PLANT :_____

7. LOADING PORT :_____

8.CONTRACT SALE PRICE

USD/MMBtu of Quantity Delivered :_____

9. PAYMENT
In accordance with the terms in Clause 20 of the Master LNG Sale And Purchase "Agreement or otherwise agreed mutually between both Parties.

Seller's Account No :_____
Bank Address :_____
Country :_____
Buyer's Account No :_____
Bank Address :_____
Country :_____

10. PAYMENT SECURITY: :_____

11. QUALITY
LNG to be unloaded by Seller from LNG Ship at Unloading Point at the

Receiving Terminal, when converted to a gaseous state, comply with the quality specifications as agreed by Buyer and Seller herein.

12. DEMURRAGE
USD ……..per Day and pro-rated for part Days

13. NOTICES
Only routine operational notices to be sent to the following addresses-

BUYER
Individual :_____
Email :_____
Tel. (Office) :_____
Tel. (Mobile) :_____
Tel. (24hrs) :_____
Fax (Office) :_____
Address :_____

SELLER
Individual :_____
Email :_____
Tel. (Office) :_____
Tel. (Mobile) :_____
Tel. (24hrs) :_____
Fax (Office) :_____
Address :_____

Other notices not classified as routine operational notices such as general correspondences, commercial documents, invoices etc. to be sent to the addresses appeared in Clause 32 and in the manner specified in Clause 32 or, for invoice and documents accompanying invoice, in the manner specified in Clause 20 of the Master LNG Sale And Purchase Agreement.

AGREED and ACCEPTED this Day …….. of ……..

On behalf of seller

Signature

Name:
Title:

On behalf of Buyer

Signature

Name:
Title:

(d)In continuation of the Master agreement vide e-mail dated 04.02.2007, between Mr. Sidek for MLNG @ Petronas and Mr. Affendy (MLNG) (internal e-mail of the appellant), four cargoes for the respondent, one each for April, May, June and August had been discussed. The minutes of the meeting held between the representatives of the parties namely, the appellant and respondent herein held on 15/16.02.2007 at Bangkok in relation to the schedule for delivery of cargoes and pricing are at page '815' of the second part of the paper-book wherein schedule for delivery in April, May, June and August, 2007, pricing, payment guarantee, diversion clause, confirmation notice and next steps were discussed. Paragraph '7' of the minutes of meeting are to be noted as under:-

"7. Next Steps

7.1 Schedule

7.1.a Adani to revert if the new dates proposed are acceptable for them.

7.2 Pricing

7.2.a Both parties to agree on the Sharing of Upside and Helping Hand Concepts.

7.3 Payment Guarantee

7.3.a Adani to revert on the usage of either one or multiple SBLCS

7.3.b. MLNG to revert on status of proposed banks by Adani.

7.4 Confirmation Notice

7.4.a Both parties to agree on the Confirmation Notice mode, either one or multiple.

7.4.b To add new clauses in the Confirmation Notice

7.4.b1 Diversion Clause

7.4.b2 "First Right of Refusal"”

5. The case of the learned Senior Counsel for the respondent (buyer) is that the terms relating to schedule for delivery, pricing etc. though were discussed in the said meeting but it was resolved that the buyer would revert back on the terms discussed therein.

6. A letter dated 22.02.2007 of Hazira LNG Private Ltd. addressed to the respondent – buyer has been placed at page ‘838’ of the second part of the paper-book wherein it was intimated that “considering the expected arrivals of LNG vessels at our terminal in the coming months, we are not in a position to offer any regasification capacity, which may please be noted”.

7. The confirmation notice dated 12.03.2007 was executed between the parties namely, the appellant (seller) and the respondent herein (buyer) for sale and purchase of four cargoes of LNG in the months of April, May, June and August, as per the schedule of unloading date range listed therein as under:-

4. SCHEDULED UNLOADING DATE RANGE

The Scheduled Unloading Date Range for the four cargoes shall be as listed below.

i. First Cargo	:	26-28 April 2007
ii. Second Cargo	:	26-27 May 2007
iii. Third Cargo	:	25-26 June 2007

iv. Fourth Cargo : 26-27 August 2007

Seller shall immediately inform Buyer and Buyer shall immediately inform Seller of any circumstances as a result of which delivery of a Cargo might be made on a date other than the Scheduled Unloading Date shown above. In such circumstances, the Party concerned shall, use its best endeavours to minimize any adverse effects arising from such circumstances and the Parties shall consult together as to whether any alteration of the then Scheduled Unloading Date Range shall be made.

8. A perusal of Clause 4 of the Schedule unloading date range mentioned therein indicates that the seller had agreed to immediately inform buyer and the buyer in turn to immediately inform the seller of any circumstances for change in the date other than the scheduled unloading date shown therein, while using its best endeavours to minimise any adverse effects arising from such circumstances and that the parties shall consult together about any alteration of the scheduled unloading date range whether to be made.

9. The confirmation notice further refers to and provides format of delivery notice, as exhibit attached to it, as under:-

DELIVERY NOTICE
EX-SHIP SALE & PURCHASE OF LNG

1. BUYER

Buyer	:	Adani Energy Limited
Attn	:	Deputy General Manager – Gas Sourcing
Telephone	:	+91-120-2443008
fax	:	+31-120-2443009
Seller	:	Asean LNG Trading Co.Ltd. (ALTCO)

Attn : General Manager, Marketing & Trading (Sector 3)
Telephone : +603-2331-6747
Telefax : +603-2331-7888

This Delivery Notice confirms the agreement made between Buyer and Seller as identified herein. This sale is subject to the terms and conditions of the existing Master Agreement ("Agreement") executed on 2.August 2006. and Confirmation Notice executed on 12 March 2007 ("Agreement") between Buyer and Seller.

2. **LNG SHIP**

Name of Ship :_____
Designed Draft (moulded) :_____
Estimated Fully Laden Draft :_____
Length Overall :_____
Service Speed :_____
Gross Cargo Tank Capacity :_____
Name of Ship Owner :_____
Name of Ship Operator :_____
Flag :_____
Vessel's Current Position :_____

3. RECEIVING TERMINAL

Unloading Port :_____
State :_____
Country :_____

4. SCHEDULED UNLOADING DATE RANGE

Date of unloading expected to commence :_____
Targeted period of unloading :_____

5. QUANTITY

Estimated Quantity Loaded in MMBtu :_____
Estimated Quantity to be Unloaded in MMBtu :_____
Estimated Quantity of Heel in cubic meters to be retained at Unloading Port :_____

6. QUALITY

Without prejudice to paragraph 11 (Quality) in the Confirmation Notice, the average total sulfur content of three preceding cargoes loaded on February 26th to 27th 2007, March 2nd to 4th 2007 and March 5th to 6th 2007 contain not more than 15 mg/Nm3 by weight of total sulfur compound.

7. PAYMENT SECURITY

Irrevocable SBLC value at US$..... with a validity period from ..... to.....

On behalf of SELLER

Signature:

Name:

Title:

On behalf of BUYER

Signature:

Name:

Title:

10. By placing the delivery notice, it was sought to be demonstrated by the learned Senior Counsel for the respondent – buyer herein before us that the particulars of the LNG Ship, receiving terminal, scheduled uploading date range, quantity, quality, payment security etc. were to be provided in the delivery notice itself.

11. The copy of an e-mail dated 15.03.2007 appended at page '924' (second part of the paper-book) is an internal communication between the officers of the seller (MLNG), wherein it is is stated by the In-charge Marketing & Trading India & South East Asia 2 that an e-mail was sent on behalf of the buyer on the July pricing but it was yet to arrive. However, having spoken to the representative of the seller, his offer price to the buyer was US$8.15.

12. A delivery notice along with the letter dated 16.03.2007 addressed to the buyer's Deputy General Manager is enclosed at page '925' of second part of the paper-book wherein the details with regard to the scheduled unloading date between 26th and 28th April, 2007 has been mentioned with the details of LNG Ship, receiving terminal, quantity, quality and payment security. The receiving terminal of unloading port disclosed therein is Hazira, Gujarat.

13. It is contented by the learned Senior Counsel for the respondent that the delivery notice for April Cargo does not specify the price and further it is indicated therein that the amount and the validity period of the payment security will be advised at a later day. The delivery notice further states that the sale is subject to the terms and conditions of the existing master agreement executed on 02.08.2006 and the confirmation notice executed on 12.03.2007 between buyer and seller. A perusal of the delivery notice at pages '925'-'927' (second part of the paper-book) indicates that the signature column on behalf of the buyer is blank.

14. A copy of the e-mail dated 19.03.2007 at page '928' (second part of the paper-book) indicates that in the said internal e-mail between the officers of MLNG, it was communicated that:-

> "As per our telecom on Friday, this is a reverse confirmation of Adani's offer for the said cargo being fix and firm at USD 8.15 or HH + 1.50. The float price is also subject to us agreeing to hedge Adani's cost exposure capping it to USD 8.15 equivalent.

> At this point in time, due to the prevailing HH for Jun / July, the fix and firm offer is not economical and the alternative float offer with hedging is also not possible. "

15. A copy of the e-mail dated 21.03.2007 sent by the seller (MLNG) to the buyer, further reads that a confirmation was needed regarding the price for April cargo and it was also requested to clear the issue regarding the standby letter of credit. The extract of the communication relevant for our purposes at page '934' of the second part of the paper-book reads as under:-

> "I also like to assure you that we are looking at all possibilities in getting the best price for Adani in this transaction, As you are well aware, the weather factor in US lately is not to our favour. The Henry Hub price has been yo-yo between 6.84 to 7.00 lately. However, we are still optimistic that the price will go down further and level around 6.65 (will give DES price of 8.50) is still possible. Thus, as I mentioned to Alok earlier today, we need your confirmation whether you would accept 8.50 to be the firmed price for April cargo should we able to hedge at that level. As we are running short of time, we need the confirmation urgently."

16. A reading of another e-mail dated 22.03.2007 sent by the appellant (seller) to the respondent (buyer) at page '937' of the second part of paper-book indicates that there was no agreement or consensus on the price, inasmuch as, the same reads as under:-

"Affendy B. Adnan\(MLNG\)" <affenad@nad@petronas.com.my>	To : "Alok Singh"<Alok. ccSingh@adanienergy.com> <shahars@petronas.com. my>, "Rajeev Sharma"
03/22/2007 11:28 AM	<Rajeev.Sharma@ adanienergy.com> bcc

Dear Alok,

I think there's some misunderstanding. We have not yet offered to you a firmed price of $8.50. What we are offering is that should we are in the position to hedge the price at $8.50. Do you want us to do this? As stated in Mr Shaharuddin email. What you are suppose to revert to us by today is that your agreement for to hedge at $8.50 whenever we can. Currently, the price is still too high for us to hedge therefore the price is still based on indexed pricing.

I will call you later to explain further.""

Regards.
Affendy Adnan

From: Shaharuddin B M Sidek (MLNG)
Sent: Thursday, March 22, 2007 12:34 AM
To: alok.singh@adanienergy.com; Affendy B Adnan (MLNG).
Cc: Rajeev Sharma
Subject: RE: future July cargo & the coming April cargo

Dear Mr. Rajeev Sharma and Mr Alok Singh,

“I also like to assure you that we are looking at all possibilities in getting the best price for Adani in this transaction. As you are well aware, the weather factor in US lately is not to our favour. The Henry Hub price has been yo-yo between 6.84 to 7.00 lately. However, we are still optimistic that the price will go down further and level around 6.65 (will give DES price of 8.50) is still possible. Thus, as I mentioned to Alok earlier today, we need your confirmation whether you would accept 8.50 to be the firmed price for April cargo should we able to hedge at that level. As we are running short of time, we need the confirmation urgently.

Once again I plead to you to clear the SBLC issue so that we can proceed with the bigger agenda. By the way, what is the news on the Nigerian Cargo for April?

Regards

SHAHARUDDIN

17. In response thereto at page '949' of the second part of the paper-book is the letter of the appellant (seller) to the respondent (buyer) acknowledging the letter dated 27.03.2007, which reads that:-

28 March 2007
Mr Shirdhar Tambraparni,
Vice President,
Adani Energy Limited
Deputy General Manager - Gas Sourcing
Adani Energy Limited

Greetings,

Master LNG Sale and Purchase Agreement For Ex-Ship Short Term Sale and Purchase of Liquefied Natural Gas between Malaysia LNG Sdn. Bhd. (for and on behalf of Malaysia LNG Companies) and Adani Energy Limited (Adani) dated 2 August 2006 ("Master Agreement"). Confirmation Notice between Adani Energy Limited and Asean LNG Trading Co. Ltd. (ALTCO) dated 12 March 2007 ("Confirmation Notice") and Delivery Notice sent by ALTCO to Adani on 16 March 2007 ("Delivery Notice")

Thank you for your letter dated 27 March 2007 (the "Letter"). We understand from the Letter that Adani will not be able to accept the delivery of the cargoes agreed between the Parties under the Confirmation Notice scheduled for delivery on 26-28 April 2007 (the "April Cargo") and the cargo scheduled for delivery on 26-27 May 2007 (the "May Cargo").

> Based on the above mentioned Letter on Adani's failure to accept delivery of the April Cargo and the May Cargo, we will be sending an invoice to your goodselves for Adani's obligation to Take or Pay under Clause 12.2 of the Master Agreement.
>
> We would also like to reiterate our request for the Standby Letter of Credit (SBLC) in accordance with the Master Agreement and Confirmation Notice which was due from your goodselves to us on 22 March 2007.
>
> Best Regards,
>
> For and on behalf of Asean LNG Trading Co. Ltd.
>
> SHAHARUDDIN M.SIDEK
>
> General Manager
> Marketing & Trading (Sactor 3)
> Commercial Division

18. There is another letter dated 28.03.2007 (at page '950' of the paper-book) sent by the buyer to Hazira LNG Private Ltd. on the subject of making inquiry about requirement of regasification capacity of the Hazira terminal during April-August, 2007 wherein while stating that the first cargo was proposed to be loaded at Port Fortin, Trinidad and Tobago on 01.04.2007, the buyer sought confirmation from the Hazira terminal on the availability of regasification slot at the terminal. The details of the ship and the quantity of the gas had also been disclosed therein with the Annexures appended to the said letter. It was also stated therein that in case there is difficulty in accepting the cargo on the above days, a suggestion be made about minor reschedulement of the cargo, which may be acceptable to the terminal, while stating that there is a possibility of first

cargo being rescheduled to first week of May, 2007.

19. Another communication dated 29.03.2007 at page '972' of the paper-book indicates that upon inquiry made by the respondent (buyer) vide letter dated 28.03.2007 regarding availability of regasification slot during April-August, 2007 at Dahej terminal in the State of Gujarat, the Petronas LNG Ltd. responded by saying that their capacity during the said period was fully booked, they would not be in a position to accept the cargo mentioned in the letter dated 28.03.2007.

20. In reply to the letter dated 28.03.2007 for inquiry into the requirement of regasification capacity at Hazira terminal, a response was received by the respondent (buyer) vide letter dated 03.04.2007 at page '980' of the paper-book wherein it is stated that it would be difficult to offer regasification capacity considering the expected arrival of LNG cargoes in the coming month and that they are not in a position to offer any regasification capacity.

21. The appellant, however, sent a message through FAX dated 03.04.2007 appended at page '981' of the paper-book, whereby Take or Pay invoice was sent to the respondent in respect of the April cargo. The said notice is stated to be in terms of the Master agreement dated 02.08.2006, the Confirmation notice dated 12.03.2007 and the delivery notice dated 16.03.2007, stating that the payments were to be made to the bank account designated in the letter of instructions dated 03.04.2007.

22. By inviting attention of the Court at pages '1028'-'1032'

of the paper-book, it is sought to be demonstrated before us that April cargo, allegedly sent to the respondent by the appellant had been sold to one BG LNG Trading, LLC vide master agreement dated 06.04.2007.

23. It seems, thereafter, the respondent (buyer) wrote a letter dated 10.04.2007, indicating that they were facing unforeseen difficulties in obtaining regasification capacity at both the terminals at Dahej and Hazira for taking April and May cargoes as scheduled in the confirmation notice signed on 12.03.2007 and that intimation with regard to the same was sent to the appellant vide letter dated 27.03.2007. It was also stated therein that as the respondent had received a letter dated 28.03.2007 and Take or Pay invoice dated 03.04.2007 from the appellant and they may meet at the earliest to amicably settle the issue and that once the above matter would be resolved by mid April, 2007, the respondent (buyer) would be in a position to get end May, 2007 slot. The content of the letter dated 10.04.2007 at page '1033' of the second part of the paper-book are to be extracted hereinunder:-

> "Dear Mr Shahruddin,
>
> This is in continuation with our earlier letter dated 27 March 2007 wherein we had submitted the difficulties being faced by us for getting necessary slots at the LNG re-gasification terminals at Dahej and Hazira for taking the April and May Cargoes as scheduled under the confirmation notice signed on the 12th of March 2007. Subsequently, we have received your letter dated 28 March 2007 and your Take or Pay Invoice dated 3 April 2007.

> As intimated to you earlier also, you would appreciate that we are facing unforeseen difficulties in obtaining re-gasification capacities at the terminals which we hope to resolve soon. Unless the aforesaid matter is resolved with the terminal owners and a firm re-gasification slot is made available by them it would not be possible for us to confirm on the delivery location, date or acceptance of the cargoes. We are hopeful that the above matter would be resolved by mid April 2007. Once that is resolved, we are hoping to get end May 2007 slot.
>
> At this stage let me assure you that we stand by the spirit of the agreement. In order to resolve the issues regarding the first cargo scheduled for Delivery in April 2007 we suggest that we meet at the earliest date at New Delhi to amicably settle the Issue.
>
> In this regard I would like to invite MLNG team to New Delhi for a meeting tentatively on the 18th April 2007 and 17th of April 2007 to discuss on the way forward and to resolve the issues related with the first LNG cargo.
>
> We look forward to hearing from you soon on the above matter."

24. A communication dated 17.04.2007, however, was sent by the Senior Manager India / South Asia 2, of the appellant to the respondent (buyer) enclosing another delivery notice for 26th-27th May, 2007 cargo and Receiving terminal / unloading port mentioned therein is both Hazira / Dahej though the details of the vessel remain the same as was mentioned in the previous delivery notice. A perusal of the content of the delivery notice sent along with the communication dated 17.04.2007 indicates that it is mentioned therein in the column "Schedule Unloading Date Range" that the buyer's letter dated 27.03.2007

confirm that "buyer is not able to accept the delivery or the cargo scheduled for delivery on 26th – 2th May, 2007 as agreed between the parties under the confirmation notice". Further while mentioning the quantity and quality, it is stated therein that the buyer was required to immediately provide SBLC for the May, 2007 cargo in the amount of US$29,265,600, the validity period of which shall be until 18.06.2007 from the date, i.e. 17.04.2007.

25. A perusal of the delivery notice in respect of the May cargo at pages '1041'-'1043' of the paper-book indicates that it does not bear the signature of the buyer. Another Take or Pay notice with the invoice was sent through FAX dated 17.04.2007 itself, at page '1044' of the second set of the paper-book on the premise that the buyer showed inability to accept the delivery of the May cargo.

26. A communication dated 19.04.2007 was sent by the respondent to the appellant stating that the confirmation notice did not contain the details of LNG Ship and receiving terminal and those details were deliberately left blank as it was understood that the shipments were to take place subject to finalization of the receiving terminal and execution of the delivery notice confirming the availability of the same. The fact that the buyer was unable to finalize the receiving terminal was totally beyond its control and without the receiving terminal being finalized, confirmation notice was not complete and final. It was, thus, intimated that as there was no agreement on the receiving terminal, it was inappropriate on the part of the appellant to have

hastily invoked Take or Pay invoice clause and issued invoice thereunder.

27. A request was made to withdraw the letter dated 28.03.2007 and the invoices dated 03.04.2007 and 17.04.2007 until by mutual agreement the issue relating to the receiving terminal is resolved. It was conveyed that the said issue can be discussed in the forthcoming meeting scheduled on 20.04.2007 at New Delhi.

28. It was further submitted by the learned Senior Counsel for the respondent (buyer) that a confirmation memorandum dated 30.04.2007 was executed between the appellant (seller) and one Vitol S.A. for the purchase of LNG in respect of the May cargo.

29. An e-mail dated 15.05.2007 (page '1076' of the paper-book) was sent by the appellant to the respondent (buyer) requesting to confirm the terminal (whether Dahej or Hazira) for the upcoming third cargo loading on 01.06.2007. However, vide letter dated 18.05.2007 (page '1078' of the paper-book) the appellant sent a letter enclosing the delivery notice for 25-26th June 2007 cargo. In response thereto an e-mail dated 18.05.2007 was sent by the respondent (buyer) (page '1081' of the paper-book) *interalia* stating that the slots in both the regasification terminals have been denied, and hence, they cannot accept to take any cargo in June, 2007. Again Take or Pay invoice was sent by the respondent on 23.05.2007 through fax in respect of the June cargo (Ref:page '1085' of the paper-

book).

30. A termination notice dated 24.05.2007 (page '1096' of the paper-book) was sent by the appellant (seller) to the respondent (buyer) terminating the confirmation notice dated 12.03.2007 agitating that there is a breach of contract by the buyer, by failing to accept delivery, open letters of credit or nominate the receiving terminal(s) for the discharge of the LNG cargoes, besides other numerous breaches of the contract. The particular breaches stated in the termination letter while stating that the said list is a non-exhaustive list of the breaches of the contract on the part of the buyer are:-

> (1) In breach of clause 10 of the Confirmation Notice and clause 20.9(a) of the Master Agreement, the Buyer's failure to provide a letter of credit to secure the April 2007 delivery under the Confirmation Notice.
>
> (2) In breach of clause 10 of the Confirmation Notice and clause 20.9(a) of the Master Agreement, the Buyer's failure to provide a standby letter of credit to secure the May 2007 delivery under the Confirmation Notice.
>
> (3) In breach of clause 9 of the Confirmation Notice and clauses 12.1, 12.2 and 20 of the Master Agreement, the Buyer's failure to pay the take or pay invoices sent to the Buyer on 3 April 2007 in respect of the April 2007 delivery under the Confirmation Notice.
>
> (4) In breach of clause 9 of the Confirmation Notice and clauses 12.1, 12.2 and 20 of the Master Agreement, the Buyer's failure to pay the take or pay invoices sent to the Buyer on 17 April 2007 in respect of the May 2007 delivery under the Confirmation Notice.
>
> (5) In breach of the Contract, the Buyer's failure to

nominate a Receiving Terminal to receive the June 2007 delivery under the Confirmation Notice.

(6) In breach of clause 10 of the Confirmation Notice and clause 20.9(a) of the Master Agreement, the Buyer's failure to provide a standby letter of credit to secure the June 2007 delivery under the Confirmation Notice.

31. It is also brought on record that by an agreement dated 30.05.2007 between the appellant (seller) and Suez Global LNG Ltd. (supplier) it was agreed that the appellant would forgo taking delivery of the full cargo lot described in confirmation # 3 and Suez agreed to cancel the confirmation # 3 and the list subject to the conditions mentioned therein.

32. The respondent (buyer) replied to the termination notice dated 24.05.2007 by communication dated 01.06.2007, *interalia,* stating that the price was to be mutually agreed through the delivery notice and no fixed price was provided by the buyer. Moreover, the said seller was required to deliver LNG cargo on ex-ship basis at a terminal agreed between the two sides in the confirmation notice. Since the buyer did not have any regasification terminal available which had been explicitly communicated to the seller by the buyer and two sides agreed to restructure the confirmation notice as envisaged at Annexure-'C' of the Master agreement (MSPA), under the restructured form the "confirmation notice" was split into two parts. The first part was designated "confirmation notice" which covered the commercial terms for the proposed, whilst the second part designated as "delivery notice" would cover the buyers

facility (regasification terminal), the SLBC amount and the details of Sulpher content (a subject of concern for the buyer). Subject to availability of the regasification terminal, acceptability of the price for raising SBLC and the total Sulpher content, the two sides were to mutually agree through the "delivery notice" making the contract effective.

33. It is stated therein that under the provisions of the "confirmation notice", the seller is supposed to provide a fixed price to the buyer before the date of loading and seek the acceptance of the buyer on the pricing. The seller has failed in all the occasions to provide a fixed price option to the buyer which is a breach of the provisions of the "confirmation notice". Further, in absence of a valid / effective contract, as the delivery notice has not been mutually executed between the parties, raising Take or Pay invoice has no sanctity.

34. The buyer through e-mail letters dated 27.03.2007, 06.04.2007, 18.04.2007 and 18.05.2007 informed the seller of the non-availability of regasification terminal, raising reservation regarding the invocation of Take or Pay clause and sending invoices. It was, thus, finally stated by the respondent (buyer) that:-

> "It will therefore, be seen that there is no concluded contract between the parties, as the material terms, including the agreement on the discharge terminal. In view of the fact that there is no concluded contract, the question of termination thereof does not arise at all. We however, have taken note of your letter dated 24th May, 2007 titled as Termination Notice and shall consider the

matter to be closed, reserving our right under the MSPA and Confirmation Notice."

35. Final Take or Pay notice was issued by the appellant for the April, May and June, 2007 cargoes dated 30.09.2007 (page '1151'-'1193' of the paper-book).

36. The arbitral award came to be passed on 25.06.2009 by the London Court of International Arbitration.

37. An execution application No.71 of 2014 had been filed on 29.01.2014 by the appellant before the City Civil Court at Ahmedabad. By order dated 16.03.2017 the said execution application had been transferred to the Commercial Division of the High Court. As noted hereinbefore, vide judgment and order dated 05.07.2018, the learned Single Judge of this Court refused to enforce the arbitral award dated 25.06.2009, which has led to this appeal.

[III] <u>Arbitral Award:-</u>

38. The learned Arbitrator after hearing the learned Counsels for the parties and perusal of the evidence framed the following questions for determination:-

"80.....

(1) Whether, as Altco contends, the 12 March Confirmation Notice constituted a binding contract for the sale of the four LNG cargoes or whether, as Adani contends, there was no binding contract at all, no intention to create legal relations, or at most only a framework agreement unless and until a Delivery Notice

was completed (or perhaps completed and signed) for each cargo.

(2) The related Issue arising from Adani's submissions that whether or not the Confirmation Notice was a binding contract its terms were insufficiently certain or amounted to no more than an agreement to agree in certain significant and important respects such that it was not legally effective. The matters relied upon by Adani in this context, with the emphasis and greatest reliance on the first two, were:

(a) The Price;

(b) The identity of the Receiving Terminal;

(c) The amount of the SBLC;

(d) The particulars of the LNG Ship; and

(e) The Sulphur level of the LNG.

(3) Even if Adani is unsuccessful on the first two Issues Adani submits that on the proper construction and application of the TOP Clause Altco is not entitled to TOP payments for any of the first three cargoes and even if it is wrong in that submission that there are features of the TOP claims for each of the individual April, May and June cargoes which make the Clause inapplicable to those cargoes.

(4) If Altco is entitled to any TOP payments what is the amount (including interest) to be awarded in respect of each cargo.

(5) Is Altco's claim for damages in respect of the August cargo valid and if it is what is the quantum (including interest) of the claim.

39. On the first issue whether the 12th March confirmation notice constituted a binding contract, it was concluded by the learned Arbitrator that:-

> "82. The purpose of the Confirmation Notice was expressly agreed at the meeting on 15 and 16 February as recorded in paragraph 5 of the minutes and that purpose was faithfully carried out in the Confirmation Notice itself. It was to be and was a single contract for the four cargoes. That of course is wholly consistent with the fact Altco itself had agreed to purchase the four cargoes from Suez.
>
> 83. The only factor of any potential significance which might lend support to the submission of Adani is the undoubted fact that the form of Delivery Notice attached to the Confirmation Notice provided for the signatures of both parties. But the Tribunal does not think that factor comes near to outweighing the other matters to which it has referred and that is in any event makedly improbable that the parties would ever have intended that a binding commitment could be left to be agreed or not to a date which could be only 14 days before the relevant cargo was due to be loaded. That would not be in the interests of Adani or Altco.
>
> 84. The language used in the form of Delivery Notice is itself indicative that the matters to be included in it were indeed of an operational nature nor, of course, does it follow that because the document was not signed by Adani what it contained was not in fact agreed."

40. On the second issue as to whether there was certainty on the aspects of the price etc., it was held that the agreed price for each of the four cargoes was Henry Hub (HH) price for the relevant month plus US$1.85 unless the buyer sought a hedge of the HH element of the price at a specific level, which it was possible for the seller to achieve and was in fact achieved. Reference has been made to the minutes of meetings held on 15th-16th February, 2007 and 5th and 6th March, 2007 and the terms of the confirmation

notice to record that the above noted price was the agreement underlying clause 8 of the confirmation notice. It was concluded in paragraph '86' as under:-

> "86. As Altco submitted, an obligation upon Altco to offer a fixed price is, without more, meaningless. It was no doubt in recognition of this and that it was the only way to secure to Adani the margin it sought on the transaction, that Adani, at least in submissions, if not in the evidence of the witnesses, came close to acknowledging that any fixed price would be derived from a hedge. It would follow that it would be for Adani to make the judgment whether or not a hedge at a given price, if achievable, would be likely to produce a lower price than the price on the relevant determination date. The information on necessary would be available on NYMEX. In the event the figure proposed by Adani for April was not achievable and Adani did not put forward any figures for the other cargoes."

41. On the issue of receiving terminal (part of issue No.2), it was held that:-

> "87. Again in summary, the Tribunal has found that at all times prior to 27 March Adani, on its own evidence, fully borne out by the conduct of Mr Sharma and M. Singh, was confident that it had or could readily obtain slots at either Dahej or Hazira for each of the four cargoes. That is supported by the original Petronet letter, the 15 and 16 February meeting, the 5 and 6 March meeting, the very fact that the parties continued to discuss the cargoes and the lack of any record of expressions of doubt let alone conditionality on the part of Mr Sharma and Mr Singh.
>
> 88. The Tribunal has also found that Adani expressly nominated Hazira as the Receiving Terminal for the April cargo. The possibility was raised at the 5 and 6 March meeting and confirmed at the signing ceremony on 12 March. That is further supported by the reference

to Hazira in the Delivery Notice sent on 16 March and the draft forms of SBLC sent to Adani on 23 March.

89. The Tribunal has determined that the underlying assumption on 12 March, reflected in the fact that it was for Altco and not Adani to name the Receiving Terminal in the Delivery Notice, was that Adani would, notify Altco for each cargo for inclusion in the Delivery Notice one or other of Dahej or. Hazira. Again it would be commercially wholly improbable that the existence or not of a binding contract would be left to whether or not Adani chose to give such a notice at any time upto 14 days before loading. An agreement that one or other terminal would be nominated by Adani is, as is rightly not in issue, sufficiently certain to be a binding obligation."

42. The conclusion on issue Nos. 1and 2 arrived by the Arbitral Tribunal in paragraph '93' of the award is as under:-

"93. The Tribunal is entirely satisfied that the Confirmation Notice was, and was intended by the parties to be, a binding legal commitment for the sale by Altco and purchase by Adani of the four cargoes. Such matters as remained outstanding were of an operational nature. If there was to be a fixed price the onus was upon Adani to seek it or the price would be fixed on the HH determination date for the relevant date. It was for Adani to nominate one or the other of Hazira or Dahej as the Receiving Terminal. In accordance with that agreement Adani did nominate Hazira for the April cargo. There was agreement on the estimated value to be used for the SBLC. The details of the LNG ship were known and appropriate. The Sulphur specification had been addressed and agreed."

43. With the above, on issue No. 3 about the Take or Pay (TOP claim), the learned Arbitrator had concluded that the

buyer "fails to accept the delivery of LNG cargo" so it is required to pay an amount equal "to such LNG quantity as specified in the confirmation notice multiplied by the LNG price as specified in the confirmation notice". It was concluded that although the nature of the agreement changed following the February and March meetings, the new form of confirmation notice did include the price provision, estimated quantities and a reference to "quantity delivered" to be ascertained as provided in Clause 13 of the Master agreement.

44. It was held that in view of Clause 12 of the Master agreement and that the Commercial sense dictate that the words are given the meaning for which the seller contents that require no more than that the buyer makes clear that it cannot or will not accept delivery of a given cargo at the time, it has otherwise agreed to do so. That construction accords with the language of "Take or Pay". It was in the interest of both parties that if cargo was not to be taken by the buyer that was known as soon as possible thereby probably improving the chance of a sale to a third party at a reasonable price.

45. It was held that in case of each of the April, May and June cargoes, a delivery notice was sent by the seller before it invoked the Take or Pay clause and, in each case, the notice referred to the statement by the buyer that it would not accept delivery of the relevant cargo.

46. The tribunal records that 27th March letter was unequivocal that buyer would not accept the May cargo.

The 10th April letter, whilst expressing the hope that buyer might get an end of May slot, was clear no slot had been obtained and, as such, the acceptance of the cargo could not be confirmed. The discussion in 20th April meeting made clear that the seller sought to sell the cargo without any protest from the buyer. The delivery notice sent on 17th April expressly referring to the 27th March letter and the fact that buyer was not able to accept delivery of the cargo. The provisional Take or Pay (TOP) notice had been sent on the same day. No SBLC was provided by the buyer and further, had the buyer obtained a slot at either receiving terminal, and so informed the seller so that the seller before the on-sale then the sale to buyer could have been revived. It was, thus, concluded that Clause 12.2 of the Master agreement operates as the buyer fails to accept delivery of "any LNG cargo". It also entitles the buyer to the "net proceeds" from the sale by buyer of "such LNG cargo" to a third party. The case of the buyer that there was no cargo unless and until the ship was actually loaded and until it was identified in the delivery notice, was rejected by the tribunal.

47. While saying that the contract was entered into between the seller with Suez on 09.03.2007 and even in February when seller first informed buyer about them, and that in the confirmation notice with reference to the ship (paragraphs '6' and '7') the seller identified the cargoes as those bought from Suez, it was concluded in paragraph '107 as under:-

> "107. On the evidence both the April and May cargoes were, in any event, in fact loaded on the LNG ship. There is a discrete factual issue in this context relating to the June "cargo". This cargo was bought by Altco from Suez but the sale was cancelled when Adani refused to accept delivery of it. Nonetheless, the Tribunal considers that the cargo was sufficiently identified and it would make no commercial sense for either party to miss the opportunity for such an arrangement should it be available. The issue is also relevant to the calculation of the LNG Quantity of the June cargo required by Clause 12.2 of the TOP Clause and is further considered in that context. "

48. Further discussions are on the issue Nos.4 and 5 about the quantum of Take or Pay (TOP) payments and damages claimed by the seller.

[IV] Order of the learned Single Judge:-

49. The learned Single Judge while dealing with the applications seeking enforcement of the arbitral award, has noted the arguments of the respondent that there was no concluded contract only by virtue of the confirmation notice signed by the parties. The tribunal has misread the contract and has arrived at a perverse finding erroneously coming to the conclusion that the respondent had agreed to buy and pay for the cargo worth USD110,000,000, approximately, even without knowing the price or without the unloading port being finalized. It was contended by the respondent that the tribunal has defied all logics in holding that the issues about price or the receiving tribunal were merely operational issues.

50. It was argued opposing the enforcement of the arbitral award that the tribunal, on the one hand, concluded that the price USD 8.50 for the purchase of cargo would cause loss to the buyer and that the fixed price was not offered before HH determination date, but had reached at the conclusion that by default HH price would become the agreed price, as buyer did not offer the fixed price before the HH determination date. It was contended that this finding is wholly perverse and unreasonable, inasmuch as, when the price was not agreed in writing between the parties, it cannot be said that there was a concluded contract.

51. On the issue of receiving terminal, it was contented that the only available terminals at Dahej and Hazira were unavailable at the relevant point of time and it was highly inconceivable that the respondent would purchase such huge cargo without determination of the receiving terminal and its availability.

52. Even the Master agreement prescribed that the receiving terminal was an essential term, which infact had to be agreed in writing before the contract could have been said to be concluded. The findings arrived at by the tribunal that the receiving tribunal is an irrelevant factor for the foreign supplies and it was for the respondent to nominate the terminal is wholly unreasonable, irrational, defies logics. The tribunal has erred in coming to this findings considering the determination of receiving terminal as a post contract obligation of the respondent,

which is nothing but a result of misreading of the contract.

53. With the above, it was argued that in absence of any concluded contract, no price having agreed between the parties and the receiving terminal could not be determined by the respondent for the circumstances beyond its control, or could not be agreed between the parties, the findings arrived at by the tribunal are illogical, irrational, perverse and are such which are against the fundamental public policy of Indian law and, thus, falls within the scope of sub-section (2) of Section 48 of the Act' 1996.

54. It was argued that without touching upon the merits of the arbitral award, the reasoning given by the learned Arbitrator to hold that there was a concluded contract and the buyer had committed the breach of the contract leading to invocation of Take or Pay clause of the Master agreement are nothing but such which would make the award wholly perverse, irrational and against the fundamental public policy so much so that it shocks the conscience of the Court, and therefore, the execution / enforcement of the award is to be refused.

55. While noticing that the learned Counsel for the petitioner / appellant herein had taken the Court through plethora of evidence which were produced before the learned tribunal, the enforcement Court recorded that it was conscious of the fact that it was not sitting in appeal over the findings given by the learned Arbitral Tribunal on merits and that the contentions of the petitioner requiring

the Court to examine the evidence *de novo* was outside the jurisdiction of Section 48 of the Act' 1996. It was also observed therein that on the reference made to the evidence and on merits of the award passed by the Arbitral Tribunal, it cannot examine the contentions of both the parties namely, the petitioner as well as the opponent therein on merits.

56. Thus, without touching upon the merits of the arbitral award, keeping in mind the scope of scrutiny within the limited jurisdiction of Section 48 of the Act' 1996, the enforcement Court has held in paragraph '75' to '84' [extracted in the opening paragraphs (1 & 2) of this judgment] that the impugned award cannot be enforced being against the fundamental public policy of Indian law and is such that it shocks the conscience of the Court.

[V] Arguments of learned Senior Counsel for the appellant:-

57. Mr. Devang Nanavati, learned Senior Counsel for the appellant would vehemently argue that the question as to whether there was a concluded contract could only be decided in a substantive appeal which could have been filed under the English law. As per Clauses 26 and 27 of the Master agreement, insofar as the agreement and every confirmation notice was concerned, it was governed by and to be construed in accordance with the laws of England and Wales. Whereas London Court of International Arbitration Rules were governing laws of Arbitration.

58. The award had not been challenged in accordance with the governing English law and the respondent filed a misconceived application under Section 34 of the Act' 1996 before the City Civil Court at Ahmedabad wherein application under Order VII Rule 11 of the Code of Civil Procedure, 1908 for rejection of the same was dismissed. However, the Civil Revision was allowed and the Special Leave Petition challenging the order of the revisional Court had been dismissed. The challenge to the arbitral award raised by the respondent has, thus, been exhausted. In the Execution Petition filed by the appellant before the Civil Court by the appellant, the matter was transferred to the High Court.

59. The submission is that the learned Single Judge while refusing to enforce the arbitral award has lost sight of the fact that merit review as to the construction of the contract or interpretation of the contract, which was solely within the jurisdiction of the Arbitrator, is not permissible. The award had been passed after full participation by the respondent and it is a unanimous award. Without there being any challenge to the award on merits under the governing laws, interference in the enforcement proceedings under Section 48 falls foul of the limited scope of interference under the Act of 1996. The limited scope of judicial interference on the premise of the award being in conflict with fundamental policy of Indian law or basic notion of morality is limited by Explanation 2 to sub-section (2) of Section 48 of the Act' 1996. Even otherwise,

the scrutiny or interference in the award by applying the Indian Contract Act was not permissible.

60. It was urged that the Court wherein enforcement of foreign award is sought cannot analyse the reasoning of the Arbitrator in terms of business efficacy that there was concluded contract between the parties. The commercial sense of the Court is not to be seen. What is to be examined by this Court in appeal is whether it was permissible for the enforcement Court under Section 48 of the Act' 1996 to look into or examine the question as to whether the contract was concluded in the facts of the case or under the contract law applicable to the agreement.

61. The submission is that the question of interpretation of construction of contract was completely out of bounds of the Court under Section 48, which would obviously require re-appreciation of evidence and arriving at an independent finding analysing the reasoning of the learned Arbitrator, which is a completely prohibited arena. Even otherwise, in the limited inquiry, even if the Court was examining the question, it could not have the applied principles of the Indian Contract Act.

62. On the scope of inquiry into a foreign award under Section 48 of the Act' 1996 while refusing for enforcement of an arbitral award under sub-section (2) of Section 48 of the Act' 1996, the learned Senior Counsel for the appellant has taken us through the law stated by the Apex Court holding the field.

63. Taking us through the judgment of the Apex Court in ***Government of India Vs. Vedanta Limited (Formerly Cairn India Ltd.)***[1] referring to paragraphs '118' to '121', it was submitted that the Apex Court has categorically held therein that the merits of the Arbitral award are not open to review by the enforcement Court, as it lies within the domain of the Seat Court. Errors of judgment are not a sufficient ground for refusing enforcement of a foreign award. Considering the well settled position of law with respect to the finality of the awards in international commercial arbitrations, and the limits of judicial intervention on the grounds of public policy of the enforcement State, it was held therein, in the facts of the case, that the contention of the appellant therein who had not made out a case of violation of the procedural due process in the conduct of the arbitral proceedings or of procedural fairness, fair and equal treatment of the parties, which constitutes a fundamental basis of the integrity of the arbitral process, cannot contend that the award may not be enforced since it is contrary to the basic notions of justice.

64. It was held by the Apex Court therein that Section 48 of the Act' 1996 does not provide a *de facto* appeal on the merits of the award. The enforcement Court exercising jurisdiction under Section 48, cannot refuse enforcement by taking a different interpretation of the terms of the contract.

[1] [(2020) 10 SCC 1]

65. Taking note of the judgment of the Apex Court in ***Renusagar Power Co. Ltd. Vs. General Electric Co.***[2] it was held therein that the enforcement may be refused only if it violates the enforcement state's most basic notions of morality and justice, which has been interpreted therein to mean that there should be great hesitation in refusing the enforcement, unless it is obtained to "corruption or fraud, or undue means".

66. Placing ***Vijay Karia and Others Vs. Prysmian Cavi E. Sistemi SRL***[3] it was argued that the Apex Court has held therein that the enforcement of foreign award under Section 48 of the Act' 1996 may be refused only if the party resisting enforcement furnishes to the Court proof that any of the stated grounds has been made out to resist enforcement. The said ground are watertight-as no ground outside Section 48 can be looked into.

67. On the contention made therein as to the discretion of the Court to refuse to enforce an arbitral award for the use of the word "may" under sub-section (2) of Section 48, it was held therein that in the proceeding for enforcement of a foreign award, since the grounds stated in sub-section (2) of Section 48 can only be looked into, when it comes to the "public policy of India", there would be no discretion in enforcing an award, which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or if it is in conflict with the basic notions of morality of justice.

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2 1994 Supp (1) SCC 644
3 (2020) 11 SCC 1

68. The expression "may" in Section 48 of the Act' 1996 can, depending upon the context, mean "shall" or as connoting that a residual discretion remains in the Court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion is limited to the circumstances pointed out in paragraphs '52' to '58' of the judgment, in which case a balancing act may be performed by the Court enforcing upon it.

69. On the plea of violation of principles of natural justice, on the interpretation of Clause 48(1)(b) of the Act' 1996, "unable to present his case" being co-terminus with the breach of natural justice and which would go to the extent of making an inquiry, in line with broader arbitral requirements of the *audi alteram partem* rule of natural justice, it was held therein that given the fact that the object of Section 48 is to enforce foreign awards subject to certain well defined narrow exceptions, the expression "was otherwise unable to present his case" occurring in Section 48(1)(b), cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase.

70. In a case where no opportunity was given to deal with the arguments which goes to the root of the case or findings based on evidence which goes behind the back of the parties and which results in denial of justice to the prejudice of the party; or additional or new evidence is

taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of the given case, render a foreign award unenforceable on the ground that a party has been unable to present his case. However, this must come with a caveat that such breach be clearly made out on the facts of the given case and the award must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48.

71. The Apex Court therein has further held therein that if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counter claim in its entirety, the award may shocks the conscience of the Court and may not be enforced on the ground of violation of the public policy, as in that case it would offend a most basic notion of justice in this country. It was, however, clarified therein that poor reasoning, by which a material issue or claim is rejected, can never fall in this class of cases.

72. It was urged that the most important point, as observed therein, to be considered is that the foreign award must be read as a whole, fairly and without nit-picking. If read as a whole, if the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter claims of the parties, enforcement must follow.

73. The observations in paragraph '112' of ***Vijay Karia and***

Others[3] was pressed into service to agitate that applying the said principles, if the award, in the instant case, is read as a whole, no interference was permissible.

74. Paragraph '20' of the judgment of the Apex Court in ***LMJ International Ltd. Vs. Sleepwell Industries Company Ltd.***[4] has been placed before us to argue that in the instant case, the arbitral tribunal has considered all aspects of the matter and even if it is accepted for a moment that it has committed any error, the same could, at best, be a matter for correction by way of appeal on the grounds as may be permissible under the English law, by which the arbitration proceedings are governed, which has not been resorted to. The instant appeal, as such, is liable to the allowed.

75. Reliance is placed on paragraph '66' of ***Renusagar Power Co. Ltd.***[2] to agitate on the narrow scope of refusal of recognition and enforcement of a foreign award on the grounds available under the Indian law.

76. Reliance is placed on the decision of the Apex Court in ***Gemini Bay Transcription Private Limited Vs. Integrated Sales Service Ltd. & Anr***[5] to submit that a foreign award cannot be set at naught under Section 48 on the ground that it has infracted the substantive law of a foreign country under the agreement.

77. Placing ***Shri Lal Mahal Ltd. Vs. Progetto Grano Spa***[6], it was argued that Section 48 of the Act' 1996 does

4 (2019) 5 SCC 302
5 (2022) 1 SCC 753
6 (2014) 2 SCC 433

not give an opportunity to have a "second look" at the foreign award at the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits.

78. Placing reliance on ***Shri Lal Mahal Ltd.***[6] *and* ***Avitel Post Studioz Ltd & Ors Vs. HSBC PI Holdings (Mauritius) Ltd***[7] it was argued that the expression "public policy of India" is used both in Section 34(2)(b)(ii) and Section 48(2)(b) of the Act' 1996, however, the application of "public policy of India" doctrine for the purpose of Section 48(b) is more limited.

79. Placing ***OPG Power Generation Pvt. Ltd. Vs. Enexio Power Cooling Solutions India Private Ltd. & Another***[8]***,*** it was argued that 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.

80. Placing ***Cruz City 1 Mauritius Holdings Vs. Unitech Limited***[9], it was argued that the contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law.

81. With the aid of decision of the Apex Court in ***Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd.***[10]***,*** it was urged that the Arbitrator is the final Judge of the facts and the findings of facts cannot be interfered with on the grounds that the terms of the contract was not correctly interpreted

7 2024 SCC OnLine SC 345
8 (2025) 2 SCC 412
9 2017 SCC OnLine Del 7810
10 (2015) 5 SCC 739

by the Arbitrator.

82. Summing up his arguments, it was vehemently submitted by the learned Senior Counsel for the appellant that mere violation of codified law of enacted statute of India is not a reason to interfere in the arbitral award. Substantive law of contract being English law and no appeal having been preferred under the English law, the enforcement Court could not have substituted its own view on merits by re-assessment of the reasoning or evidence appreciated by the Arbitrator to hold that there was a concluded contract.

83. The Arbitral Tribunal has decided mixed questions of law and facts and the enforcement Court has not been able to make out any ground that the tribunal's view was not a plausible view or is such which shocks the conscience of the Court.

84. Section 48 prohibits review on merits and the scope of violation of fundamental policy of India is such that the error must go to the core value of the Indian law and perversity goes to the fulcrum of the dispute, root of the case. None of these grounds could be made out by the respondent in the instant case and the interpretation of contract by the learned Arbitrator considering business efficacy was not open to review by applying the commercial sense of the Court by enforcement. The submission, thus, is that the order of refusal to enforce a foreign award under Section 48(2) of the Act' 1996 by the learned Single Judge of this Court is directly hit by Explanation 2 attached

thereto. The appeal, thus, deserves to be allowed, setting aside the order passed by the enforcement Court.

[VI] Arguments of learned Senior Counsel for the respondent:-

85. Mr. Mihir Joshi, learned Senior Counsel appearing for the respondent, on the legal principles of interference in an arbitral award would argue that the present case pertains to pre-amendment regime of the Act' 1996 with effect from 23.10.2015 by Act No.3 of 2016, whereby Explanation 2 to sub-section (2) of Section 48 was brought on the statute book by substitution of the explanation originally attached to Section 48 of the Act' 1996.

86. The submission is that the award was rendered in the year 2009 and the application seeking for enforcement of the award under Section 48 was filed in 2014. The unamended explanation to Section 48 was couched in a different language. It is also pertinent to note that the application for enforcement of the award was filed in the City Civil Court, which had no jurisdiction and upon transfer, it was registered on 16.03.2017 in the High Court.

87. Be that as it may, inviting attention of the Court to the decision of the Apex Court in ***Renusagar Power Co. Ltd.***[2], it was urged that the enforcement of foreign award can be refused on the ground that it is contrary to public policy if such enforcement would be contrary (i) fundamental policy of Indian law; (ii) the interest of India; and (iii) justice or

morality.

88. Taking us through the development of law beginning from ***Renusagar Power Co. Ltd.***[2], it was submitted that ***ONGC Vs Saw Pipes Ltd.***[11] has added patent illegality in the public policy. However, ***Shri Lal Mahal Ltd.***[6] referring to ***Renusagar Power Co. Ltd.***[2] has held that what has been stated in ***Renusagar Power Co. Ltd.***[2] with reference to Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 must apply equally to the ambit of scope of Section 48(2)(b) of the Act'1996. Following ***Renusagar Power Co. Ltd.***[2] it was held therein 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 Power Co. Ltd.***[2]***.***

89. It was further clarified in ***Shri Lal Mahal Ltd.***[6] that the expression "public policy of India" is used both in Section 34(2)(b)(iii) and Section 48(3)(b) and the concept of "public policy of India" is same in nature in both the sections, but 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. It was, thus, held that ***Renusagar Power Co. Ltd.***[2] must apply for

11 (2003)5 SCC 705

understanding the scope of inquiry under Section 48(2)(b) of the Act' 1996 and the wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in ***Saw Pipes Ltd.***[11] is not applicable to the objection raised to the enforcement of the foreign award under Section 48(2)(b).

90. In ***Associate Builders v. DDA***[12] decided on 25.11.2014, while elaborating on each of the heads contained in ***Saw Pipes Ltd.***[11] to set aside an award being on the ground of being against the public policy of India on "fundamental policy of India" referring to ***ONGC v. Western Geco International Ltd.***[13], it was held in paragraph nos.'27', '28', '29', '30', '31', '32', '33' and '34' as under:-

> "27. Coming to each of the heads contained in *Saw Pipes* [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from *Renusagar* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.
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> 28. In a recent judgment, *ONGC Ltd.* v. *Western Geco International Ltd.* [(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held : (SCC pp. 278-80, paras 35 & 38-40)

12 (2015) 3 SCC 49
13 (2014) 9 SCC 263

"*35*. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in *ONGC* [(2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The *first and foremost* is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a '*judicial approach*' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while

determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* [*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face

> of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(*a*)(*iii*) of the Arbitration and Conciliation Act. These sections read as follows:

> "**18.*Equal treatment of parties***.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.
>
> ***
>
> **34.*Application for setting aside arbitral award***.—(1)***
>
> (2) An arbitral award may be set aside by the court only if—
>
> (*a*) the party making the application furnishes proof that—
>
> ***
>
> (*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(*i*) a finding is based on no evidence, or

(*ii*) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(*iii*) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath & Sons* [1992 Supp (2) SCC 312] , it was held : (SCC p. 317, para 7)

> "7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In *Kuldeep Singh* v. *Commr. of Police* [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held : (SCC p. 14, para 10)

> "*10*. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the

arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd.* v. *B.H.H. Securities (P) Ltd.* [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held : (SCC pp. 601-02, para 21)

> "*21*. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any

> ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."
>
> 34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

91. The third grounds setting aside the award included in public policy, of "justice and morality" in ***Saw Pipes Ltd.***[11], it was observed that these are two different concepts in law. An award can be said to be against the justice only when it shocks the conscience of the Court and would be liable to be set aside on that ground.

92. The discussion on morality is also on the same fundamental principle that the contract, which is made upon an immoral consideration or for an immoral purpose is unenforceable, however, interference on this ground would also be only if something shocks the Court's conscience. On patent illegality as one of the grounds included in the public policy of India, it was held that such a ground will be available, for instance in a case where the Arbitrator commits jurisdictional error, if he wanders outside the contract and deal with the matters not allotted to him.

93. The rationale of the rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. However, if the view taken by the Arbitrator is a possible, even if not a

plausible view, it is not possible to say that the Arbitrator had travelled outside his jurisdiction and the Court cannot substitute its view in place of the interpretation accepted by the Arbitrator.

94. In ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***[14] decided on 08.05.2019, the Apex Court while dealing with Section 34 petition filed on 30.07.2016 post amendment Act of 2016, was considering the effect of amendment from 23.10.2015, in particular, in the "public policy of India" ground for challenge of arbitral awards.

95. It was noted therein that there is no doubt that fundamental changes have been brought in law and the expansion of "public policy of India" in ***Saw Pipes Ltd.***[11] and ***Western Geco International Ltd.***[13] has been done away.

96. However, while surveying the law as it relates to ground of setting aside an arbitral award being in conflict with the public policy of India as it existed before the amendment Act' 2015, the Apex Court referred to the judgment in ***Renusagar Power Co. Ltd.***[2] followed by ***Associate Builders***[12] and while noticing the pre-amendment Sections 34(2)(b) and 48(2)(b) of the Act' 1996, it was recorded that when it comes to the ground "public policy of India" used to set aside an award under Section 34 or to refuse recognition and enforcement of a foreign award under Section 48, Section 34(2)(b) ought to have been construed in the same manner as Section 48(2)(b).

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97. It was noted that the Apex Court has expanded the scope of the ground of "public policy of India" to set aside an arbitral award under Section 34 with ***Western Geco International Ltd.***[13] as explained in ***Associate Builders***[12]***,*** which included juristic principle of "judicial approach", which demands that the" decision must be fair, reasonable and objective, *audi alteram principle,* equal treatment of parties, perversity and irrationality that no reasonable person would have arrived at the same decision in the public policy of India. However, while clarifying that when a Court is applying the public policy" test to arbitral award, it does not act as a Court of appeal and consequently errors of fact cannot be corrected, it was observed therein that a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quality and quantity of evidence to be relied upon when he delivers his arbitral award. The award based on little evidence or on evidence, which does not measure up for quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.

98. It was noted that this observation was with the important caveat that the two principles which form part of fundamental policy of Indian law, that the Arbitrator must have a judicial approach and that he must not act perversely, are to be understood.

99. It was further noted in ***Ssangyong Engg. &***

Construction Co. Ltd.[14] that fundamental changes have been brought with the amendment of 2015 pursuant to 246th report of the Law Commission of India of August, 2014. The amended Section 48 proposed therein noted in paragraph '29' of ***Ssangyong Engg. & Construction Co. Ltd.***[14] reads as under:-

> **"29.** So far as Section 48 is concerned, an amendment was proposed as follows:
>
> "***Amendment of Section 48***
>
> **22.** In Section 48—
> (*i*) In sub-section (2), in the "*Explanation*.—", delete the words "Without prejudice to the generality of clause (*b*), it is hereby declared, for" and add the word "for" and after the words "avoidance of any doubt," add the words "it is clarified" and after the words "the public policy of India" add the word "only" and after the word "if" delete "-" and ";" and insert sub-clause "(*a*)" before the words "the making of the award" and delete "." And add ";" after the words "by fraud or corruption" and add sub-clauses "(*b*) it is in contravention with the fundamental policy of Indian law; (*c*) it is in conflict with India's most basic notions of morality or justice."

100. The supplementary report of February, 2015 of the Law Commission of India, after ***Western Geco International Ltd.***[13] has noted that the Law Commission, in its 246th report, provided for the same narrow standard, namely that a mere violation of law of India would not be a violation of "public policy" in cases of international commercial arbitrations held in India.

101. The amendments have been brought in Section 34 with insertion of sub-section (2A) introducing the ground of "patent illegality" test with respect to domestic arbitration. It was observed in the supplementary report of the Law Commission at paragraphs '10.5' and '10.6' as under:-

> "10.5. As the Supreme Court's judgment in *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] would expand the court's power rather than minimise it, and given that it is also contrary to international practice, a clarification needs to be incorporated to ensure that the term "fundamental policy of Indian law" is narrowly construed. If not, all the amendments suggested by the Law Commission in relation to construction of the term "public policy" will be rendered nugatory, as the applicability of *Wednesbury* [*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] principles to public policy will certainly open the floodgates.
>
> 10.6. This will have four major deleterious effects, being (*a*) a further erosion of faith in arbitration proceedings amongst individuals and businesses in India and abroad; (*b*) a reduction in popularity of India as a destination for international and domestic commercial arbitration; (*c*) increased investor concern, amongst domestic and foreign investors, about the efficacy and speed of dispute resolution and potential for judicial interference; and, (*d*) an incidental increase in judicial backlog. In this regard, the following amendment to the draft is suggested, by inserting Explanation 2 to Section 34(2)(*b*)(*ii*) of the Act:
>
> '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.'"
>
> (emphasis supplied)

102. Pursuant to the Law Commission report, the 1996 Act was amended with effect from 23.10.2015. Corresponding amendments have been brought in Sections 34 and 48 of the Act' 1996 to bring the unamended Section 48 in line with the amendments made in Section 34, except sub-section (2A) of Section 34, which is missing in Section 48, as the said section deals with the recognition and enforcement of the foreign awards.

103. It was, then observed in paragraphs '34' and '35' in ***Ssangyong Engg. & Construction Co. Ltd.***[14] as under:-

> **"34.** What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(*a*)(*iii*) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

> **35.** It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground."

104. Paragraph '76' of ***Ssangyong Engg. & Construction Co. Ltd.***[14] placed before us by Mr. Mihir Joshi, learned Senior Counsel appearing for the respondent is also to be extracted hereinunder:-

> **76.** However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract

for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

105. In ***MMTC Ltd. v. Vedanta Ltd.***[15] , decided on February 18, 2019, prior to ***Ssangyong Engg. & Construction Co. Ltd.***[14]**,** with reference to scope of interference with the pre 2015 arbitral award under Section 34, it was observed in paragraph '11' as under:-

> **"11.** As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(*b*)(*ii*) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in

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> the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses* v. *Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."

106. In ***Vedanta Limited[1],*** three Judge Bench of the Apex Court was dealing with an appeal against the judgment of the High Court rejecting the application under Section 48 of the Act' 1996 for enforcement of the foreign award.

107. It was held therein that the enforcement Court cannot set aside a foreign award, even if the conditions under Section 48 are made out. The power to set aside a foreign award vests only with the Court at the seat of Arbitration, since the supervisory or primary jurisdiction is exercised by the curial Courts at the seat of Arbitration. The enforcement Court may "refuse" enforcement of a foreign award, if the conditions contained in Section 48 are made out.

108. The opening words of Section 48 are used permissive, rather than mandatory language, that enforcement Court "may be" refused. The use of words "may be" indicate that even if the party against whom the award is passed, proves the existence of one or more grounds for refusal of enforcement, the Court would retain a residual discretion

to overrule the objections, if it finds that overall justice has been done between the parties, and may direct enforcement of the award. It is clarified therein that this is generally done where the ground for refusal concerns a minor violation of the procedural rules applicable to the arbitration, or if the ground for refusal was not raised in the Arbitration. The Court may also take the view that the violation is not such as to prevent enforcement of the award in international relations. It was further held that the grounds for refusing enforcement of foreign awards contained in Section 48 are exhaustive, which is evident from the language of the section, which provides that the enforcement may be refused "only if" the applicant furnishes proof of any of the conditions contained in that provisions.

109. It was then clarified that the enforcement Court is not to correct the errors in the award under Section 48, or undertake a review on the merits of the award, but is conferred with the limited power to "refuse" enforcement, if the grounds are made out".

110. The learned Senior Counsel for the respondent has referred to paragraphs '88', '94', '97', '100', '101', '103', '105', '106', '111', '112', '113' and '125' to '128' in support of his submissions.

> **"88.** The enforcement of the award is a subsequent and distinct proceeding from the setting aside proceedings at the seat. The enforcement court would independently determine the issue of recognition and enforceability of the foreign award in India, in accordance with the

provisions of Chapter 1 Part II of the Indian Arbitration Act, 1996.

97. This issue is required to be determined in accordance with the conditions laid down in Section 48 of the 1996 Act, which reads as:

> "**48.** ***Conditions for enforcement of foreign awards***.—(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court proof that—
>
> (*a*) the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (*b*) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (*c*) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
>
> (*d*) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such

agreement, was not in accordance with the law of the country where the arbitration took place; or

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

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

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

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

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

(3)***"

(emphasis supplied)

100. The counsel for the respondents submitted that it was the amended Section 48, which would be applicable to the present case; or alternately, that the amendments effected by the 2016 Amendment Act would have retrospective effect.

101. We will now briefly touch upon the amendments made to Section 48, and consider the issue whether the amendments have retrospective application, and are applicable to the present case.

103. After the judgment of the Supreme Court in *ONGC* v. *Western Geco International*

Ltd. [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , which had expanded the power of judicial review, the Law Commission submitted a Supplementary Report on "public policy". It was recommended that a clarification needs to be incorporated to ensure that the phrase "fundamental policy of Indian law" is narrowly construed. It was recommended that a new Explanation being Explanation 2 be inserted into Section 34(2)(*b*)(*ii*) i.e.:

"*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."

105. The highlighted portions show the amendments made to Section 48 by the 2016 Amendment Act. We find that these are substantive amendments, which have been incorporated to make the definition of "public policy" narrow by statute. It is relevant to note that the 2016 Amendment has dropped the clause "interests of India", which was expounded by *Renusagar* [*Renusagar Power Co. Ltd*. v. *General Electric Co.*, 1994 Supp (1) SCC 644] judgment. The newly inserted Explanation 2 provides that the examination of whether the enforcement of the award is in conflict with the fundamental policy of Indian law, shall not entail a review on the merits of the dispute.

106. The two Explanations in Section 48 begin with the words "For the avoidance of any doubt". It cannot, however, be presumed to be clarificatory and retrospective, since the substituted Explanation 1 has introduced new sub-clauses, which have brought about a material and substantive change in the section. A new Explanation 2 has been inserted which states that 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. Since the amendments have introduced specific criteria for the first time, it must be considered to be prospective, irrespective of the usage of the phrase "for the removal of doubts". Reliance is placed on the judgment of this

Court in *Sedco Forex International Drill. Inc.* v. *CIT* [*Sedco Forex International Drill. Inc.* v. *CIT*, (2005) 12 SCC 717] wherein it was held that an Explanation if it changes the law, it cannot be presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts". In *SsangYong Engg. & Construction Co. Ltd.* v. *NHAI* [*SsangYong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] this Court was considering the amendments made to Section 34, wherein two Explanations to Section 34 had been inserted, which are identically worded with the two Explanations to Section 48. In that case, a similar ground of retrospectivity had been urged. This Court held that since the Explanations had been introduced for the first time, it is the substance of the amendment which has to be looked at, rather than the form. Even in cases where "for avoidance of doubt", something is clarified by way of an amendment, such clarification cannot have retrospective effect, if the earlier law has been changed substantially.

111. In view of the aforesaid discussion, we hold that the amended Section 48 would not be applicable to the present case, since the court proceedings for enforcement were filed by the respondent-claimants on 14-10-2014 i.e. prior to the 2016 Amendment having come into force on 23-10-2015.

112. We will now consider the issue whether the award in the present case is in conflict with the public policy of India, and contrary to the basic notions of justice, as submitted on behalf of the appellants.

113. Applying the unamended Section 48 to the present case, this Court in the *Renusagar* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] judgment had placed reliance on the enunciation of the law on international public policy in the judgment of the US Court of Appeals for the 2nd Circuit in *Parsons & Whittemore Overseas Co. Inc.* v. *Societe Generale De L'industrie du Papier* [*Parsons & Whittemore Overseas Co.*

Inc. v. *Societe Generale De L'industrie du Papier*, 508 F 2d 969 (2nd Cir 1974)] (RAKTA) wherein it was held that:

> "7. Article V(2)(*b*) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcement, on the defendant's motion or sua sponte, if 'enforcement of the award would be contrary to the public policy of (the forum) country'. The legislative history of the provision offers no certain guidelines to its construction. Its precursors in the Geneva Convention and the 1958 Convention's ad hoc committee draft extended the public policy exception to, respectively, awards contrary to 'principles of the law' and awards violative of 'fundamental principles of the law'. In one commentator's view, the Convention's failure to include similar language signifies a narrowing of the defense [Paolo Contini, "International Commercial Arbitration : The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" [(1959) 8 Am J Comp L 283 at p. 304]]. On the other hand, another noted authority in the field has seized upon this omission as indicative of an intention to broaden the defense [Quigley, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" [(1961) 70 Yale LJ 1049 at pp. 1070-71]].
>
> *8*. Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points towards *a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement*. [See Straus, "Arbitration of Disputes between Multinational Corporations, in New Strategies for Peaceful Resolution of International Business Disputes" 114-15 (1971); Digest of

Proceedings of International Business Disputes Conference, 14-4-1971, at 191 (remarks of Professor W. Reese)]. Additionally, considerations of reciprocity — considerations given express recognition in the Convention itself — counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

9. We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice.

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... To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision is not meant to enshrine the vagaries of international politics under the rubric of "public policy". Rather, a circumscribe public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. Cf.Scherk v. *Alberto-Culver Co.* [*Scherk* v. *Alberto-Culver Co.*, 1974 SCC OnLine US SC 128 : 41 L Ed 2d 270 : 94 S Ct 2449 : 417 US 506 : 42 USLW 4911 at pp. 4915-16 n. 15 (1974)] "

(emphasis supplied)

125. The gravamen of the challenge of the appellants is that the Tribunal has given an erroneous interpretation of the terms of the PSC read with the Ravva Development Plan, which would amount to rewriting the contract.

125.1. The view taken by the Tribunal is based on an interpretation of Article 15.5(*c*) read with the exceptions

contained in Article 15.5(*e*)(*iii*)(*dd*). The Tribunal held that the exception came into play on account of the range of physical reservoir characteristics being materially different, from what was contemplated in the Ravva Development Plan.

125.2. The Tribunal relied upon the evidence of the expert witness produced by the claimants who deposed that the enlarged reservoir known as Block A/D showed a range of physical characteristics, which were "materially different" from those of the Fault Blocks defined in Article 11.1 of the PSC, on which the Ravva Development Plan was based. Since there was a material change in the physical reservoir characteristics of the existing reserves, Article 15.5(*e*)(*iii*)(*dd*) would get triggered, which would enable the claimants to request for an increase in the capped figure of base development costs under Article 15.5(*e*)(*iii*)(*dd*).

125.3. The Tribunal noted that the PSC was entered into for a period of 25 years and the parties envisaged the possibility that the respondents may incur development costs greater than those anticipated when the Ravva Development Plan and the PSC were executed. Articles 15.5(*d*) and (*e*) were events where the capped figure under Article 15.5(*c*) could be increased by the management committee.

125.4. The Tribunal held that the cap on base development costs under Article 15.5(*c*) was to be read with reference to the object of the Plan to achieve the production profile of 35,000 BOPD. The production profile of 35,000 BOPD was achieved on the drilling of 14 wells by about 31-3-1999. The reference to 21 wells under Article 15.5(*c*)(*xi*) was interpreted as being an estimate of the number of wells contemplated by the parties in 1993, which would be required to achieve the object of achieving the production profile of 35,000 BOPD. It could not be construed to be an undertaking by the claimants to drill 21 wells, even though the targeted production profile of 35,000 BOPD had been achieved by the drilling of 14 wells.

125.5. The remaining 7 wells were drilled subsequently, not for the purposes of the Ravva Development Plan, but to take into account the changed physical characteristics of the existing reserves which were encountered. The costs of US $278 million were incurred by the respondents as a result of events which fell within Article 15.5(*e*)(*iii*)(*dd*).

125.6. In 1998-1999 when the complete extent of the reserves in the Ravva Field was known, the management committee, approved an increase in the production profile from 35,000 BOPD to 50,000 BOPD on 25-3-1998. The respondents proceeded to develop the Ravva Field to enable a production rate of 50,000 BOPD, and drilled 7 wells. The respondents incurred costs of US $278,871,668 million towards the drilling of the 7 wells.

126. The appellants herein filed a counterclaim, seeking sums equivalent to the amount which the respondents had claimed as cost petroleum, in excess of the agreed figure of US $198 million limit. On the interpretation of Article 15.5(*c*) of the PSC, and the circumstances in which the PSC and the Ravva Development Plan, were executed, the Tribunal held that the respondents were entitled to costs of US $278 million, in excess of the US $198 million. The counterclaim of the appellants to the extent of US $22 million was allowed by the Tribunal.

127. The appellants are aggrieved by the interpretation taken by the Tribunal with respect to Article 15.5(*c*) of the PSC and its other sub-clauses. The interpretation of the terms of the PSC lies within the domain of the Tribunal. It is not open for the appellants to impeach the award on merits before the enforcement court. The enforcement court cannot reassess or reappreciate the evidence led in the arbitration. Section 48 does not provide a de facto appeal on the merits of the award. The enforcement court exercising jurisdiction under Section 48, cannot refuse enforcement by taking a different interpretation of the terms of the contract.

128. We feel that the interpretation taken by the Tribunal is a plausible view, and the challenge on this

ground cannot be sustained, to refuse enforcement of the award."

111. However, noticing that in ***Vedanta Limited[1],*** the Court was specifically dealing with Section 48 of the Act' 1996, we would like to make a deep study of the said decision, at this stage only.

112. Proceeding further from paragraph '88' wherein the Apex Court has held that the enforcement Court would independently determine the issue of recognition and enforceability of the foreign award in India in accordance with the provisions of *Chapter* I Part II of the Act' 1996, it was observed in ***Vedanta Limited[1]*** in paragraph '92.3' therein that the curial law of Arbitration is determined by the seat of Arbitration, which is necessary to conduct the arbitral proceedings in an international commercial arbitration.

113. While the curial law governs the procedure of arbitration, the commencement of arbitration, appointment of Arbitrator(s) in exercise of the default power by the Court, grant of provisional measures, collection of evidence, hearing and challenge to the arbitral award, the *lex fori* governs the proceedings for recognition and enforcement of the award in other jurisdictions.

114. Article III of the New York Convention provides that the national Courts apply their respective *lex fori* regarding limitation periods applicable for recognition and enforcement proceedings; the date from which the

limitation period would commence, whether there is power to extend the period of limitation. The *lex fori* determines the Court which is competent and has the jurisdiction to decide the issue of recognition and enforcement of the foreign award, and the legal remedies available to the parties for enforcement of the foreign award. It was held in paragraph '94' that:-

> **"94.** The enforcement court would, however, examine the challenge to the award in accordance with the grounds available under Section 48 of the Act, without being constrained by the findings of the Malaysian courts. Merely because the Malaysian courts have upheld the award, it would not be an impediment for the Indian courts to examine whether the award was opposed to the public policy of India under Section 48 of the Indian Arbitration Act, 1996. If the award is found to be violative of the public policy of India, it would not be enforced by the Indian courts. The enforcement court would however not second-guess or review the correctness of the judgment of the seat courts, while deciding the challenge to the award."

115. Proceeding further on the question of public policy defense for refusing enforcement under Section 48, the Apex Court in ***Vedanta Ltd.***[1] has referred to the three Judge judgment in ***Shri Lal Mahal Ltd.***[6] wherein it was held that the law as expounded in ***Renusagar Power Co. Ltd***[2] would be applicable to the ambit and scope of Section 48(2)(b) even under the Act' 1996.

116. In ***Vedanta Limited***[1]***,*** the question was for enforceability of pre 2015 amendment award, rendered on 18.01.2011. It was argued therein by the learned Senior

Counsel for the respondent therein that the amended Section 48 would be applicable to the said case as the amendment effected by 2016 amendment of 2015 would have retrospective effect. The Apex Court, therefore, proceeded to examine as to whether the amendments made to Section 48 would have retrospective application and were applicable to a pre-amendmend award.

117. Dealing with the said question, the Apex Court has taken note of the judgment in ***Western Geco International Ltd.***[13]***,*** on public policy and that the amendments made to Section 48 by the 2015 amendment were based on the supplementary report of the Law Commission on "public policy" wherein a clarification by way of Explanation 2 was recommended to be inserted into Section 34(2)(b)(ii). Corresponding amendment in Section 48 also resulted in insertion of two explanations by amendment of Section 48, which are *pari materia* to explanations in Section 34(2)(b)(ii).

118. Noticing the above, the Apex Court proceeded to record that amendments made to Section 48 by the 2016 Amendment Act are substantive amendments which have been incorporated to make the definition of “public policy” narrow by its statute. The newly inserted Explanation 2 provides that examination of whether the enforcement of the award is in conflict with the fundamental policy of Indian Law, shall not entail a review on merits of the dispute. It was, thus, held in paragraphs '106' and '114' that amended Section 48 would not be applicable to the

case since the Court proceedings for enforcement were filed by the claimants therein on 14.10.2014 prior to the 2016 amendment having come into force on 23.10.2015.

119. Further, while examining the question as to whether the award can be held to be in conflict with the public policy of India and contrary to the basic notion of justice as agitated therein, the Apex Court while applying the unamended Section 48 to the case, taking note of the judgment of the US Court of Appeals for the second circuit in ***Parsons & Whittemore Overseas Co. Inc. Vs. Societe Generale De L'Industrie Du Papier (Rakta)*** *and* ***Bank of America,***[16], relied on by the Apex Court in ***Renusagar Power Co. Ltd.***[2] and the International Counsel for Commercial Arbitration Guide to the interpretation of 1958 New York Convention a "handbook for Judges" (2011), has observed in paragraphs '123', '124', '125' and '127' as under:-

> **"123.** It appears that both the parties are not satisfied with said view of the Division Bench of the High Court in applying the decision in *Forasol case* [1984 Supp SCC 263 : (1984) 1 SCR 526] to the present case.
>
> **124.** Shri Venugopal has urged that in *Forasol case* [1984 Supp SCC 263 : (1984) 1 SCR 526] this Court was dealing with the enforcement of an award governed by the Indian Arbitration Act and that the principles laid down in the said decision cannot be applied to the present case arising out of a foreign award which is not governed by the provisions of the Indian Arbitration Act but is governed by the provisions of the Foreign Awards Act. It is no doubt true that in the *Forasol case* [1984 Supp SCC 263 : (1984) 1 SCR 526] this Court was

16 508 F 2D 969(2nd Cir 1974)

dealing with an award governed by Indian Arbitration Act but that does not affect the applicability of the said decision to proceedings for enforcement of a foreign award in Indian courts because the matter of conversion of foreign currency into Indian currency at the stage of enforcement of an award is governed by the same principle irrespective of the fact whether the award is governed by the Indian Arbitration Act or a foreign award governed by the Foreign Awards Act. Moreover the position has been made clear by Section 4(1) of the Foreign Awards Act which lays down that a foreign award shall subject to the provisions of this Act be enforceable in India as if it were an award made on a matter referred to arbitration in India. The said provision equates a foreign award to an Indian award for the purpose of enforcement with the exception that such enforcement will be subject to the provisions of the Foreign Awards Act. There is nothing in the provisions of the Foreign Awards Act which excludes the applicability of the principles laid down in *Forasol case* [1984 Supp SCC 263 : (1984) 1 SCR 526] with regard to enforcement of foreign awards. In our opinion, therefore, the enforcement of the award in the instant case is governed by the law laid down in *Forasol case* [1984 Supp SCC 263 : (1984) 1 SCR 526] .

125. Shri Venugopal has further urged that the matter of conversion of foreign currency and the rate of exchange for such conversion is not a matter of procedure but is a matter of substance and it is governed by the proper law and that since the contract as well as performance of the contract are both governed by the New York law, the breach-date rule which was applicable in the State of New York at the relevant time, should be applied for the purpose of ascertaining the exchange rate for conversion of U.S. dollars into Indian rupees and that the rule in *Forasol case* [1984 Supp SCC 263 : (1984) 1 SCR 526] can have no application to the present case. Shri Venugopal has in this regard placed reliance on certain observations in *Legal Aspects of Money* by F.A. Mann, 5th Edn. at pp. 326-327 and *The Conflict of Laws* by Dicey & Morris, 11th Edn., Vol. II, p. 1454. We are unable to agree with

this submission of Shri Venugopal. The manner in which the court should pass the decree in a case where a foreign award is sought to be enforced is a matter of procedure and not of substance and is governed by *lex fori*, i.e., the law of the forum. The rule laid down in *Miliangos case* [1976 AC 443 : (1975) 3 All ER 801] has been described as a rule of procedure. (See : *Services Europe Atlantique Sud (Seas) of Paris* v. *Stockholms Rederiaktiebolag Svea of Stockholm* [1979 AC 685 : (1979) 1 All ER 421*sub nom Eleftherotria (M.V.) (Owners)* v. *Despina (M.V.) (Owners) sub nom Despina R. The*] at p. 704; *Cheshire & North, Private International Law*, 12th Edn., p. 100). For the same reasons, the principles laid down in *Forasol case* [1984 Supp SCC 263 : (1984) 1 SCR 526] must be held to be rule of procedural law and would be applicable to the proceedings for enforcement of a foreign award under the Foreign Awards Act.

127. We find that in the said passage which falls in Chapter XI relating to "The Payment of Foreign Money Obligations" the learned author is dealing with the conversion of the money of account to the money of payment and he has not considered the matter of convertibility of the foreign currency at the stage of enforcement of a judgment or award. We have already indicated that convertibility of the money of account into the money of payment involves determination of the liability and is a matter of substance governed by the proper laws of contract. This question arises prior to the stage of the judgment or award. Here we are dealing with a case where the award has already been made and is sought to be enforced in India and the question is about the conversion of the foreign currency in which the award has been made into Indian currency. This question has been dealt with by Dr F.A. Mann in Chapter XII relating to "*The Institution of Legal Proceedings and its effect upon Foreign Money Obligations*" and the learned author has stated:

> "It is now clear that English law does not require any foreign money obligation to be converted into sterling for the purpose of instituting proceedings

> or of the judgment; on the contrary, where the plaintiff claims a sum of foreign money, he is both entitled and bound to apply for judgment in terms of such foreign money and it is only at the stage of payment or enforcement that conversion into sterling at the rate of exchange then prevailing takes place. This is so whether the claim is for payment of a specific sum contractually due or for damages for breach of contract or tort or for a just sum due in respect of unjustified enrichment or for restitution. Nor does it matter whether the contract sued upon is governed by English or by foreign law. Nor is it necessary to ask for specific performance rather than payment: in either case the defendant will be ordered to pay foreign money. Moreover an award in an English arbitration may be expressed and enforced in foreign currency and a foreign award or judgment so expressed may be enforced like the English award or judgment." (p. 352)

120. Applying the principles, noticing the challenge in the facts of the said case, it was, thus, held in ***Vedanta Ltd.***[1] that the enforcement Court exercising jurisdiction under Section 48, cannot refuse enforcement while taking a different interpretation of the terms of the contract and since the interpretation taken by the tribunal is plausible view, the challenge on the ground of erroneous interpretation of the terms of the contract, that it amounts to rewriting the contract, was held unsustainable, to refuse enforcement of the award, as it does not contravene the public policy of India, or it cannot be said that it is contrary to the basic notions of justice.

121. Further, referring to paragraph '21' of the judgment of the Apex Court in ***Vijay Karia and Others***[3]***,*** it was argued before us by the learned Senior Counsel for the respondent

that the facts and circumstances of the said case are similar to that of the instant case, inasmuch as, there was no challenge to the award therein under the English Arbitration law. The objections under Section 48 of the Act' 1996 were raised only when the award was brought to India for recognition and enforcement.

122. The submission before us is that in the said context, the observations in paragraphs '81' and '83' can be relied upon to hold that if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counter claim in its entirety, the award may shocks the conscience of the Court and may not be enforced.

123. In ***Vijay Karia and Others***[3] as well, four foreign awards, which were held to be enforceable in India, were rendered prior to the 2015 Amendment Act, however, the Court was dealing with the amended Section 48.

124. Further, referring to the decision of the Apex Court in ***Satya Jain v. Anis Ahmed Rushdie***[17], it was argued that it is held therein that the principle of a business efficacy is normally invoked to tweak in a term in an agreement of contract so as to achieve the result or the consequence intended by the parties acting as a prudent businessman. Business efficacy means the power to produce intended results. The classic test of business efficacy as proposed by ***Bown, L.J. Moorcock***[18] **,** requires that a term can only be

17 (2013) 8 SCC 131
18 (1889) LR 14 PD 64 (CA)

implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended, but only the most limited term should then be implied-the bare minimum to achieve this goal. If the contract makes business sense without the term, the Court will not imply the same. Relevant paragraphs '32' and '33' of the said decision are quoted hereinunder:-

> **"32.** The High Court, notwithstanding the clear language of Clause (7) of the agreement, had invoked the principle of "business efficacy" to hold that a slight deviation from the plain meaning of the language of Clause (7) would be justified so as to read an obligation on the part of the plaintiff to pay the further amount of Rs 1 lakh as demanded by the defendant instead of insisting on making such further payment(s) only to the Income Tax Authorities.
>
> **33.** The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in *Moorcock* [(1889) LR 14 PD 64 (CA)] . This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied—the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in *Moorcock* [(1889) LR 14 PD 64 (CA)] sums up the position: (PD p. 68)
>
> "… In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been

> intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

125. It was, thus, argued by the learned Senior Counsel for the respondent that the business efficacy test should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement.

126. Another decision of the Apex Court in ***Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.***[19] has been pressed into service to argue that the contract being a creature of an agreement between the parties, has to be interpreted giving literal meanings unless there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the Court to make a new contract, however, reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be valid, inasmuch as, a party cannot claim any more than what is covered by the terms of the contract, for the reason that the contract is a transaction between the parties and has been entered into with open eyes and understanding the nature of contract. The terms of the

19 (2013) 5 SCC 470

contract has to be construed strictly without altering the nature of the contract as it may affect the interest of either parties adversely.

127. With the aid of the above decisions in light of the law laid down by the Apex Court in the matter of interpretation of contract, the law to apply business efficacy test and to interpret the terms of contract and the scope of Section 48 of the Act' 1996, Mr. Joshi, learned Senior Counsel appearing for the respondent has taken us to clause 1.1 of the Master agreement under the heading "Buyers Facilities" (quoted hereinbefore) to submit that it was specifically agreed by the parties that the berthing unloading, receipt, storage, regasification and regasified LNG processing and delivery facilities at the receiving terminal was to be mutually agreed in the relevant Confirmation Notice, to be executed by the parties in the form set out in Schedule 'C 'in relation to the sale and purchase of a cargo of LNG pursuant to the Master agreement. The receiving terminal as specified in clause 1.1 for regasification and associated facilities was to be confirmed by the buyer in the confirmation notice, which will be used to unload the LNG purchased under the agreement (if any). The unloading port as mentioned in clause 1.1 was to be assigned in the relevant confirmation notice.

128. Clause 2 of the Master agreement pertaining to duration of the agreement has been read over to submit that the sale and purchase of cargoes of LNG from time to time as per

the intention of the parties in the agreement were individual and several contract. Clause 2.3 of the Master agreement expressly provides that the execution of the Master agreement by the party shall not oblige either party at any time to enter into any contract with the other party for sale and purchase of LNG. It would be in absolute discretion of the seller, at any time offer to sell quantities of LNG to buyer on the terms and conditions contained therein. If the buyer accepts such offer, the parties shall negotiate and execute a confirmation notice, substantially in the form set out in Schedule 'C'.

129. The parties, thus, had agreed that any contract between them for the sale and purchase of any cargo or cargoes of LNG shall be in accordance with the terms of the Master agreement, the relevant confirmation notice, which shall be mutually agreed, relating to each contract (of sale and purchase of cargo). It was clarified therein that execution of any confirmation notice by the parties shall constitute an individual and several contract whereby seller agrees to supply, sell and deliver a cargo or cargoes of LNG to buyer and the buyer agrees to purchase, receive and pay seller for such cargo or cargoes of LNG in accordance with the agreement and the relevant confirmation notice.

130. Clause 6.1 of the Master agreement has further been placed before us to submit that it was also agreed between the parties that prior to loading of any cargo of LNG, the seller and the buyer shall consult each other and agree in the confirmation notice, terms that are to be applicable to a

cargo or cargoes of LNG to be loaded, which included (i) scheduled unloading date range, i.e. day date-range for arrival of the LNG ship at the receiving terminal taking into consideration seller's LNG ship's operation and its commitment on long term contracts as well as buyer's berth schedule (ii) the name of the LNG ship to be utilized (iii) LNG ship's estimated fully laden draft and estimated quantity of LNG to be delivered.

131. It is further provided in clause 6.1 that during such consultation between buyer and seller, buyer shall also use all reasonable endeavours to provide seller with information about the requirements of the proposed unloading port, receiving terminal and for the shipment concerned. It further states that seller shall send notice to the buyer by letter, telex, fax, email or other electronic method of written transmission within 24 hours after loading completion. The buyer shall on receipt of the above advice, provide seller with full documentation requirements for the shipment concerned.

132. Clause 6.3 further states that any revised scheduled unloading date range agreed between the parties as a result of any amendment, for the purpose of agreement, replace the previously agreed details in clause 6.1 and the confirmation notice shall be amended accordingly.

133. Clause 6.5 of the Master agreement provides for liability of the seller to give or cause to be given notice (a) of not less than 72 hours of the estimated time of arrival of LNG

ship at the receiving terminal; (b) notice of not less than 48 hours prior to the estimated time of arrival of the LNG ship at the receiving terminal; (c) an additional notice of not less than 24 hours prior to the estimated time of arrival of the LNG ship at the receiving terminal; (d) prompt notice of any alteration of more than 3 hours to the time contained in the notice given under Clause 6.5(c); and (e) any other or further notice as may be proposed by buyer in order to meet with the additional requirements of the unloading port and included in Buyer's delivery instructions.

134. With these clauses of the contract, it was vehemently argued by the learned Senior Counsel for the respondent that the terms and conditions of the Master agreement were clear to the extent that both the parties were to mutually agree not only on the Scheduled unloading date range, but also on the buyers berth Schedule, in the Confirmation notice.

135. The receiving terminal having regassification and associated facilities was to be confirmed at the ends of the buyer in the confirmation notice and unloading port must be assigned in the confirmation notice itself. The buyer was obliged to use all reasonable endeavours to provide information about the requirement of the purpose for loading and receiving terminal, etc. to the seller.

136. Besides that, clause 20 pertaining to invoice, price, payment and credit support of the Master agreement in clause 20.1 provide for any sale of LNG pursuant to the Master agreement, the contract sale price shall be

specified in the confirmation notice. The credit support was also to be provided by the buyer, if requested by seller in accordance with and specified in the confirmation notice.

137. Clause 21.1 pertaining to delivery states that delivery of LNG shall be on the ex-ship basis and unless otherwise agreed in the confirmation notice, the point of delivery of every LNG sale under the Agreement shall be at the unloading point.

138. The Schedule 'C' to the Master agreement, the confirmation notice contains clause, such as details of the ship, receiving terminal (unloading port), scheduled unloading date range, quantity, etc.

139. However, the confirmation notice jointly signed by the parties (at page '176' of the paper-book) did not contain these vital information such as the details of the LNG ship, receiving terminal, unloading port, quantity, etc. and it was agreed that all such information shall be notified by the seller to buyer through the delivery notice. While agreeing to the scheduled unloading date range in Clause 4 of the confirmation notice (extracted hereinbefore), it was also agreed that for any change of the scheduled unloading date, buyer shall inform seller of any circumstances as a result of which delivery of a cargo was to be made on any other date than the scheduled unloading date shown therein.

140. For the contract sale price, only a formula was provided in clause 8 with the alternative option given to the buyer to

confirm to seller on receipt of the price offer as to which price was to be used for invoice and payment purpose. Clause 8 of the confirmation notice signed by the parties reads as under :-

> **"8.CONTRACT SALE PRICE**
> US$/MMBtu of Quantity Delivered=HH + US$1.85
>
> "HH" means the final Henry Hub Natural Gas Futures Contract Settlement price in US$/MMBtu/for the month in which a particular LNG cargo shall be delivered at the Receiving Terminal falls as quoted on the New York Mercantile Exchange
>
> OR
>
> A fixed price to be offered by Seller (i) prior to the loading of each cargo, or (ii) prior to the determination date of the Henry Hub settlement price for the discharge month.
>
> Buyer shall confirm to Seller immediately upon receipt of the price offer as to which price to be used for invoice and payment purpose."

141. It was, thus, vehemently argued by the learned Senior Counsel appearing for the respondent that in fact the delivery notice substituted the confirmation notice and it was agreed between the parties that all terms of the sale and purchase of LNG except scheduled unloading date range agreed therein shall be mutually agreed at the time of delivery notice to be sent by seller to buyer for each cargo.

142. Pressing Clause 2.3 of the Master agreement, it was submitted that with the substitution of confirmation notice

with the delivery notice, it was mutually agreed by the parties that the terms and conditions of the agreement for sale and purchase, delivery or receiving and payment in a cargo or cargoes of LNG shall be mutually agreed at the stage of delivery notice.

143. The contention is that in absence of the vital details, viz. information with respect to the LNG ship, receiving terminal, quantity, contract sale price and payment security in the confirmation notice, which was agreed to constitute an individual and several contract, the confirmation notice dated 12.03.2007 cannot be considered to be concluded contract with regard to four cargoes scheduled in the month of April, May, June and August. The scheduled unloading date range mentioned in the confirmation notice, though mutually agreed by the parties, but the confirmation notice essentially was substituted by the delivery notice and as such, all details were required to be agreed at the stage of delivery notice.

144. Clause 12.2, Buyers obligation to Take or Pay could not be invoked as the LNG price has not been specified in the confirmation notice and it was never mutually agreed between the parties. The submission, thus, is that the details mentioned in the first delivery notice dated 16.03.2007 for the cargo unloading between 28th April 2007 containing the details of receiving terminal was without any agreement of the parties. The buyer had already informed the same on 27.03.2007 that it was not feasible to conclude the contract with regard to April and May 2007 cargoes as

regasification terminal operators have shown inability to accept the cargoes during these months and request was made to work out a suitable solution in the matter. The letters written by the buyer to both Hazira and Dahej Port requesting to offer regasification facility in the month of March 2007 and their denial to offer any regasification capacity are placed on record.

145. The submission is that there is no dispute about the fact that the buyer intimated the seller well in time, i.e. on 27.03.2007 that it would not be possible to receive the cargoes of April and May 2007 because of unavailability of the unloading port which was beyond the control of the buyer. The submission is that even as per Clause 4 of the confirmation notice, buyer could have asked for change in scheduled unloading date after due intimation/information to seller of any circumstance as a result of which delivery scheduled was to be changed.

146. Submission is that the first delivery notice for April cargo sent along with letter dated 16.03.2007 contains a unilateral mentioning of receiving terminal and does not refer to final or frozen price of the cargo. It was submitted that the contracted sale price formula stated in the confirmation notice dated 12.03.2007 was not final. Rather, there were two alternative options and negotiations were going on between the parties with the exchange of e-mails as mentioned hereinabove.

147. Without confirmation of the receiving terminals at the ends of the buyer and agreement on the price, there was no

question of releasing of the ship or invoking Take or Pay Clause 12.2 of the Master agreement. The submission is that each contract for sale and purchase of a cargo or cargoes was to be entered by mutually signing the confirmation notice, which was further agreed by the parties at the stage of delivery notice. The result is that unless the terms and conditions of the agreement pertaining to receiving terminal and price of LNG was mutually agreed, the scheduled unloading date range mentioned in Clause 4 of the confirmation notice became tentative.

148. The learned Arbitrator in a mechanical manner completely ignoring this aspect of the matter that in individual and several contracts pertaining to sale and purchase of a cargo or cargoes, once the terms and conditions of the supply, sale and receiving was not decided, it could not have been held that the contract was concluded with the signing of the confirmation notice dated 12.03.2007 and the issue pertaining to the receiving terminal and price were operational issues.

149. The contention is that the second and third delivery notices followed by the Take or Pay notices sent by the seller mentioned in the delivery notice dated 17.03.2007 for the May cargo mentioning unloading port at both Hazira and Dahej show that the seller has completely bypassed all the terms to extract money from the buyer alleging breaches. In fact, the price was never agreed, frozen or locked by the mutual agreement of the parties

and there was no obligation upon the buyer to accept the deliveries sent through the notices for the month April, May and June cargo. The Take and Pay notice were completely unconscionable and the learned Arbitrator has acted perversely and had thrust upon the new contract upon the buyer to purchase LNG without availability of unloading port. The Liquified Natural Gas (LNG) is a product which cannot be stored anywhere and cannot be unloaded without availability of regasification facility at the unloading port and it is for this reason the receiving terminal or unloading port was a pre-requirement of the delivery notice, to be agreed at the time of signing of the confirmation notice.

150. The submission is that the enforcement Court has rightly held that the award referring to vital terms as operational issues and applying the test of business efficacy has rendered the award illogical and perverse, and such, which shocks the conscience of the Court and hence, cannot be enforced.

151. It was argued that the reasoning given by the learned Arbitrator are implausible, inasmuch as, terming the conditions of the Master agreement read with the confirmation notice about fixation of the price and receiving terminal as operational issues resulted in foisting a new contract upon the buyer by unlawful delivery notice. In fact, as mutually agreed by the parties while executing the confirmation notice dated 12.03.2007 that the contract shall be concluded with the delivery notice, when the

details are locked therein. All three delivery notices were unilateral and sending of Take and Pay notice along with the subsequent two delivery notices for May and June cargo with the assertion therein that the buyer refused to receive the cargo of LNG is unacceptable. The learned Arbitrator has rendered an illogical award by treating the issues of receiving terminal and fixing of price as operational issues, post concluded contract.

152. It was submitted that the standby letter of credit was to be issued by the buyer after the price was quoted and acceptance by the buyer. There can be no assumption with regard to receiving terminal by unilateral mentioning of unloading port in the delivery notice without seeking confirmation from the buyer and further forcing delivery for May and June cargo. It was contended that it is an accepted position that May, June and August cargoes were never uploaded and April cargo was sold much before the delivery date.

153. The learned Senior Counsel for the respondent would submit that the respondent is not seeking intervention of the Court to interpret the terms of the contract, rather a bare reading of the Master agreement, confirmation notice and delivery notice, on the face of it would establish that there was no concluded contract and hence, there was no question of breach for invoking Take or Pay clause by seller. This case is a glaring example of perversity in the award, which goes to the root of the matter being irrational, defying all logics or illogical and the

enforcement Court cannot be said to have erred in holding that the award shocks the conscience of the Court and is against the fundamental public policy of Indian law, and is such, that the enforcement is to be refused even within the limited jurisdiction of Section 48 of the Act.

154. In rejoinder, Mr. Devang Nanavati, learned Senior Counsel appearing for the appellant would emphasize on the law of limited scope of interference under Section 48 to submit that the interpretation made by the Arbitrator or the reasoning which accord with business sense and commercial realities and probabilities as to the construction of the contract are not open for scrutiny within the scope of Section 48, inasmuch as, re-appreciation of evidence to arrive at different conclusion, is impermissible.

[VII] Analysis and Conclusion:-

155. Having considered the submissions of the parties and perused the record, at the outset, we may note that Section 48 of the Act' 1996 though comes with restrictions and limitations, but the Courts are not required to adopt a hands-off approach. Rather, limited discretion is conferred upon the Court where it may refuse to enforce a foreign award, if the party agitating enforcement furnishes proof of the any of the circumstances mentioned in Clauses (a) to (e) of sub-section (1) of Section 48 of the Act and the Court in exercise of its residuary discretion finds it legally to do so.

156. Sub-section (2) of Section 48 provides public policy grounds to refuse enforcement of the award. Explanation 1 of Section 48(2) (b) provides three contingencies when the award would be said to be in conflict with the public policy of India, viz. (i) the award is an outcome of fraud or corruption or violation of Section 75 or Section 82; (ii) is in contravention with the fundamental policy of Indian law; (iii) in conflict with the most basic notions of morality and justice. Explanation 2 of Section 48(2)(b) adds a clarification by a caveat that the Court shall not review the award on merits of the dispute, while refusing to enforce it on the grounds of being in contravention with the fundamental policy of Indian law.

157. For ready reference, Section 48 of the 1996 Act is extracted hereinunder :-

> "**48. Conditions for enforcement of foreign awards. —**(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—
>
> (a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

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

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

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

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

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

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of

morality or justice.

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

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

158. Without entering into the dispute, at this stage, irrespective of whether the pre or post 2015 amended Section 48 would apply in the present case where enforcement application under Section 48 of the Act was filed in the year 2014 in a wrong Court, we may record that in a case of unamended Section 48 in ***Vedanta Limited***[1]***,*** the Apex Court has clarified that the enforcement Court cannot reassess or re-appreciate the evidence on record in the arbitration as Section 48 does not provide a *de facto* appeal on the merits of the award. The enforcement cannot be refused by taking a different interpretation of the terms of the contract. The errors of judgment are not a sufficient ground for refusing enforcement of a foreign award and that the limits of judicial intervention on the grounds of public policy of the enforcement State are to be looked into within the contours of Section 48.

159. Applying ***Renusagar Power Co.***[2], enforcement of a foreign award could be refused on the ground that it was

contrary to the public policy, if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. Explanation to unamended Section 48(2)(b) reads as under :-

> "**Explanation**. Without prejudice to the generality of clause (b) of this section, it is hereby declared for avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption."
>
> Which means that the enforcement of award induced or affected by fraud or corruption could be refused being in conflict with the public policy of India.

160. ***Shri Lal Mahal Ltd.[6],*** rendered on 03.07.2013 relying on ***Renusagar Power Co.[2]***, has held that :-

> **"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.
>
> **46.** In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report obtained by the buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12-5-1994 and wrongly rejected the report of the contractual agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal.

47. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(*b*) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (*1*) fundamental policy of Indian law; or (*2*) the interests of India; or (*3*) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(*b*)."

161. ***Ssangyong Engg.[14],*** while referring to pre and post 2015 amendment to Section 48 of 1996 Act, held that the expression "public policy of *India*" would mean "fundamental policy of Indian law" as explained in paragraphs '18' and '27' of ***Associate Builders[12]***, i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of the expression. Reverting to ***Renusagar Power Co.[2]***, paras '18' and '27' are extracted hereinunder :-

"18. In *Renusagar Power Co. Ltd.* v. *General Electric Co.* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] , the Supreme Court construed Section 7(1)(*b*)(*ii*) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

"**7.** ***Conditions for enforcement of foreign awards***.—(1) A foreign award may not be enforced under this Act—

***

(*b*) if the Court dealing with the case is satisfied that—

***

(*ii*) the enforcement of the award will be contrary to the public policy."

In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

(*i*) The fundamental policy of Indian law,

(*ii*) The interest of India,

(*iii*) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (*see* SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (*see* SCC pp. 689 & 693, paras 85 & 95)."

"**27.** Coming to each of the heads contained in *Saw Pipes* [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from *Renusagar* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."

162. As held therein in construing the expression "public policy of India" in the context of foreign award, if an award

is contrary to the "fundamental policy of Indian law", its enforcement may be refused. This comes with the caveat in paragraph '33' that when a court is applying the "public policy" test in an arbitral award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. The award based on little evidence which is not arbitrary or capricious, the Arbitrator shall be treated as a last word of facts.

163. From the reading of the public policy test to an arbitral award, as held in ***Associate Builders[12],*** such award which shocks the conscience of the Court may be refused to be enforced by applying public policy test.

164. In ***Vijay Karia and Others[3],*** while dealing with the enforcement of a foreign award, the Apex Court has observed that ***Renusagar Power Co.[2],*** which was one of the first judgments which construed *pari materia* provisions in the Foreign Awards Act, 1961 would continue to apply to cases which arise under Section 48(2)(b) and wider meaning given to "public policy of India" in the domestic sphere shall not be applicable in enforcement of proceedings under Section 48(2)(b). While interpreting the fundamental policy of the Indian law, as has been held in ***Renusagar Power Co.[2],*** must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. It is held therein that "fundamental policy" refers to the core values of public policy as a nation, which may find its expression

not only in statutes but also time honoured, hallowed principles which are followed by the Courts.

165. If a foreign award fails to determine a material issue, which goes to the root of the matter, the award may shocks the conscience of the Court and may not be enforced. The test laid down therein is that a foreign award must be read as a whole, fairly, and without nit-picking. If upon reading as a whole, the award has addressed the basic issues raised by the parties and has, decided the claims and counter-claims of the parties, enforcement must follow.

166. The Apex Court in ***Vijay Karia and Others[3] ,*** has noted a judgment of the Delhi High Court (***Cruz City 1 Mauritius Holdings v. Unitech Limited***)[9], while dealing with the challenge to the enforcement of foreign award under Section 48(1)(b) of the Act, wherein it was observed that the width of the public policy defence to resist enforcement of a foreign award is extremely narrow and the same cannot be equated to offending particular provision or statute.

167. The observations in paragraph '98' therein (***Cruz City) (Delhi High Court Judgement)[9]*** are that the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and such which cannot be expected to compromise. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a

provision of any enactment. The enforcement of foreign award on the public policy ground cannot be refused when it violates any one or the other provisions of Indian statute. This very reasoning met with the approval of the Apex Court in ***Vijay Karia and Others***[3].

168. Keeping in mind the above principles as to the public policy defence while examining in the facts and circumstances of the instant case as to whether the award can be said to offend the core values of the fundamental policy of Indian law, reminding ourselves that we cannot enter into the merits of the award or re-appreciate the evidence on record, when we look to the objections of the respondent dealt with by the enforcement Court, no error can be attached to the reasoning given in paras '75' to '84' of the judgement impugned.

169. The enforcement Court, on a bare look to the Master agreement entered into between the parties for LNG sale and purchase, the confirmation notice, which is part and parcel of the Master agreement, and the delivery notice, has noted that;

(i) while the parties agreed to keep the Master agreement as it is, they voluntarily agreed and divided original confirmation notice into confirmation notice and delivery notice.

(ii) The proposed format of delivery notice includes details such as LNG ship, receiving terminal, scheduled

unloading date range, quantity, quality and payment security.

(iii) The confirmation notice duly signed by both the parties on 12.03.2007 envisaged a separate delivery notice.

(iv) From a bare perusal of the record, the details such as receiving terminal, was not fixed and the price was alternatively provided, i.e. Henry Hub Price + USD 1.85 or the price to be offered by the seller in the confirmation notice.

(v)The record indicates that receiving terminal was not agreed between the parties and the buyer informed the seller that slots for registration were not available.

(vi) These facts were noted and taken into consideration in order to test whether the findings arrived at by the Tribunal falls within the scope and ambit of Explanation 2 of Section 48 and while taking note of the judgments in ***Renusagar Power Co.***[2] and ***Shri Lal Mahal Ltd.***[6]***,*** while exercising very limited and narrow jurisdiction, the enforcement Court in the judgment impugned has held that there is no concluded contract as the details which were to be mentioned in the delivery notice were not operational in nature and cannot be termed as post contract obligations, as held by the learned arbitrator.

(vii) It was noted that the Master agreement provides that it would be a basic agreement for sale and purchase of

LNG and confirmation notice would precede each transaction.

(viii) The composite notice for all four cargoes came to be executed with the Henry Hub price as an alternative price and the learned Arbitrator decided the claim of the seller on the premise that the receiving terminal mentioned in the confirmation notice were merely operational issues and were post contract obligations.

(ix) The price aspects remained undecided till the last moment and admittedly, the receiving terminal was not fixed at all. Only because two terminals were available in India, i.e. Dahej and Hazira, the same can neither be presumed one way or the other and fixing of the receiving terminal cannot be termed as operational aspect.

(x)In a commercial transaction, if goods are sent by the seller to the purchaser and that too at a distance like the case in hand, to believe that the destination was operational in nature is itself perverse and irrational. On the face of it, the facts clearly establish that the delivery notices sent by the seller was a unilateral act on the part of the seller and admittedly the same were never signed by the buyer and that too without any SBLC being provided by the buyer, without determination of price and even without fixing the place of receiving the goods, the contract cannot be said to have been concluded.

(xi) In any commercial transaction, the price segment

and the place of delivery are the important aspects for execution of a binding contract. The delivery notice not being signed by the buyer is an admitted fact and in such circumstances, the findings arrived at by the arbitral tribunal defies all logic. The findings are based on assumption that there was a concluded contract.

(xii) The facts that no security was provided by the buyer and the buyer had already informed the seller that no slots were available on the receiving terminal were sufficient for the seller not to proceed, as there was no concluded contract.

(xiii) Besides that the April cargo though was loaded from the port of Trinidad, but was sold on 06.04.2007 before the cargo reached the Hazira terminal. May cargo was sold before the loading date and June and August cargoes were never loaded.

170. The only argument made by the learned counsel for the appellant to assail this reasoning of the enforcement Court that the April cargo had not reached Hazira terminal or May cargo was sold before the loading date or June and August cargoes were never loaded, would be wholly beyond the limited scope of inquiry, inasmuch as, the question of loading of cargo or reaching the cargo at the terminal was not relevant for invoking Take or Pay notice in Clause 12.1 of the Master agreement.

171. The appellant had already secured the lot of LNG for

each cargo from Suez under a Master agreement which incurred liability upon the appellant when delivery was refused to Suez and further, the sale of cargo were distress sale because of the refusal by the respondent buyer, and hence, it would have no effect on the claim of the appellant. However, there is no answer as to how the receiving terminal could have been decided by the seller on its own when much before the scheduled unloading date of April cargo, the respondent buyer intimated about the unavailability of the receiving terminal.

172. There is no answer as to how in absence of regasification facility being available at the receiving terminal, the appellant buyer could receive the delivery of LNG gas and that under the contract itself, receiving terminal was required to be confirmed by the buyer for each of the slated delivery of cargo. There is no answer as to the language of Clauses 4 and 8 of the confirmation notice dated 12.03.2007, mutually signed by the parties that, in case, the buyer informs the seller of any circumstance, as a result of which, delivery of cargo cannot be received at the scheduled date, the parties shall consult together about any alteration to the scheduled unloaded date range.

173. The consultative process to mutually agree between the parties with regard to the schedule unloading date range mentioned in the confirmation notice in view of the inconvenience expressed by the buyer on account of unavailability of regasification in any of the two ports,

namely Dahej & Hazira, had never been undertaken and the appellant seller had forced upon the delivery of LNG cargoes by sending unilaterally delivery notices one after the other, mentioning one or both the receiving terminals available in India, as an alternate or only receiving port.

174. It is incomprehensible that a loaded LNG ship would not know its route, i.e. whether it will reach at Hazira or Dahej port in India.

175. The contract sale price, from the bare reading of Clause 8 of the confirmation notice dated 12.03.2007 was offered an alternative price and buyer was required to confirm to seller immediately upon receipt of the price offer as to which price was to be used for invoice and payment purpose. There has been no agreement between the parties about the price as admitted by the parties.

176. The insistence of the learned Senior counsel for the appellant that the Henry Hub price was a fixed price accepted by the parties in the confirmation notice dated 12.03.2007 itself is misreading of Clause 8 thereof, and the findings of the learned Arbitrator that the HH price was a default price is wholly incomprehensive.

177. All the above noted issues go to the very core value of the fundamental policy of the Indian law that in absence of a concluded contract, there was no question of breach. The time honoured, hallowed principles which are followed by the Indian Courts are that (i) a proposal when accepted,

becomes a promise, (ii) every promise and every set of promise forming consideration for each other is an agreement, (iii) the agreement enforceable by law is a contract. In the instant case, resistance to enforcement of a foreign award is not on the ground that the arbitral award offends one or the other provisions of the Indian Contract Act. Rather, the objections to enforcement on the ground of public policy are that the award offends the fundamental and substratal principles of contract laws.

178. With the above, we reach at an irresistible conclusion that none of the reasonings given by the enforcement Court for refusal would violate Explanation 2 of Section 48(2)(b) of the Act' 1996 and that the liability of Take or Pay triggered in the facts of the present case defies all logic. The award has rightly been held to be based on irrelevant consideration and perverse, irrational and such that it shocks the conscience of the Court, therefore, the same is against the fundamental public policy of Indian law.

179. Within the limited scope of the grounds available under Section 48(2) of the Arbitration and Conciliation Act' 1996, the refusal by the enforcement Court in the exercise of its residuary discretion, to enforce foreign award in the present case, cannot be said to suffer from any error of law. The enforcement Court cannot be said to have travelled beyond its jurisdiction in refusing to enforce the award in the facts and circumstances of the instant case.

180. Consequently, the appeal is found devoid of merits and

hence, dismissed. No order as to costs.

Pending Civil application, if any, would not survive and shall stand disposed, accordingly.

(SUNITA AGARWAL, CJ.)

(D.N.RAY, J.)

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