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

\+ OMP 29/2003

JINDAL EXPORTS LTD. ..... Petitioner
Through Mr. Ramesh Singh with Ms. Anne Mathew, Mr. Suman Jyoti Khaitan and Mr. Nitya Bagaria, Advocates

versus

FUERST DAY LAWSON LTD. ..... Respondent
Through Ms. Ashwani Kumar, Senior Advocate, with Ms. Sangeeta Bharti, Ms. Nidhi Minocha, Mr. Rahul Malik, Advocates

WITH

\+ OMP 204/1998 & I.A. 4424/2006

JINDAL EXPORTS LTD. ..... Petitioner
Through Mr. Ramesh Singh with Ms. Anne Mathew, Mr. Suman Jyoti Khaitan and Mr. Nitya Bagaria, Advocates

versus

FUERST DAY LAWSON LTD. ..... Respondent
Through Ms. Ashwani Kumar, Senior Advocate, with Ms. Sangeeta Bharti, Ms. Nidhi Minocha, Mr. Rahul Malik, Advocates

AND

\+ EX. P. 168/1998 & EAs 114/2006, 410/2006, 163/2007

FUERST DAY LAWSON LTD..... Decree Holder
Through Ms. Ashwani Kumar, Senior Advocate, with Ms. Sangeeta Bharti, Ms. Nidhi Minocha, Mr. Rahul Malik, Advocates

versus

JINDAL EXPORTS LTD. ..... Judgment debtor
Through Mr. Ramesh Singh with Ms. Anne Mathew, Mr. Suman Jyoti Khaitan and Mr. Nitya Bagaria, Advocates

AND

\+ EX. P. 169/1998 & EAs 409/2006 & 162/2007

FUERST DAY LAWSON LTD..... Decree Holder
Through Ms. Ashwani Kumar, Senior Advocate, with Ms. Sangeeta Bharti, Ms. Nidhi Minocha, Mr. Rahul Malik, Advocates

versus

JINDAL EXPORTS LTD. ..... Judgment debtor
Through Mr. Ramesh Singh with Ms. Anne Mathew, Mr. Suman Jyoti Khaitan and Mr. Nitya Bagaria, Advocates

Reserved on : November 27, 2009
% Date of Decision : December 11, 2009

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J

1. While OMP No. 29/2003 has been filed challenging the enforceability of arbitration Award No. 1030 dated 30th August, 1996, the Execution Petition bearing No. 168/1998 has been filed for its enforcement. Similarly, while OMP No. 204/1998 has been filed challenging the enforceability of Award No. 1034 dated 16th October, 1996, Execution Petition No. 169/1998 has been filed for its enforcement. Since disputes between the same parties arise out of a

common contract, all the four petitions are being disposed of by a common judgment.

2. The relevant facts in all the four petitions are that on 1st August, 1994 a contract was executed between M/s. Jindal Exports Ltd. (hereinafter referred to as "petitioner") and Fuerst Day Lawson Ltd. (hereinafter referred to as "respondent") for supply of 108 metric tons of Indian Menthol Crystals @ US$ 9.25 per kg. less 2% commission to the respondent. The shipment schedule indicated that supply was to be made in three stages as under :-

i) January – June 1995 - 3 Full Container Loads at buyer's call.
ii) July – December1995- 6 Full Container Loads at buyer's call.
iii) January – June 1996 - 3 Full Container Loads at buyer's call.

3. The aforesaid contract as well as the relevant terms of the General Conditions of Purchase accompanying the said contract read as under :-

> *"Confirmation of Purchase Reference P64608 1st August, 1994*
>
> *Jindal Exports Ltd.,*
>
> *C54/2, Wazirpur Industrial Area, New Delhi-110052, India We (Buyers) have this day bought from you (Sellers) the following goods in accordance with the following Special Conditions and the General Conditions hereon and overleaf.*
>
> *SPECIAL CONDITIONS*
>
> *ARTICLE* *INDIAN MENTHOL CRYSTALS BP/USP*
>
> *DESCRIPTION:* *fair merchantable quality, Bold crystals of the "Panda" brand.*

QUANTITY:	*108,000 (One hundred and eight thousand) kilos nett.*
PACKING:	*in drums each containing 25 kilos nett to be sound and suitable for shipment*
PRICE:	*@US$9.25 (Nine US Dollars Twenty Five Cents) per Kilo CIF EMP/NY less 2% commission to Fuerst Day Lawson Ltd.*
WEIGHTS:	*certified nett shipping weights.*
INSURANCE:	*against All Risks and War Risks as per Institute Commodity Trades Clauses (A) for at least 10% over the full CIF invoice amount.*
SHIPMENT:	*from origin 3 full container loads between January and June 1995 at buyers call, (continued on page 2)*
PAYMENT:	*in London by net cash for the full invoice amount on presentation of and in exchange for documents and drafts drawn at sight under irrevocable letter of credit.*
TERMS AND	*Documents – see page 2*
CONDITONS:	*Each shipment position to be treated as a separate contract. If goods shipped in refrigerated containers price to be increased by US$0.27 per kilo with costs for buyers account.*

All other terms and conditions as per IGPA Contract No. 9 (Including contract amendments current at the date of this contract) in so far as they do not conflict with the terms and conditions above and hereover. In the event of conflict it is understood that the terms and conditions above and hereover shall prevail.

xxxx *xxxx* *xxxx* *xxxx*

GENERAL CONDITIONS OF PURCHASE

xxxx xxxx xxxx xxxx

8. In default of fulfilment of this Contract by the Sellers, the Buyers at their discretion shall have the right either to cancel the contract or to purchase against the Sellers who shall on demand make good the loss, if any, on such purchase. If the Sellers shall be dissatisfied with the price of such purchase, the damages, if any, shall, failing amicable settlement, be determined by arbitration. The damages awarded against the Sellers shall be the difference between the Contract Price and the market price on the day of default together with any additional damages which the Buyers may directly or indirectly have suffered. Damages are to be computed on the mean contract quantity. If for any reason the Sellers fail to fulfil the Contract and are declared by the Buyers to be in default and default is either agreed between the parties or subsequently found by arbitrators to have occurred, the date of default shall, failing amicable settlement, be decided by arbitration or otherwise in accordance with clause 17.

xxxx xxxx xxxx xxxx

17(1). This Contract shall be construed in accordance with and governed by the laws of England and Wales. Save where a contrary intention is expressed in the Special Conditions set out overleaf, any dispute or difference arising between the parties to this Contract as to the meaning of the Contract or any matter or thing arising out of or connected with this Contract shall, at Buyers' option and at any time after the dispute or difference has arisen, be determined either:

17(1) 1. By the High Court of Justice in England; or

17(1) 2. By reference to arbitration in accordance with Clause 17(2) hereof.

17 (2) If the Buyers opt for arbitration, such arbitration shall be commenced and conducted.

17(2) 1. In accordance with the Rules of Arbitration of any one of the following bodies:

- *a) The Grain and Feed Trade Association; or*
- *b) The Federation of Oils, Seeds and Fats Associations Ltd.;*
- *c) The International General Produce Association Ltd.;*
- *d) The China International Economic and Trade*

Arbitration Commission, in Beijing or by its Shenzhen Sub-Commission in Shenzhen or by its Shanghai Sub-Commission in Shanghai at the Buyer's option in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties; or at Buyers' option under the rules of arbitration of any other body or trade association of their choice.

17(2) 2. In accordance with English Law in London by two arbitrators experienced in the trade one to be nominated by each party or if they shall fail to agree by an umpire who shall also be experienced in the trade and who shall be appointed by the two arbitrators. The arbitrators and umpire shall have power to act upon such oral or documentary evidence or information, without regard to the strict rules of evidence, and to conduct the arbitration in such manner as they or he may think fit and further to proceed with the arbitration in the absence of either party unless the latter gives written notice to his arbitrator at the time of the latter's appointment of his desire to be present and give and or adduce evidence.

17(3). The Buyers shall be entitled to nominate any of the above options at any time after the dispute or difference has arisen, the Sellers hereby acknowledging that they are familiar with the Arbitration Rules of the Association thereby nominated and agree to be bound by the decision of such arbitrators or of any appeal therefrom."

4. It is the petitioner's case that due to excessive heat and extremely low rainfall, mentha crop got badly damaged resulting in shortage of crude mentha oil required for manufacturing Menthol Crystals and consequently, suppliers of crude mentha oil backed out. Though initially the respondent extended the time for shipment, on 20th November, 1995 respondent wrote a letter to the petitioner stating that petitioner was in repudiatory breach of its shipment obligation. Respondent invoked the arbitration clause and claimed damages for default.

5. Subsequently, on 14th December, 1995 respondent nominated its arbitrator under the International General Produce Association Rules (in short "IGPA Rules") and requested petitioner to appoint its own arbitrator.

6. Despite number of requests and letters from IGPA, petitioner did not appoint its arbitrator. Subsequently, on 24th January, 1996 IGPA appointed Mr. R. Backer as petitioner's nominee on the Arbitral Tribunal (in short "AT"). However, vide telefax message dated 25th January, 1996 petitioner objected to IGPA appointing an arbitrator on its behalf. The said message reads as under :-

> "*Received your Fax dated 24th Jan regarding Fuerst day Lawson. We are really disappointed to note that in spite of our reply dated 18th Jan you have appointed arbitrator on our behalf without our consent and approval. We totally disagree and disapprove that, please take note that we will not be responsible in any manner for any decision taken by any arbitrator appointed without our consent.*
>
> *In case you will still want to proceed, please treat this Fax of ours as our resignation from the membership of IGPA from immediate effect.*
>
> *In the meantime this is simply for your information that we are closed for3 days starting from tomorrow the 26th Jan. (Our Republic Day Holiday) till 28th Jan. I will be travelling from 27th Jan. till 11th Feb. and will be back in office on 12th Feb."*

7. On the same date, i.e, 25th January, 1996, IGPA responded to petitioner's letter. IGPA's response reads as under :-

> ***"****I acknowledge receipt of your fax of 25th January in respect of the above case. Please be advised that the Association is obliged to appoint an Arbitrator in accordance with Rule 1.*

This Rule gives you the opportunity to do so, but we have not received any notice of a nomination from you.

I also draw your attention to Rule 3(b)(ii) of the Rules of Arbitration and Appeal concerning your reply submissions and documents which reads:

"If the party against whom a claim is made wishes to reply, such reply together with supporting documents shall be despatched in writing to the Association in triplicate and to the other party without delay but not later than 30 days from receipt of the claimants submissions. Failing receipt of such reply, the arbitrators shall proceed with the arbitration without delay."

I shall refer your fax to the Arbitrators."

8. In pursuance to a query that arose for consideration before AT, IGPA on 3rd May, 1996 wrote to the petitioner asking for petitioner's view with regard to interpretation of Clause 8 of General Conditions of Contract (in short "GCC"). The said letter dated 3rd May, 1996 reads as under :-

"I have been asked by the Arbitrators to advise you that they intend to proceed to produce an award as soon as possible.

There is a possible question regarding conflicting rules, and accordingly the arbitrators call on both parties to make submissions within 15 days of the date of this communication regarding the interpretation of Clause 8 in Buyer's "house" terms vis-à-vis corresponding regulations regarding default in the Association's terms and conditions. Upon receipt of these submissions they shall be passed on to the other party involved, whereupon said party shall have 15 days to respond. Once these 15 days have passed, arbitrators will proceed to consider this matter."

9. Though respondent filed its submission with regard to interpretation of Clause 8, petitioner did not file any response. On 30th August, 1996, the first impugned Award bearing No. 1030 was passed against petitioner for US$ 408060 along with UK£ 2020 as costs. The

relevant portion of the first Award dated 30th August, 1996 reads as under :-

> *WE FIND AND HOLD THAT :-*
>
> *A. The contract calls for shipment of 6 full container loads between July and December 1995 at buyers call;*
>
> *B. Whilst Sellers shipped 2 container loads within the period, and these were accepted by Buyers in part fulfillment, Sellers expressed their intention not to ship further quantities within the contracted period, and failed do so;*
>
> *C. Sellers intention to ship goods towards the end of 1996 cannot be considered to fall within the terms of the contract and was not accepted by Buyers;*
>
> *D. The contract contains the express agreement that any disputes arising out of the Contract are to be settled by Arbitration according to the Rules of the International Produce Association;*
>
> *E. Disputes between Sellers and Buyers concerning other contracts can have no bearing on the fulfillment of this contract nor be considered by arbitrators in this dispute;*
>
> *F. Buyers' interpretation of Clause 8 allows them to buy in against Sellers, or rely on market difference as determined by arbitrators. Sellers have not disputed this interpretation.*
>
> *WE FURTHER FIND AND HOLD THAT :-*
>
> - *Sellers are in default in respect of 4 full container loads, and*
> - *The default date is 20th November 1995.*
>
> *WE DO HEREBY AWARD THAT Sellers shall pay to Buyers within 14 days of the date of this AWARD the sum of US$ 408,060.00…."*

10. Subsequently, on 16th October, 1996 second impugned Award bearing No. 1034 was passed against petitioner for US$ 478050 along with UK£ 2120 as costs.

11. It is pertinent to mention that while petitioner boycotted the arbitral proceedings which culminated in Award No. 1030, petitioner had filed its written submissions in second arbitral proceedings which culminated in Award No. 1034.

12. In October, 1998, even when the present execution proceedings were pending in this Court, petitioner filed an appeal before IGPA's Board of Appeal challenging both the impugned Awards. However, on 14th November, 1998, the said Board of Appeal refused to hear the petitioner's appeal on the ground of delay. Against the said order, petitioner preferred an appeal. The High Court of Justice at London dismissed petitioner's said appeal *in limine*.

13. Thereafter, proceedings initiated by petitioner and respondent in this Court culminated in Supreme Court's judgment titled as ***Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*** reported in ***(2001) 6 SCC 356***. The relevant paras of the said judgment read as under :-

> *"31. Prior to the enforcement of the Act, the law of arbitration in this country was substantially contained in three enactments, namely, (1) the Arbitration Act, 1940, (2) the Arbitration (Protocol and Convention) Act, 1937, and (3) the Foreign Awards (Recognition and Enforcement) Act, 1961. A party holding a foreign award was required to take recourse to these enactments. The Preamble of the Act makes it abundantly clear that it aims at consolidating and amending Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The object of the Act is to minimize supervisory role of the court and to give speedy justice. In this view, the stage of approaching the court for making the award a rule of court as required in the Arbitration Act, 1940 is dispensed with in the present Act. If the argument of the respondent is accepted, one of the objects of the Act will be*

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

32. Part II of the Act relates to enforcement of certain foreign awards. Chapter 1 of this Part deals with New York

Convention awards. Section 46 of the Act speaks as to when a foreign award is binding. Section 47 states as to what evidence the party applying for the enforcement of a foreign award should produce before the court. Section 48 states as to the conditions for enforcement of foreign awards. As per Section 49, if the court is satisfied that a foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court and that court has to proceed further to execute the foreign award as a decree of that court. If the argument advanced on behalf of the respondent is accepted, the very purpose of the Act in regard to speedy and effective execution of foreign award will be defeated. Thus none of the contentions urged on behalf of the respondent merit acceptance so as to uphold the impugned judgment and order. We have no hesitation or impediment in concluding that the impugned judgment and order cannot be sustained."

(emphasis supplied)

14. Mr. Ramesh Singh, learned counsel for petitioner submitted that the impugned Awards were not a 'foreign award' within the meaning of Sections 44 and 47 of Act, 1996 and Article II of the New York Convention. Sections 44 and 47 of Act, 1996 and Article II(1) of the New York Convention read as under :-

*"**44. Definition.** -In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-*

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

xxxx xxxx xxxx xxxx

47. Evidence. *–(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produces before the court-*

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof, and

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

xxxx xxxx xxxx xxxx

THE FIRST SCHEDULE
(SEE SECTION 44)
CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

(emphasis supplied)

15. According to Mr. Ramesh Singh, the foreign award had not only to be an arbitral award in pursuance to an arbitration agreement but also that agreement should have fulfilled the condition precedent mentioned in the First Schedule in Article II, namely, (i) agreement should have been in writing, (ii) under such agreement, reference of differences/disputes to arbitration should have been agreed to, (iii) there should have been an undertaking under such an agreement to dispose of differences/disputes through arbitration and (iv) such undertaking should have been given by all the parties to the agreement.

16. Mr. Singh submitted that Clause 17 of the Agreement to arbitrate did not fulfill the requirements mentioned in (ii), (iii) and (iv) hereinabove inasmuch as under the said Clause, buyer was free to opt for court proceedings and not to invoke arbitration at all. He submitted that a bare reading of Clause 17 made it evident that it was not the intention of parties that arbitration was to be the sole remedy. According to Mr. Singh, the purported arbitration clause lacked mutuality and was unilateral. He submitted that at the highest, Clause 17 was an agreement to enter into a future arbitration agreement and, therefore, the same was not enforceable. In support of his submission, Mr. Singh relied upon following judgments :-

i) ***Wellington Associates Ltd. v. Kirit Mehta*** reported in ***(2000) 4 SCC 272*** wherein Supreme Court has held as under :-

> *7. On the above submissions, the following points arise for consideration:*
>
> *(1) Whether clause 5 amounted to an arbitration clause at all and whether such a question amounted to a dispute relating to the "existence" of the arbitration clause? Whether such a question should be decided only by the Arbitral Tribunal under Section 16 and could not be decided by the Chief Justice of India or his designate while dealing with an application under Section 11?*
>
> *(2) If the Chief Justice or his designate could decide the said question, then whether clause 5 of the agreements dated 15-8-1995 which used the words "may be referred" required fresh "consent" of the parties before a reference was made for arbitration?*
>
> *(3) What relief?*
>
> *POINT 1*
>
> *8. This point raises a question as to the scope of Section 16 on the one hand and Section 11 on the other.*

9. Before referring to the said sections, I shall refer to the relevant clauses 4 and 5 in the two agreements dated 15-8-1995. They read as follows:

> *"4. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.*
>
> *5. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."*

xxxx xxxx xxxx xxxx

17. Further, a reading of sub-sections (4), (5) and (6) of Section 11 shows that they enable the Chief Justice or his designate to appoint an arbitrator or arbitrators, and likewise Section 11(12) enables the Chief Justice of India or his designate to appoint an arbitrator or arbitrators; under Rule 2 of the scheme framed by the Chief Justice of India, a request is to be made to the Chief Justice of India along with a duly certified copy of the "original arbitration agreement". Section 2(b) of the Act defines "arbitration agreement" as an agreement referred to in Section 7. Section 7 defines "arbitration agreement" as follows:

> *"7. Arbitration agreement.—(1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement shall be in writing.*
>
> *(4) An arbitration agreement is in writing if it is contained in —*
>
> > *(a) a document signed by the parties;*
> >
> > *(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or*
> >
> > *(c) an exchange of statements of claim and defence in which the existence of the agreement*

is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

The words in sub-section (1) of Section 7, "means an agreement by the parties to submit to arbitration", in my opinion, postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator/arbitrators. Section 7 does not cover a case where the parties agree that they "may" go to a suit or that they "may" also go to arbitration.

18. Thus, unless the document filed by the party before the Chief Justice of India or his designate is an "arbitration agreement" as defined in Section 7 as explained above, requiring a reference in a mandatory sense, no reference, in my view, can be made to the Arbitral Tribunal. It is, as already stated, indeed implicit — if an objection is raised by the respondent before the Chief Justice of India or his designate that the so-called arbitration clause is not an arbitration clause at all falling within Section 7 — that such a question will have to be decided in the proceedings under Section 11 of the Act. Therefore the contention raised by the learned counsel for the petitioner that the question — whether clause 5 of the agreement amounts to an arbitration clause — is to be decided only by the Arbitral Tribunal is liable to be rejected.

19. It is true that in Ador Samia (P) Ltd. v. Peekay Holdings Ltd. it has been held that the Chief Justice or his designate under Section 11(6) acts in an administrative capacity and he does not exercise any judicial function and that he has no trappings of a judicial authority. But this decision, in my view, cannot support the plea raised by the petitioner in his rejoinder. Even if the Chief Justice of India or his designate under Section 11(12) is to be treated as an administrative authority, the position is that when the said authority is approached seeking appointment of an arbitrator/arbitrator tribunal under Section 11 and a question is raised that there is, to start with, no arbitration clause at all between the parties, the Chief Justice of India or his designate has to decide the said question."

ii) ***Jagdish Chander Vs. Ramesh Chander and Ors.*** reported in ***2007(2) Arb. L.R. 302 (SC)*** wherein it has been held as under :-

> *"2. The appellant and first respondent entered into a Partnership as per deed dated 9.1.1964 to carry on the business under the name and style of 'Empire Art Industries'. Clause 16 of the said Deed relates to settlement of disputes. The said clause is extracted below:*
>
> > *"16. If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine.*
> >
> > *(emphasis supplied)*
>
> *xxxx xxxx xxxx xxxx*
>
> *8. ……. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement:*
>
> *(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.*
>
> *(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put*

forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

iii) ***Jagatjit Jaiswal and Anr. v. Karmajit Singh Jaiwal*** reported in ***2007 (4) Arb.L.R.300 (Delhi)*** wherein it has been held as under :-

> *"5. The MOFS also contained clause 9 whereby a Dispute Resolution Committee (DRC) was to be constituted. The said clause which calls for interpretation, reads as follows:*
>
> > *9. The Parties agreed to nominate and constitute a committee hereinafter to be referred to as the Dispute Resolution Committee comprising of persons acceptable to them. It is agreed that the Parties shall be bound to refer all disputes between them relating to any matter or dealings between the Parties that have any connection to the affairs of any of the Companies or otherwise and the decision of the Committee shall be final and binding on the Parties. The Parties agreed and undertook to abide by all decisions of the Committee whether the Committee chooses to act as arbitrator or as umpire or referee. Accordingly, the Parties have agreed not to take recourse to litigation to resolve disputes or differences between them.*
>
> *xxxx xxxx xxxx xxxx*
>
> *55. The next issue which arises for consideration is, what is the effect of clause 9 providing for an option to the DRC to either act as an Arbitrator or as an expert? In* ***Wellington Associates Ltd(supra)*** *the clause under consideration before the Court gave discretion to the party to file a suit to resort to arbitration. The Court held that since either of the forums could be approached by the parties there was no obligation to refer matters to arbitration and thus, there was no arbitration agreement. It was "not the intention of the parties that arbitration is to be the sole remedy". Thus, unless there is a clear and unequivocal intention expressed in the written agreement, to resort to arbitration alone, an arbitration agreement does not comes into existence."*

iv) ***Emmsons International Ltd. Vs. Metal Distributors (UK) and Anr.*** reported in ***116(2005) DLT 559*** wherein it has been held as under:-

> *"4. Clause 13 of the contract between the parties on the strength of which the defendant No. 1 has moved the present*

application and has raised the objection about the jurisdiction of this Court to entertain and try the suit of the plaintiff is a material one and is reproduced below for the facility of reference:

> *"Governing Law and Forum for Resolution of Disputes- This contract shall be construed in accordance with and governed by English Law. Sellers shall be entitled at their opinion, to refer any dispute arising under this contract to arbitration in accordance with the rules and regulations of the London Metal Exchange or to institute proceedings against buyers in any Courts of competent jurisdiction."*
>
> *xxxx xxxx xxxx xxxx*

11. On the other hand, Mr. V. K. Sharma, learned Counsel for the plaintiff, has argued that the Clause 13 is not capable of enforcement because it is against the public policy and also hit by the provisions of Section 28 of the Contract Act inasmuch as it does not give any right or remedy to the plaintiff e.g. the buyer of the goods for the redressal of his grievance/for resolution of any disputes/claims raised by him in relation to the supplies made under the said contract. A reading of Clause 13 would clearly show that it is a unilateral cause because it gives all the right to the sellers i.e. defendants to refer any dispute arising under the Contract through the mechanism of Arbitration in accordance with the Rules and Regulation by instituting the proceedings against the buyers and it does not give any corresponding rights to the buyers i.e. plaintiff in the present case. Such a clause would be hit by Section 28 of the Indian Contract Act, 1872, and will not enforceable as has been held by this Court in the case of ***A. V. N. Tubes Ltd.*** *v.* ***Bhartia Cutler Hammer Ltd.,*** *46 (1992) DLT 453 (DB)=1992 (2) Arbitration Law Reporter 8. In this case the Court considered the effect of a similar clause which was to the following effect:*

> *"Without prejudice to the above Clause 17, of the Contract the Company, M/s. AVN Tubes Limited, reserves its right to go in for arbitration, if any dispute so arisen is not mutually settled within 3 months of such notice given by the Company to the Contractor. And, the award of the Arbitration, to be appointed by the Company, M/s. AVN Tubes Limited, shall be final and binding on both the Company and the Contractor."*

12. The Court on a reading of the aforesaid arbitration clause held that M/s. A.V.N. Tunes Ltd. alone has been given the right to go in for arbitration. Not only this, the aforesaid course has

to be followed only at the instance of the company by giving three months notice if the dispute is not mutually settled between the parties; and thirdly, the right to appoint an arbitrator has been given only to M/s. AVN Tubes Limited and the decision of the Arbitrator of M/s. AVN Tubes Ltd. is to be considered final and binding on both the parties. The Court held that cumulative effect of all the three clauses was that it is unilateral agreement. In case, any one of the clauses alone had been there, that by itself may not have made the agreement unilateral. The Court finally ruled that the said agreement was clearly unilateral and not enforceable in a Court of Law.

xxxx xxxx xxxx xxxx

"15. The basis of the above legal provision is that no man can exclude himself from the protection of Courts by contract. In other words, every citizen has the right to have his legal position determined by the ordinary tribunals, except, subject to contract (a) when there is an arbitration clause which is valid and binding under the law; and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be discharged. The section renders void those agreements which absolutely restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. As noticed above, Clause 13 of the agreement between the parties in the case in hand imposes an absolute bar on the buyer of the goods i.e. the plaintiff from enforcing its rights under the contract before ordinary tribunals or through the Alternate Dispute Resolution mechanism. In the opinion of this Court, such type of absolute restriction is clearly hit by the provisions of Section 28 of the Contract Act besides it being against the public policy. Had it been a case where the restriction imposed by the contract was against the enforcement of the rights of the buyer before the ordinary tribunals but the agreement had provided for selection of one of several ordinary tribunals in which ordinarily a suit would lie, the defendant would have been within its right to enforce such an agreement."

17. Mr. Singh next submitted that the composition of AT was neither in accordance with Agreement executed between the parties nor in accordance with the English Arbitration Act, 1950, which applied to the present proceedings. This, according to Mr. Singh, was for the reason that neither Clause 17 of GCC nor IGPA Rules prescribed any procedure in case a party defaulted in appointing its arbitrator. Hence,

according to Mr. Singh, the provision of English Arbitration Act, 1950 would apply according to which there could only be a sole arbitrator.

18. Mr. Singh further submitted that the parties had agreed to an ad hoc arbitration, that is, IGPA Rules and not an institutional arbitration and, therefore, the appointment of an arbitrator by IGPA on petitioner's behalf was not in accordance with the Agreement executed between the parties. He further submitted that the purported foreign Awards dealt with respondent's claims which were not contemplated by the parties to be referred to arbitration and as such did not fall within the ambit of purported arbitration clause. According to Mr. Singh, the arbitration could have commenced by virtue of Clause 8 of GCC only if respondent had made a risk purchase against petitioner on its default to supply goods under the contract.

19. Mr. Singh next stated that in the present case, petitioner was unable to present its case as Rule 3(g) of IGPA Rules did not allow any legal representative to present the case of the parties. He pointed out that as the petitioner did not have any office in England and was not familiar with English law, petitioner was prejudiced. Rule 3(g) of IGPA Rules reads as under :-

> *"3. PROCEDURE FOR ARBITRATIONS*
>
> *xxxx xxxx xxxx xxxx*
>
> *(g) If either party has expressed a wish to be present, the arbitrators or the umpire shall give reasonable notice to the parties of the date, time and place when any oral evidence or additional submissions may be heard and both parties to the*

> *arbitration or their authorised representatives may attend any such hearing but may not have present or be represented by counsel, solicitor or any member of the legal profession wholly or principally engaged in legal practice."*

20. Mr. Singh next submitted that the impugned Awards were contrary to public policy of India as not only the same were passed on a notional and not a real loss but they also awarded claims beyond 2% of value of the contract, that means, respondent's entitlement. In this context, he referred to and relied upon the case of ***Usha Beltron Ltd. Vs. Nand Kishore Parasramka and another*** reported in ***AIR 2001 Calcutta 137*** wherein it has been held as under :-

> *"44. The learned Counsel of the defendant company rightly submitted that loss of damages must be actual and not by way of punishment. Damages are obviously required to be in the nature of compensation and it cannot be a penal one. As no actual purchase had been made by the plaintiff firm on the alleged failure of the defendant company to supply the balance quantity of the ordered material the plaintiff No. 2 admittedly it could not suffer any loss and the question of suffering any damages or quantification of such damages under such circumstances, therefore, does not arise. It has been held by the various courts that damages can be quantified only by way of compensation for loss suffered and not by way of punishment. The learned Counsel of the defendant company cited following decisions which are very much relevant in this regard……"*

21. According to Mr. Singh, the impugned foreign Awards were opposed to public policy inasmuch as they were procured by inducement and were affected by fraud and corruption. Mr. Singh stated that respondent had mischievously opted for IGPA Rules because respondent had complete control over IGPA. He stated that

representative of respondent was a Member of Managing Committee of IGPA.

22. Mr. Singh also stated that petitioner was not given proper notice for appointment of an arbitrator as well as proper notices of arbitral proceedings, which were held behind the back of the petitioner.

23. Mr. Singh lastly submitted that purported foreign Awards sought to be executed had not yet become final under the law of the contract under which they had been passed. He submitted that in accordance with Section 26 of the Arbitration Act, 1950 (England) it was a condition precedent that an award made by an Arbitral Tribunal in England could only be enforced after leave of English Court had been obtained. According to Mr. Singh, if the award could not be enforced in England, it could not be enforced in India.

24. On the other hand, Mr. Ashwani Kumar, learned senior counsel for respondent stated that this Court must approach the matters with a pro enforcement bias and the Court must lean in favour of sustaining the validity of the arbitration agreement. He submitted that courts must give due weightage to the autonomy of the parties in construing the arbitration and procedures thereof. In this connection, Mr. Kumar relied upon ***Sime Darby Engineering Sdn. Bhd. Vs. Engineers India Ltd.*** reported in ***(2009) 7 SCC 545*** wherein Supreme Court has held as under :-

"28. …….The parties' autonomy in the arbitration agreement must be given due importance in construing the intention of the parties."

25. Mr. Kumar also relied upon the following passage in ***Russell on Arbitration, Twenty-First Edition*** which reads as under:-

"2-003 The approach of the Courts. English law respects the parties' freedom to enter into arbitration agreements in the same way as it respects their freedom to enter into other contracts. As a result the court gives effect to arbitration agreements except in cases of hopeless confusion:

- *An agreement contained a clause referring "any dispute and/or claim" to arbitration in England. It was followed by a clause referring "any other dispute" to arbitration in Russia. It was held that the arbitration agreement was void for ambiguity, and was neither effective nor enforceable.*

However "the court should if the circumstances allow lean in favour of giving effect to the arbitration clause to which the parties have agreed", and seek to give effect to their intentions [Refer to Paul Smith Ltd. Vs. H&S International Holdings Inc. (1991) 2 Lloyd's Rep. 127]."

26. Mr. Kumar submitted that validity of the arbitration Clause and constitution of AT was required to be decided with reference to the agreement executed between the parties and in accordance with the substantive and procedural law of the country in which and/or under which the award had been rendered. Mr. Kumar relied upon Section 48(1)(a) of Act, 1996 and further pointed out that the applicable governing law in the present case was the English law. He submitted that any challenge with regard to arbitration clause was to be determined with reference to the English law as stated in the contract.

27. Mr. Kumar stated that as both the parties had signed the contract containing the arbitration clause, namely, Clause 17, the test of mutuality was satisfied. He submitted that the parties were *ad idem* at all time to the nature, effect and validity of the said arbitration clause. He stated that said arbitration clause gave an option to the buyer at the first instance to invoke arbitration in accordance with Clause 17. According to Mr. Kumar, the arbitration mechanism was mandatory with full implication thereof. He submitted that such clauses had been upheld by Courts in England after applying the English law as well as by the Courts in India.

28. Mr. Kumar next submitted that the Courts in England had upheld the validity of clauses wherein one party had been given option to choose any forum that means either Court or arbitration. In this context, Mr. Kumar relied upon the following passage of ***Russell on Arbitration, Twenty-First Edition*** which reads as under :-

> *"A time charter contained a conditional or optional agreement to refer future disputes to arbitration, with the English courts having jurisdiction if the option was not exercised or the condition not met. The Court held that this did not prevent it being a valid arbitration agreement"*

29. Mr. Kumar also submitted that the constitution of AT was in accordance with the arbitration clause read with IGPA Rules of arbitration and appeal. He pointed out that the objection with regard to constitution of AT had neither been taken in the original objection petition bearing OMP No. 203/1998 nor in the other connected OMP bearing No. 204/1998. He

also drew my attention to the correspondence exchanged between the petitioner, IGPA Secretariat and Arbitrator to show that at no stage the said objection was taken at the time of initiation of arbitration proceedings or soon thereafter. In fact, according to Mr. Kumar, petitioner had actually participated in its own way in the arbitration proceedings and acquiesced in the same. He laid considerable emphasis on the fact that petitioner had filed their written submissions before the A.T. in Award No. 1034. In this connection, Mr. Kumar relied upon the following judgments :-

i) ***Narayan Prasad Lohia Vs. Nikunj Kumar Lohia & Ors.*** reported in ***(2002) 5 SCC 572, para 16***; and

ii) ***Prasun Roy v. Calcutta Metropolitan Development Authority and Anr.*** reported in ***(1987) 4 SCC 217, paras 5, 6 & 7***.

30. Mr. Kumar also pointed out that petitioner had not taken any objection with regard to appointment of an Arbitrator by IGPA on their behalf. According to Mr. Kumar, IGPA had rightly exercised its option to appoint an arbitrator in terms of IGPA Rules I(a) (b), II and III.

31. Mr. Kumar submitted that interpretation of Clause 8 of GCC by AT was correct and legal. He stated that the award of damages was neither unconscionable nor opposed to public policy. He emphasised that on complete reading of Clause 8, it cannot be said that it was necessary for the respondent to first purchase the unsupplied cargo and suffer damages, than alone claim compensation/damages. Mr. Kumar further submitted that the contention of the petitioner that the

respondent was entitled only to 2% commission under the contract was wrong. He submitted that all correspondence including the contracts was on principal to principal basis and the alleged 2% commission was only a discount offered by the seller to the buyer as was customary in the commodity trade.

32. Mr. Kumar submitted that assuming without admitting that interpretation of Clause 8 by the A.T. was contrary to the opinion of this Court, this Court would not substitute its views for that of the Arbitrator. In this context, Mr. Kumar relied upon the following judgments :-

i) ***G. Ramachandra Reddy and Co. v. Union of India (UOI) and Anr.*** reported in ***2009 (6) SCC 414;***

ii) ***Kwality Manufacturing Corporation v. Central Warehousing Corporation*** reported in ***(2009)5SCC 142***; and

iii) ***Smita Conductors Ltd. vs. Euro Alloys Ltd.*** reported in ***(2001) 7 SCC 328***.

33. As far as issue of public policy was concerned, Mr. Kumar submitted that public policy of India was to be narrowly construed and there was no fraud or corruption in the present case. He pointed out that Mr. Morris Lawson, the Managing Director of respondent-Company was not the Member of the Governing Council of IGPA at the relevant time.

34. Mr. Kumar further submitted that it was not necessary in accordance with the English law that the foreign award made in England should have been confirmed by the English Court only. He submitted that in any event, the said issue stood decisively determined by the Supreme Court of India in a judgment rendered inter se between the parties, that is, ***Fuerst Day Lawson Ltd.*** (Supra). In this context, he relied upon certain observations made by Supreme Court in paragraph no. 31 of the said judgment.

35. Mr. Kumar lastly submitted that the respondent was entitled to interest upon the Awards as the same was a money decree. In this context, he relied upon Section 20 of the Arbitration Act, 1950 (England) along with judgments rendered by the Supreme Court in the cases of ***Renusagar Power Co. Ltd. v. General Electric Co.*** reported in ***1994 Supp (1) SCC 644*** and ***Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*** reported in ***(1992)1 SCC 508***.

36. In rejoinder, Mr. Ramesh Singh emphasized that petitioner had advanced an argument on validity of the arbitration clause as contemplated under Sections 44 and 47 read with New York Convention and not Section 48(1)(a) of Act, 1996. He submitted that Sections 44 as well as Article II of New York Convention of Act, 1996 itself suggested that it was the local law of the place where enforcement

was sought that would be the governing law with regard to enforcement proceedings.

37. In the alternative, Mr. Singh submitted that as Part II of Act, 1996 which dealt with 'foreign award' did not have a provision defining arbitration agreement, then by virtue of Section 2(2) of Act, 1996, the definition as given in Section 7 of said Act, 1996 would apply. In this context, he relied upon observations of ***Bhatia International Vs. Bulk Trading S.A. and Anr.*** reported in ***(2002) 4 SCC 105***.

38. Mr. Singh submitted in the alternative that as per conflict of law, rules applicable for enforcement of a foreign award viz., Rule 62, it was the local law of place where enforcement was sought, that would be the law governing enforcement proceedings. The relevant portion of Rule 62 reads as under :-

> *"RULE 62(1) A foreign arbitration award will be enforced in England whether or not the law governing the arbitration proceedings requires a judgment or order of a court to make the award enforceable.*
>
> *(2) If a party obtains a foreign judgment by which a foreign arbitration award is made enforceable, he may enforce that judgment in England in accordance with Rules 35, 46, 47 and 49.*
>
> *COMMENT*
>
> *Clause (1) of the Rule. The enforcement in England of foreign awards, like the enforcement of foreign judgments, is governed by English law. Foreign law regulating the enforcement of awards and in particular the need for obtaining judgments thereon does not apply in England. Hence a foreign award may be enforced in England though it has not been made enforceable by judgment in its country of origin and though the law of that country requires a judgment*

> *of a court to make the award enforceable. If the English court insisted on a foreign judgment in order to make the award enforceable in England, it would "not be enforcing the award but the judgment," i.e. the foreign award as such might be deprived of all effect in England. The English technique of enforcing an award applies to all proceedings for enforcement of arbitral awards in England, whether the awards are English or foreign. How the award can be made enforceable under its own law is of no concern to the English court……"*

39. Mr. Singh submitted that assuming without admitting that applicable law was the English law, then also the law cited by respondent was not the applicable English law inasmuch as the English Arbitration Act of 1950 did not apply. He pointed out that the first impugned Award had been rendered on 30th August, 1996, when the new English Arbitration Act of 1996 had come into force, that is, on 17th June, 1996.

40. In the alternative, Mr. Singh submitted that the English law would be the foreign law, the proof of which would have to be rendered on the line of proving facts in a trial.

41. Mr. Singh next submitted that non-participation in appointment of the arbitrator or before the arbitrator did not amount to waiver/acquiescence. According to him, petitioner had to participate in the arbitration proceedings before the issue of waiver/acquiescence could be attracted.

42. Mr. Singh lastly submitted that in the present case the Arbitrator had given no interpretation with regard to Clause 8 of GCC. According

to him, there was a complete abdication of the said exercise. Consequently, according to him, the question of substituting the view of the Arbitrator of interpretation did not arise at the first place in the present case. He submitted that judgments cited by respondent with regard to power of this Court to interpret a particular clause of the contract were under the Arbitration Act, 1940 – which did not take into account the new Section 28 of Act, 1996.

43. After hearing the parties, I am of the view that all the cases proceed on admitted facts and the legal issues raised by petitioner have to be determined in accordance with the directions given by the Supreme Court in the judgment rendered in the case between the parties. It is pertinent to mention that in para 33 of ***Fuerst Day Lawson Ltd.*** (supra), the Supreme Court while remitting the case had directed this Court *"for proceeding with enforcement of the award in the light of the observations made"***.** Consequently, what I have to first consider is whether the impugned Awards are enforceable or not.

44. In my opinion, Part II Chapter I is an integrated scheme which has to be applied to New York Convention awards. Mr. Ramesh Singh's argument that validity of the arbitration clause between the parties had to be tested under Sections 44 and 47 read with New York Convention *de hors* Section 48(1)(a) of Act, 1996 is untenable in law. In fact, Section 44 of Act, 1996 has to be read in conjunction with Section 48(1)(a) of Act, 1996 and New York Convention as would be

apparent from the juxtaposition of the relevant portion of the said two Sections along with the New York Convention which reads as under :-

> *"**44. Definition.** – In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award .....*
>
> *(a) in pursuance of an **agreement** in writing for arbitration to which the Convention set forth in the First Schedule applies..."*
>
> *xxxx xxxx xxxx xxxx*
>
> ***48. Conditions for enforcement of foreign awards.** – (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that –*
>
> *(a) the parties to the **agreement** referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or..."*
>
> *xxxx xxxx xxxx xxxx*
>
> *ARTICLE II.....*
>
> *3. The Court of a Contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said **agreement** is null and void, inoperative and incapable of being performed."*
>
> *(emphasis supplied)*

45. Consequently, on a conjoint reading of the relevant provisions of Part II Chapter I of Act, 1996, I am of the opinion that any challenge to the validity of the arbitration clause has to be determined with reference to the substantive law governing the contract itself. In fact, the

expression 'Agreement' in Sections 44 and 48 has to be given the same meaning.

46. I am also fortified in this view by the following observations of the Supreme Court in ***Shin-Etsu Chemical Co. Ltd. Vs. M/s. Aksh Optifibre Ltd. and Anr.*** reported in ***AIR 2005 SC 3766*** wherein it has been held as under :-

> *"**89**. There is yet another strange result which may come about by holding that Section 45 requires a final finding. This can be illustrated by reference to the facts of the present case. The parties here have subjected their agreement to the laws of Japan. The question that will arise is: When a court has to make a final determinative ruling on the validity of the arbitration agreement, under which law is this issue to be tested? This question of choice of law has been conclusively decided by the judgment of this Court in National Thermal Power Corpn. v. Singer Co. where it was observed:*
>
> > *"The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption."*
>
> ***90.*** *Thus, the proper law of the arbitration agreement is the substantive law governing the contract itself. In the present case, to effectively decide whether the arbitration agreement is "null and void, inoperative or incapable of being performed", the court would have to apply the law to which the contract has been expressly subjected, namely, Japanese law. Obviously, proof of Japanese law (as applicable to arbitration agreements) would have to be rendered on the lines of proving facts in a trial."*
>
> *(emphasis supplied)*

47. In my opinion, the Court while testing the validity of the arbitration agreement shall apply the proper law of the agreement and not the law of the country where the awards are sought to be enforced. Accordingly, I am of the view that the burden is on the petitioner to prove that the arbitration agreement is invalid under the law to which the petitioner subjected it, namely, the English law.

48. Though in the pleadings it was the petitioner's case that English Arbitration Act, 1950 applied to the present proceedings, during rejoinder it was sought to be urged that the new English Arbitration Act, 1996 would apply. However, in my view, the English Arbitration Act, 1950 would apply to the present proceedings as the arbitration had commenced on 18th December, 1995 when a request for arbitration was filed by the respondent, that means, much prior to coming into force of the new English Arbitration Act, 1996 on 17th June, 1996.

49. In fact, the legality and validity of unilateral arbitration clause has been upheld in England. ***Mustill and Boyd in Commercial Arbitration, Second Edition*** have commented as under:-

> *"13.* ***Unilateral arbitration clauses***
>
> *Commercial contracts occasionally give a unilateral right of arbitration. Sometimes they provide that claims by one party are to be the subject of arbitration, whereas claims by the other are not. In other cases, one party has an option to call for arbitration, whilst the other party does not. Such clauses are recognized by the Court as binding."*
>
> *(emphasis supplied)*

50. The English Court of Appeal, Civil Division in ***Pittalis and Others Vs. Sherefettin*** reported in ***1986 (2) All England Law Reports 227*** has also upheld the legality of unilateral arbitration clauses. In ***Pittalis*** (supra), the Court held as under :-

> *"……Peter Gibson J held that it was an essential attribute of an arbitration clause that it gave either party the right to refer the dispute to arbitration, and that, since the lessee had a unilateral right to refer, there was no 'agreement to refer future disputes to arbitration'.*
>
> *That decision was based on the statement by Davies LJ in Baron V. Sunderland Corp. [1966] 1 All ER 349 at 351, [1966] 2 QB 56 at 64 as follows:*
>
> > *'It is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration; and it is an essential ingredient [of an arbitration clause] that either party may in the event of a dispute arising refer it in the provided manner to arbitration. In other words, the clause must give bilateral rights of reference.'*
>
> *The judgment of Davies LJ was concurred in by the other two members of the Court.*
>
> *In Tote Bookmakers Ltd v Development and Property Holding Co Ltd [1985] 2 All ER 555 at 559, [1985] Ch. 261 at 266 Peter Gibson J, after observing that the statement of the law by Davies LJ had been subjected to powerful criticism in both Russell on Arbitration (20th edn, 1982) pp 38-43 and Mustill and Boyd Commercial Arbitration (1982) p52, came to the conclusion that, whatever his personal views on the question, he was compelled as a matter of authority to follow the statement in Baron v Sunderland Corp.*
>
> *Looking at the matter apart from authority, I can see no reason, why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by only one of the parties seems to me to be irrelevant. The arrangement suits both parties. The reason why that is so in cases such as the present and in the Tote Bookmakers case is because the landlord is protected, if there is no arbitration, by his own assessment of the rent as stated in his notice; and the tenant is protected, if he is dissatisfied with the landlord's assessment of the rent, by his right to refer the matter to*

arbitration. Both sides, therefore, have accepted the arrangement and there is no question of any lack of mutuality.

The authorities prior to Baron v. Sunderland Corp. lead me to the same conclusion."

xxxx xxxx xxxx xxxx

I do not think it is correct to say that the clause must give bilateral rights of reference. All that is necessary is that there shall be a contract which gives a right of reference (whether unilateral or bilateral). That is present in this case.

xxxx xxxx xxxx xxxx

The result in my view is that the parties are entitled, if they so choose, to confer a unilateral right to insist on arbitration.

(emphasis supplied)

51. In fact, a careful reading of the Supreme Court of India's judgment in ***Wellington Associates Ltd.*** (supra) reveals that though the judgment of the English Court in ***Pittalis and Others*** (supra) was specially noted by the Supreme Court, it was not dissented from. In this connection, the following observations of the Supreme Court in ***Wellington Associates Ltd.*** (supra) are relevant:-

"24. Before leaving the above case decided by the Rajasthan High Court, one other aspect has to be referred to. In the above case, the decision of the Calcutta High Court in Jyoti Bros. Vs. Shree Durga Mining Co. has also been referred to. In the Calcutta case the clause used the words "can" be settled by arbitration and it was held that fresh consent of parties was necessary. Here one other class of cases was differentiated by the Calcutta High Court. It was pointed out that in some cases, the word 'may' was used in the context of giving choice to one of the parties to go to arbitration. But, at the same time, the clause would require that once the option was so exercised by the specific party, the matter was to be mandatorily referred to arbitration. Those cases were distinguished in the Calcutta case on the ground that such cases where option was given to one particular party, the mandatory part of the clause stated as to what should be done after one party exercised the option. Reference to arbitration

was mandatory, once option was exercised. In England too such a view was expressed in Pittalis Vs. Sherefettin,. In the present case, we are not concerned with a clause which used the word "may" while giving option to one party to go to arbitration. Therefore, I am not concerned with a situation where option is given to one party to seek arbitration. I am, therefore, not to be understood as deciding any principle in regard to such cases.

25. Suffice it to say, that the words "may be referred" used in clause 5, read with clause 4, lead me to the conclusion that clause 5 is not a firm or mandatory arbitration clause and in my view, it postulates a fresh agreement between the parties that they will to go to arbitration. Point 2 is decide accordingly against the petitioner."

(emphasis supplied)

52. In ***Navigazione Alta Italia SpA Vs. Concordia Maritime Chartering AB (The 'Stena Pacifica")*** reported in ***(1990) 2 Llyod's Law Reports 234*** the Queen's Bench Division (Commercial Court) upheld the validity of optional arbitration agreements after observing as under :-

"The arbitration clause in the charter–party is cl.41 [which I quote down to and including sub-c(i)]:

41 (a)This charter shall be construed and the relations between the parties determined in accordance with the laws of England.

(b) Any dispute arising under the charter shall be decided by the English Courts to whose jurisdiction the parties hereby agree.

(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force. (i) A party shall lose its right to make such an election only if: (a) it receives from the other party a written notice of dispute which – (1) states expressly that a dispute has arisen out of this charter: (2) specifies the nature of the dispute: and (3) refers expressly to this clause 41(c).

Sub-clause c(i) provides machinery which may operate to deprive a party of the right to choose arbitration, but it is not suggested that this occurred in the present case.

The clause therefore submits all disputes to the jurisdiction of the English Courts, subject to each party's right "to elect to have any such dispute referred to arbitration" in accordance with cl. 41(c).

A similar though not identical clause was considered in a different context by Mr. Justice Bingham in The Messiniaki Bergen. [1983] 1 Lloyd's Rep. 424. Because the actual clause has since been considered by the Court of Appeal in The Amazona [1989] 2 Lloyd's Rep. 130, though in a yet different context, I can summarize the relevant part of Mr. Justice Bingham's judgment by saying that (1) he held that the agreement is not merely an agreement to agree. On a valid election to arbitrate"…… no further agreement is needed or contemplated"; and (2) he "saw force in the contention that until an election is made there is no agreement to arbitrate".

The Amazona, [1989] 2 Lloyd's Rep. 424, was concerned with the question whether cl.41, which might permit an election to arbitrate after the one year time limit expired, was therefore void under art. III r.8. The Court of Appeal described the clause as an option to arbitrate and confirmed that until a valid election is made, the contract provides for High Court jurisdiction rather than arbitration.

The defendants submit that cl. 41 permits the election to be made only when a dispute has arisen. They say that "any such dispute", in cl. 41(c), refers to "any dispute arising" in cl. 41(b), so that no notice can be given until a dispute has arisen. Thus, the agreement in relation to future disputes is that they will be subject to the Court's jurisdiction, unless, when a dispute arises, a valid notice is given.

The plaintiffs challenge this. They say that "any dispute arising" is the common form of reference to the future disputes and that a notice may be given in respect of any such dispute, before or after it has arisen.

I am inclined to accept the plaintiffs' submissions on this point, but I prefer to rest my judgment on their second and wider contention, that even a conditional (or optional) agreement to refer future disputes to arbitration, is nevertheless "an agreement to refer future disputes" within the clause. It is a binding agreement (cf. Mr. Justice Bingham quoted above) and it requires the parties to refer a future dispute to arbitration whenever a valid election is made. True, there is no reference of any particular dispute until such an agreement does come into existence, but there never can be an actual reference until after the dispute has

arisen. Before that, there can only be an agreement that future disputes will be referred, and in my judgment the fact that such an agreement depends upon the exercise of an option, even by the party claiming arbitration, does not prevent this from being "an agreement to refer future disputes" within the clause."

(emphasis supplied)

53. In ***Russell on Arbitration, Twenty-First Edition*** it has been stated that mutuality is not a mandatory requirement. In the said commentary, it has been stated as under :-

> *2-045* ***Mutuality no longer a requirement****. Until 1986 it was the law that an arbitration agreement had to be "mutual": it had to give both parties the same right to refer disputes to arbitration. The Court of Appeal have redefined this requirement, seeing no lack of mutuality in an agreement between two persons which conferred on one of them alone the right to refer the dispute to arbitration. As Fox L.J. said (in a rent review case):*
>
> *"There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by one of the parties only seems to me to be irrelevant. The arrangement suits both parties ... the landlord is protected, if there is no arbitration, by his own assessment of the rent as stated in his notice: and the tenant is protected, if he is dissatisfied with the landlord's assessment of the rent, by his right to refer the matter to arbitration. Both sides have, therefore, accepted the arrangement and there is no lack of mutuality."*

54. In my opinion, even if the English law did not apply, then also upon a proper construction of the Disputes Resolution Mechanism as contained in Clause 17 of the General Conditions of Purchase, there was an irrevocable open offer by the grantor of the option, namely, the petitioner to submit differences to arbitration and the power of acceptance vested in the option holder namely, the respondent. When the option was exercised and the offer accepted, the arbitration

mechanism became mandatory with full implications thereof. Consequently, in my view, the petitioner's submissions that there was no legally valid arbitration agreement, is contrary to the facts of the case and untenable in law.

55. As far as the objection with regard to composition of AT is concerned, I am of the view that present AT was constituted in accordance with Rules of IGPA, in particular Rule 1 which reads as under :-

> *"1. APPOINTMENT OF ARBITRATORS/UMPIRE*
>
> *(a) The Association shall appoint arbitrator(s) who shall be a member of the Arbitration and Appeal Panel of the Association and who shall have accepted the appointment except that if a member is a party to the dispute, it may appoint its own arbitrator. Non-members may state a preference for a particular arbitrator at which the Association would have due regard to him in the appointment procedure. However, the two parties may be agreement accept the appointment of a sole arbitrator from the Arbitration and Appeal Panel, who shall have accepted the appointment. Any reference to arbitrators in these Rules shall also be taken to refer to a sole arbitrator.*
>
> *(b) (i) Any objection to either arbitrator on the grounds that either arbitrator was not eligible to serve must be made in writing and established to the satisfaction of the Management Committee of the Association before the commencement of the arbitration.*
>
> *(ii) If such objection is made the Association in its absolute discretion shall have the power to appoint a substitute arbitrator or arbitrators from the Arbitration and Appeal Panel up to the beginning of the arbitration.*
>
> *(iii) No Award of Arbitration shall be questioned or invalidated on the ground of any irregularity in the appointment of the arbitrators or umpire or on the ground that any arbitrator or umpire was not eligible to serve.*

> *(c) If two arbitrators have been appointed they shall, if and when they disagree, appoint an umpire from the Arbitration and Appeal Panel. If the arbitrators fail to agree on the appointment of an umpire, they shall notify the Association which shall appoint an umpire from the Arbitration and Appeal Panel.*
>
> *(emphasis supplied)*

56. From the aforesaid, it is apparent that by virtue of IGPA Rules, IGPA alone had the power to appoint an arbitrator. However, in case members of IGPA were a party to the arbitration, then the members had an option to appoint an arbitrator. In fact, Rule 1 significantly uses the expression *'may'* while giving the option to IGPA Members to appoint an arbitrator. Since admittedly in the present case, petitioner did not appoint an arbitrator despite being given number of opportunities to do so, I am of the view that IGPA rightly exercised its power to appoint an arbitrator. Consequently, the petitioner cannot raise a grievance on this ground.

57. Though various grounds have been urged by Mr. Ramesh Singh to contend that the impugned Awards were opposed to public policy, I am of the view that the concept of public policy has to be narrowly construed, that is to say violative of fundamental policy of law of India. Neither the Court nor a party can import its own individual beliefs about the "justice of the case", and then to try and fit its predilections into the public-policy-ground. In my opinion, an expansive construction of the concept of public policy would vitiate the New York

Convention's basic intent of removing obstacles to enforcement.

58. In ***Parsons & Whittemore Overseas Co., Inc. Vs. Societe General De L'industrie Du Papier (rakta)*** reported in ***United States Court of Appeals, Second Circuit. – 508 F 2nd 969*** it has been held as under :-

> *"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. Cf. 1 Restatement Second of the Conflict of Laws 117, comment c, at 340 (1971); Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198 (1918).*
>
> *10. Under this view of the public policy provision in the Convention, Overseas' public policy defense may easily be dismissed. Overseas argues that various actions by United States officials subsequent to the severance of American-Egyptian relations-- most particularly, AID's withdrawal of financial support for the Overseas-RAKTA contract— required Overseas, as a loyal American citizen, to abandon the project. Enforcement of an award predicated on the feasibility of Overseas' returning to work in defiance of these expressions of national policy would therefore allegedly contravene United States public policy. In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed 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., 417 U.S. 506, 94 S. Ct. 2449, 41 L.Ed. 2d 270 (1974)."*
>
> *(emphasis supplied)*

59. In fact, the Supreme Court of India in ***Renusagar Power Co. Ltd.*** (supra) has observed as under :-

> *"66. .....This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."*
>
> *(emphasis supplied)*

60. The aforesaid principle law has been followed in the following judgments :-

i) ***Smita Conductors Ltd. Vs. Euro Alloys Ltd.*** reported in ***(2001) 7 SCC 728***;

ii) ***Transocean Shipping Agency (P) Ltd. Vs. Black Sea Shipping & Ors.*** reported in ***(1998) 2 SCC 281***;

iii) ***Alcatel India Limited & Anr. Vs. Koshika Telecom Limited & Ors.*** reported in ***2004 (3) Arb. L.R. 107 (Delhi)***;

61. I am of the view that it is wrong on the part of petitioner to state that it was unable to present its case in view of the bar contained in Rule 3(g) of IGPA Rules by virtue of which counsel are not permitted to appear. In fact, from the material placed on record it is apparent that petitioner is a well known exporter who was not only a member of IGPA but was also aware of IGPA Rules. Consequently, to now raise a grievance on the ground that Rule 3(g) was opposed to public policy is

clearly contrary to facts and untenable in law. In any event, from the documents on record including the correspondence exchanged between petitioner and IGPA and with the Arbitrators, I am of the opinion that the petitioner had full opportunity to present its case. The procedure adopted by the arbitrators was just and fair so as to lead to a just decision. The requirement of fair hearing has been fully complied with in the present case. In any case, this contention of the petitioner had been negated in appeal by IGPA Board of Appeals and by the High Court of Justice at London.

62. In the present case, there is also no material on record to show that Mr. Morris Lawson, the Managing Director of respondent-Company was a member of Governing Council of IGPA at the time disputes arose between the parties.

63. As far as AT's interpretation of Clause 8 of GCC is concerned, I am of the opinion that it cannot not be said to be unconscionable or opposed to public policy. In my opinion, this submission is on merit of the case which the parties consciously left to be determined by an arbitral tribunal. In view of concepts of party autonomy and finality attached to foreign award, I am of the opinion that I cannot entertain this submission. However, even otherwise, I am in agreement with the submission advanced by Mr. Kumar that it was not necessary for the respondent to first purchase the unsupplied cargo and then alone claim compensation. In fact, a Division Bench of this Court in the case of ***Saraya Distillery Vs. Union of India & Anr.*** reported in ***AIR 1984***

Delhi 360 has held as under :-

> *"(7) Learned counsel for the contractor contended that before a party could claim damages he must go to the market, purchase the goods not supplied or short supplied and suffer actual loss. Only then, argued the learned counsel, he would be entitled to damages. We do not agree.*
>
> *xxxx xxxx xxxx xxxx*
>
> *(10) The Supreme Court in the case of M/S Murlidhar Chiranjilal v. M/s Harishchandra Dwarkadas and another AIR 1962 SC 366 observed at page 369:*
>
> > *"The two principles on which damages in such cases are calculated are well settled. The first is that as far as possible, he who has proved a breach of a bargain to supply what he contacted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps : (British Westing house Electric and Manufacturing Company Limited v. Underground Electric Rly. Co. of London (1912 AC 673 at p.689). These two principles also follow from the law as laid down in S. 73 read with the Explanation thereof. If, therefore, the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. therefore, it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things."*
>
> *Learned counsel for the Contractor relied on a judgment of a learned single Judge of this court in Union of India v. Tribhuwan Dass Lalji Patel AIR 1971 Delhi 120 . In this case it was observed that the Government can recover the loss*

only sustained by it and could not claim damages, if no loss was sustained. With respect we do not agree with this view. This is contrary to the observations made by the Supreme Court in M/s Murlidhar Chiranjilal (supra). A division bench of this court in All India Institute of Medical Sciences vs. American Refrigeration Co. Ltd. AIR. 1982 Del 275 came to the conclusion that the case Union of India v. Tribhuwan Dass. (supra) was wrongly decided. We hereby overrule the decision in Union of India v. Tribhuwan Dass."

(emphasis supplied)

64. Moreover, as held in ***Lesotho Highlands Development Authority Vs. Impregilo SpA and others*** reported in ***2005 UK HL 43***, arbitrators do not exceed their powers simply by making a mistake. In ***Burchell Vs. Marsh*** reported in ***58 U.S. 344 (1855)***, the United States Supreme Court held that if an award is within submission, and contains an honest decision of the arbitrators, then a Court would not set it aside for error, either in law or fact. According to the United States Supreme Court, a contrary course would be a substitution of the judgment of the judiciary in place of the chosen forum, namely, the arbitrators and would make the award the commencement, not the end of the litigation.

65. In fact, the Supreme Court in a catena of has held that in the realm of interpretation of a contract, the arbitrators are supreme. One such judgment under Act, 1996 is ***Mcdermott International Inc. vs. Burn Standard Co. Ltd.*** reported in ***(2006) 11 SCC 181*** wherein it has been held as under:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. <u>The construction of the contract agreement is within the jurisdiction of the arbitrators</u> having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to

have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law."

(emphasis supplied)

66. I am also of the view that it is not necessary in law for the foreign award made in England to have been confirmed by an English Court prior to its enforcement in India. In fact, this issue stands determined by the Supreme Court in the afore-referred judgment inter se parties wherein the Supreme Court in para 31 held that under the new Act, 1996, the foreign award is already stamped as a decree.

67. As far as Mr. Kumar's prayer for grant of interest is concerned, I am of the view that I have no power to award interest as I am only enforcing a foreign award. In my opinion, a Court dealing with enforcement and execution of a foreign award has no power to go behind the awards. Accordingly, Mr. Kumar's prayer for award of interest is rejected.

68. Before I part with this judgment, I would like to place on record my appreciation for the assistance rendered in the present case by counsel for both the parties in particular the young counsel Mr. Ramesh Singh.

69. In view of the aforesaid, OMP Nos. 29/2003 and 204/1998 are dismissed but with no order as to costs. In the Execution Petition Nos.

168/1998 and 169/1998, the Judgment Debtor is directed to deposit the decretal amount in the name of Registrar General of this Court within a period of twelve weeks from today. List these execution petitions in the category of 'Short Matters' on 15th March, 2010.

MANMOHAN, J.

DECEMBER 11 , 2009
rn/js