



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.01.2022

CORAM :

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Arb.O.P. (Comm. Div) Nos.410 and 412 of 2021
and
O.A.No.590 of 2021
and
Application Nos.3338 & 3343 of 2021

NCC Infrastructure Holdings Limited ("NCCIHL"),
6th Floor, NCC House,
Survey No.64, Madhapur,
Hyderabad – 500 081, Telengana,
Rep. by G.Shyam Kumar.

... Petitioner
(in Arb.O.P.No.410 of 2021)

NCC Limited ("NCC")
6th Floor, NCC House,
Survey No.64, Madhapur,
Hyderabad – 500 081, Telengana,
Rep. by G.Shyam Kumar.

... Petitioner
(in Arb.O.P.No.412 of 2021)

Vs

TAQA India Power Ventures Private Limited ("TAQA")
(previously known as TAQA Jyoti Energy Ventures
Private Limited,
C/o.TAQA Neyveli Power Company Private Limited,
Uthangal, Umangalam, Via Vridhachalam,
Cuddalore District, Cuddalore.

... Respondent
(in both petitions)



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PRAYER in Arb.O.P.No.410 of 2021 : This Petition has been filed under

Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 to declare that the Foreign Award dated 24.01.2018 in SIAC Arbitration No.003 of 2015 be deemed as a decree of this Court and direct the Respondent to deposit an amount of Rs.14,62,45,615/-, towards amount awarded in counter claim (g), along with interest at 18% p.m. from the date of Award till 31.12.2020 in accordance with the Award dated 24.01.2018 and further direct the Respondent to pay interest on the aggregate amount from 01.01.2021 till the date of payment of the entire outstanding amounts.

PRAYER in Arb.O.P.No.412 of 2021 : This Petition has been filed under Section 47 and 49 of the Arbitration and Conciliation Act, 1996 to declare that the Award dated 24.01.2018 be deemed to be a decree of this Court and direct the respondent to pay a sum of Rs.85,00,000/- being the costs awarded to the petitioner in the arbitration proceedings in accordance with the Award dated 24.01.2018.

For Petitioner : Mr.R.Murari, Senior Counsel
for Mrs.Hema Srinivasan
(in both petitions)

For Respondent : Mr.Satish Parasaran, Senior
Counsel
for Mr.P.Giridharan
(in both petitions)



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COMMON ORDER

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Several interesting and, indeed, intriguing questions arise for consideration in these two petitions, which are filed seeking, *inter alia*, a declaration of enforceability under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) of a final award dated January 24, 2018 (the Foreign Award) in arbitral proceedings (ARB No.3 of 2015) conducted under the aegis of the Singapore International Arbitration Centre (the SIAC). The Petitioner in Arb.O.P.(Comm. Div.)No.410 of 2021 is NCC Infrastructure Holdings Limited (NCCIHL). In this petition, NCCIHL seeks a declaration that the Foreign Award be deemed to be a decree of this Court and for a direction to the Respondent to deposit a sum of INR 14,62,45,615/- towards amounts directed to be paid by TAQA India Power Ventures Private Limited (TAQA/the Respondent) to NCCIHL towards counter claim (g) along with interest at 18% per annum from the date of Foreign Award until December 31, 2020 and for further interest on the aggregate amount from January 1, 2021 until the date of payment. The Petitioner in Arb.O.P.No.412 of 2021 is NCC Limited(NCC). In Arb.O.P. No.412 of 2021, NCC seeks a declaration that the Foreign Award be deemed to be a decree of this Court and for a direction to TAQA/ the Respondent to



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pay a sum of INR 8,500,000/- being the costs awarded to NCC in the arbitral proceedings as per the Foreign Award. Since both these petitions arise out of the Foreign Award and seek the recognition and enforcement thereof, they are considered and decided by this Common Order.

2. A Securities Purchase Agreement (the SPA) was entered into by and between NCCIHL, IL & FS Energy Development Company Limited (IEDCL), NCC, TAQA Jyoti Energy Ventures Private Limited (presently known as TAQA India Power Ventures Private Limited (TAQA)/the Respondent herein), Himachal Sorang Power Limited (the Company) and Infrastructure Leasing & Financial Services Limited (IL & FS). For purposes of these petitions, it is unnecessary to dwell at length on the SPA; nonetheless, the basic details are set out herein. The SPA dealt, *inter alia*, with the sale of the shares held by NCC and NCCIHL (along with four of its nominees) and IEDCL in the paid up share capital of the Company, and the purchase thereof by TAQA. IEDCL is an entity which had the right to acquire and was in the process of completing the acquisition of 218,300 shares, which were registered in the name of IL & FS Engineering & Construction Company Limited (IECCL). The SPA envisaged the initial



acquisition of 5% of the share capital from IEDCL and NCCIHL and the subsequent purchase of 95% of the share capital from IEDCL, NCC and NCCIHL in one or more tranches by TAQA/the Respondent herein. In addition, it also envisaged the acquisition of 100% of the fully convertible debentures (FCDs) by TAQA/the Respondent herein from NCCIHL and IEDCL. Under Clause 4 of the SPA, the sale consideration for the purchase of the Initial Sale Shares and Subsequent Sale Shares (both defined terms) and FCDs was specified. The conditions precedent for the completion of the transaction were specified in Clause 5. In terms of Clause 6.4.8, NCCIHL and IEDCL were required to deliver to the Purchaser/Respondent herein unconditional, irrevocable bank guarantees for sums representing the value of the subsequent sale consideration. The SPA provided for dispute resolution through arbitration as per Clause 14 thereof. Such arbitration was to be in accordance with the Rules of the SIAC.

3. Pursuant to the execution of the SPA, an Amendment Agreement dated December 07, 2012 and a Supplementary Implementation Agreement dated February 08, 2007 were executed. Disputes arose between NCCIHL and NCC, on the one hand, and TAQA and the Company,



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on the other, related to the performance of the respective obligations under

the SPA. In accordance with the arbitration clause of the SPA, such disputes were referred for arbitration before the SIAC. The SIAC constituted the Arbitral Tribunal.

4. In the arbitral proceedings, TAQA /the Respondent herein and the Company were the joint claimants and NCCIHL and NCC were the respondents. The claimants made several claims. For the purposes of these petitions, it is not necessary to set out the claims in detail. However, it is relevant to mention that the claimants sought a declaration that the respondents are in breach of their obligations under specific clauses of the SPA. In addition, the claimants sought a direction for payment of the cost overrun amounts to the Company or, in the alternative, an indemnification of TAQA/the Respondent herein for the cost overrun amount. The claimants also sought indemnification of TAQA/the Respondent herein for losses incurred on account of the claim arising out of the Bulk Power Transmission Agreement (the BPTA claim).



5. NCCIHL made counter claims. These counter claims, *inter alia*, pertained to the wrongful invocation of the security bond; and return of the bank guarantee to NCCIHL or, in the alternative, to pay NCCIHL the amount incurred as commission charges for Security Bond No.1. NCCIHL also counter a sum of INR 90,000,000 towards the balance sale consideration which was withheld by TAQA. The Arbitral Tribunal framed several issues for consideration. Eventually, the proceedings were concluded by the Foreign Award.

6. By the Foreign Award, the Arbitral Tribunal directed NCCIHL to pay INR 904,480,000 to the Company towards cost overrun (after adjusting INR 360,000,000 recovered by TAQA on behalf of the Company by encashing Security Bond - I and INR 62,000,000 paid by NCCIHL towards cost overrun, against the total cost overrun of INR 1,326,480,000). NCCIHL was also directed to pay the Company a sum of INR 287,018,685 towards the BPTA claim. With regard to interest, NCCIHL was directed to pay interest at 12% per annum on INR 904,480,000 to the Company from July 4, 2014 to the date of the Foreign Award and on INR 287,018,685 from December 31, 2014 to the date of the Foreign Award. TAQA was directed to



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pay NCCIHL a sum of INR 90,000,000 towards the balance sale consideration and interest thereon at 12% p.a. from May 23, 2016 up to the date of the Foreign Award. In all the above cases, interest was also ordered at 12% per annum on the aggregate amount found due as on the date of the Award to the date of payment thereof. As regards costs, NCCIHL was directed to pay a sum of INR 18,500,000 towards costs to the claimants and the claimants were directed to pay to NCC a sum of INR 8,500,000 towards costs.

7. In these proceedings, NCCIHL seeks to recognise and enforce the Foreign Award as regards the direction to TAQA to pay a sum of INR 90,000,000 to NCCIHL towards part consideration with interest thereon, and NCC seeks to recognise and enforce the direction to TAQA to pay to NCC costs of INR 8,500,000. The Company and TAQA have filed a composite petition, which is numbered as OMP (EFA)(COMM)No.1 of 2018 before the Hon'ble Delhi High Court, to declare the Foreign Award as enforceable and deemed to be a decree against NCCIHL, and to consequently initiate measures under specific provisions of the Code of Civil Procedure to enforce/execute the Foreign Award as regards the amounts



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awarded towards cost overrun and the BPTA claim as well as legal costs along with interest thereon. NCCIHL has raised an objection with regard to the maintainability of the said petition. The admitted position is that the said petition is pending before the Delhi High Court. In addition, NCCIHL filed Company Petition IBA.No.820 of 2019 before the National Company Law Tribunal, Chennai (the NCLT) seeking the initiation of Corporate Insolvency Resolution Proceedings (CIRP) against TAQA/the Respondent herein under the Insolvency and Bankruptcy Code, 2016 (the IBC). By order dated August 06, 2021, the NCLT concluded that there is a dispute between the parties and that the petitioner therein did not qualify as an operational creditor of TAQA/the Respondent herein. On that basis, the petition before the NCLT was dismissed. It also appears that parts of the Foreign Award were challenged before the Hon'ble Singapore High Court by both NCCIHL and the claimants. These petitions to set aside portions of the Foreign Award were rejected. The order of rejection was assailed in appeals before the Court of Appeal of the Republic of Singapore in Civil Appeal No.34 of 2019 and Civil Appeal No.35 of 2019. The said appeals were disposed of by judgment dated 29.10.2020 by remitting the issue related to the cut-off date to the Arbitral Tribunal. However, the admitted position is that the parts of the



Foreign Award, which are sought to be recognized and enforced through these proceedings, were not the subject matter of challenge before the courts in Singapore.

8. Oral submissions were made on behalf of the respective Petitioner by Mr.R.Murari, learned senior counsel, assisted by Mrs.Hema Srinivasan, learned counsel; and on behalf of the Respondent by Mr.Satish Parasaran, learned senior counsel, assisted by Mr.G.Giridharan, learned counsel.

9. After providing a brief overview of the facts, Mr.Murari contended that NCCIHL seeks recognition and enforcement of the Foreign Award insofar as it directs TAQA to pay a sum of INR 90,000,000 towards part consideration along with interest thereon. The payment of such consideration was conditional upon consent from the Himachal Pradesh Government in terms of Clause 6.6 of the SPA. After considering the question whether such consent was granted, the Arbitral Tribunal recorded its findings in Paragraphs 376 to 378 and 381 of the Foreign Award. In this respect, the Foreign Award was not challenged before the courts in



Singapore. Therefore, it was contended that this part of the Foreign Award is liable to be recognized and enforced in accordance with the Arbitration Act.

10. The next contention of Mr.Murari was that the Company is not a necessary party to this petition. Such contention is advanced on the basis that the part of the Foreign Award which is sought to be enforced is only against TAQA / the Respondent herein. Therefore, it is not necessary to implead the Company. The third contention of Mr.Murari was that the judgment of the NCLT does not preclude the institution of the present proceedings inasmuch as the NCLT was only concerned with whether the amounts due and payable to NCCIHL qualify as an operational debt or not for the purposes of the IBC. The fourth contention of Mr.Murari was that the proceedings before the Delhi High Court do not constitute a bar to the exercise of jurisdiction by this Court. On the issue of jurisdiction, he relied upon the explanation to Section 47 of the Arbitration Act and contended that this Court qualifies as the Court having original jurisdiction over the questions forming the subject matter of the arbitral award. In support of the submissions, the following judgments were relied upon:



(i) *Brace Transport Corporation of Monrovia and*

Bermuda v. Orient Middle East Lines Ltd., Saudia Arabia and others, AIR 1994 SC 1715 (Brace Transport Corporation).

(ii) *Glencore International AG v. Hindustan Zinc*

Limited, MANU/DE/1238/2020(Glencore International).

(iii) *Kotak Mahindra Bank Ltd v. Sivakama Sundari*

and others (2011) 6 CTC 11.

(iv) *R.S.Jiwani and others v. Ircon International*

Ltd (2010(1) Arb LR 451(Bom).

After relying upon the above judgments, Mr.Murari concluded his arguments by stating that the Foreign Award is liable to be recognized and enforced because it is not vitiated by any of the circumstances set out in Section 48 of the Arbitration Act. In particular, he contended that it cannot be said that the Foreign Award is in conflict with the public policy of India.

11. Mr.Satish Parasaran, learned senior counsel for the Respondent, made submissions in response and to the contrary. The first



contention of Mr.Satish Parasaran was that the NCLT concluded that there was a dispute between the parties and that NCCIHL did not qualify as an operational creditor of TAQA and that there is no operational debt due from TAQA to NCCIHL. The second contention was that the proceedings before the Hon'ble Delhi High Court were not disclosed before this Court or before the NCLT. The third contention was that the Company was intentionally not joined as a party in view of the fact that the Foreign Award directed the payment of a much larger sum to the Company. The fourth contention was that the action in the Delhi High Court is for the recognition and enforcement of a part of the Foreign Award, which directs the payment by NCCIHL of a much larger sum than the sum sought to be enforced herein, and, therefore, these petitions should not be entertained. The fifth contention of Mr.Satish Parasaran was that proceedings for recognition and enforcement may be taken only before one court although proceedings for execution may be instituted in several courts. By referring to Section 49 of the Arbitration Act, he pointed out that once a court is satisfied that the Foreign Award is enforceable under Chapter - 1 of Part -II of the Arbitration Act, the Award shall be deemed to be a decree of that Court.



12. On the facts of the case, he pointed out that a sum of INR 351 crores was paid by TAQA/ the Respondent herein from and out of a total sale consideration of INR 360 crore. As regards the balance sale consideration of INR 90,000,000/- or 9 crore, he pointed out that the Subsequent Sale Shares, as defined in the SPA, were not transferred by NCCIHL to TAQA/the Respondent herein. For such reason, the said balance sale consideration was not paid.

13. By the Foreign Award, he pointed out that NCCIHL was directed to pay a net sum of INR 904,480,000 to the Company towards cost overrun and a further sum of INR 287,018,685 to the Company towards the BPTA claim. In addition, interest was awarded on both these amounts. As compared to this, the amount of INR 90,000,000/- which was awarded to be paid to NCCIHL is not even 10% of the amount awarded to the Company. In this connection, he also pointed out that TAQA /the Respondent herein is the beneficiary of amounts due and payable to the Company under the Foreign Award. For such purpose, he relied upon an affidavit of the Company.



14. Even if only a part of the Foreign Award is being enforced, he contended that only one court is entitled to undertake such exercise. In support of this contention, he referred to and relied upon the judgment of the Hon'ble Supreme Court in *Government of India v. Vedanta Limited and others* (2020) 10 SCC 1, wherein the Hon'ble Supreme Court referred to the use of the expression "that Court" in Section 49 of the Arbitration Act. He also relied upon the judgment in *State of Maharashtra and Another v. Atlanta Limited* (2014) 11 SCC 619 (**Atlanta Limited**) and, in particular, paragraphs 29 to 31 thereof.

15. In light of the rival contentions, the first question that arises for consideration is whether this Court has jurisdiction over the matter. The Explanation to Section 47 of the Arbitration Act is as under:

"Explanation:

In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court



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having jurisdiction to hear appeals from decrees of courts subordinate to such High Court."

Thus, the test is whether this Court would have had original civil jurisdiction in respect of the questions forming the subject matter of the Foreign Award if those questions were the subject matter of a suit or whether this Court would have civil appellate jurisdiction over decrees of courts subordinate to it as regards questions forming the subject matter of the Foreign Award. It should be noticed that the expression used is “questions forming the subject matter of the arbitral award” and not “questions forming the subject matter of the arbitration”, the latter being the expression used in Section 2(1)(e) of the Arbitration Act. The question as to what constitutes the subject matter of the award was examined by the Hon'ble Supreme Court in **Brace Transport Corporation**. After noticing that it was an award of money, the Court recorded a finding that the subject matter of the award is money and that the court within the jurisdiction of which the award debtor's money is available would have jurisdiction. The distinction between “questions forming the subject matter of the arbitration” and “questions forming the subject matter of the award” was examined in considerable detail by the Delhi High Court



in **Glencore International**. After referring to judgments of the Bombay High Court in *Tata International Ltd., Mumbai v. Trisuns Chemical Industry Limited*, MANU/MH/0069/2002, and *Wireless Developers Inc. v. India Games Limited*, MANU/MH/0091/2012, the Court concluded that the relevant test is to ask whether the relief granted by the arbitral tribunal may be enforced or executed by the court concerned, *inter alia*, by issuing process for the attachment or sale of the assets of the award debtor. I respectfully concur. Thus, the court which is authorised to do the aforesaid *qua* the relevant award debtor would be the jurisdictional court. To put it differently, the cause of action for the arbitral proceedings such as the place of execution of the relevant contract, the place of performance thereof and the like, which would qualify as the “questions forming the subject matter of the arbitration”, would not be material.

16. As stated earlier, one part of the Foreign Award grants the claims made by the Company. By the other part of the Foreign Award, the counter claim of NCCIHL towards part consideration for the Subsequent Sale Shares was directed to be paid by TAQA/the Respondent herein. In addition, the Foreign Award provided for the payment of costs by both the



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claimants to NCC. By these petitions, the respective Petitioner seeks enforcement of the part of the Foreign Award which is in favour of the respective Petitioner against TAQA. TAQA/ the Respondent is a company based in Cuddalore, and the respective Petitioner pleads that the assets of TAQA/the Respondent are situated within the civil appellate jurisdiction of this Court. This contention is not disputed by TAQA. Therefore, there is no doubt that this Court qualifies as a High Court with jurisdiction in terms of the Explanation to Section 47 of the Arbitration Act in an action for recognition and enforcement against TAQA.

17. The question whether these proceedings are liable to be rejected on account of the NCLT order should be considered next. The NCLT is empowered to admit an action for corporate insolvency resolution at the instance of a financial creditor or operational creditor, as defined in the IBC, or the company concerned. As regards these proceedings, the grounds in Section 48 of the Arbitration Act have been held to be exhaustive in cases such as *Vijay Karia v. Prysmian Cavi Sistema Srl (2020) 11 SCC 1*. Indeed, the Supreme Court held that the court concerned has the discretion to reject the resistance to enforcement if made on grounds which only affect party



interest even if one of the grounds under Section 48 are made out. Therefore, the objection on this ground is rejected.

18. Nonetheless, the Company and TAQA/the Respondent herein have jointly instituted proceedings before the Delhi High Court seeking recognition and enforcement of that part of the Foreign Award which is in favour of the Company. As a result of the prior institution of the said petition, can it be said that the present petition is not maintainable? To put the question differently: is it necessary that a petition for recognition and enforcement of a foreign award should be instituted in only one high court? TAQA contended that proceedings for execution may be instituted in more than one court, but proceedings for recognition and enforcement should only be instituted in one court. TAQA also contended that the Company should have been joined as a party. Therefore, these issues should be addressed. Prior thereto, however, the issue as to the meanings of the three expressions, namely, recognition, enforcement and execution should be examined.

19. Chapter -1 of Part – II of the Arbitration Act deals with New York Convention awards. The Convention on the Recognition and



Enforcement of Foreign Arbitral Awards, 1958, is otherwise referred to as

the New York Convention. The said Convention is set out in the First

Schedule to the Arbitration Act. Neither the New York Convention nor

Chapter -1 of Part – II of the Arbitration Act employ the word “execution”.

While the New York Convention uses two expressions, namely, recognition

and enforcement, Chapter 1 of Part-II of the Arbitration Act only uses the

expression “enforcement” and its variations such as “enforceable”. The

expression “recognition” has been interpreted in **Brace Transport**

Corporation. In Paragraph 13 thereof, the Hon'ble Supreme Court held

that recognition may be used as a shield against the re-agitation of issues

which are dealt with in the relevant award. Therefore, the condition

precedent for enforcement of an award is the recognition thereof. In other

words, there can be no enforcement without recognition, whereas there could

be recognition without enforcement. In the same judgment, the Court

referred to the Law and Practice of International Commercial Arbitration by

Redfern and Hunter. The learned authors opined that legal proceedings for

enforcement may be taken wherever the assets of the losing party are

situated. In effect, an award holder is entitled to forum shop to seek and

find the assets of the losing party wherever such assets may be situated.



From the above, although the word “execution” is not used in the Arbitration Act, it follows that enforcement means execution of the award. However, as a pre-condition for the enforcement of a foreign award, it becomes necessary to approach a jurisdictional court for purposes of seeking a declaration that the award be recognised and held to be enforceable as a deemed decree of such court. In view of the judgment of the Hon'ble Supreme Court in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2011) 8 SCC 333, a composite petition is maintainable to fulfil dual purposes: (i) recognise and declare a foreign award as enforceable, in the first stage; and (ii) enforce/execute in the second stage. The Arbitration Act, however, only deals with the above mentioned first stage and recourse is necessary, in the Indian context, to Sections 36 to 74 of the Code of Civil Procedure, 1908, read with Order XXI thereof in the second stage.

20. The questions of non-joinder of the Company and whether such proceedings may be instituted in more than one high court in India remain to be answered. As regards non-joinder, the Foreign Award did not grant any relief to NCCIHL against the Company. Therefore, there is no question of any enforcement action against the Company by NCCIHL. As a



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corollary, the Company is not a necessary party to the petition by NCCIHL.

As regards the petition by NCC, costs were directed to be paid by both the Company and TAQA to NCC; therefore, the Company could have been made a party to that petition. However, in an action for recognition and enforcement, the award holder can choose to proceed against one of the award debtors subject to the condition that it cannot recover more than the amount awarded if separate proceedings are subsequently instituted against the other award debtor. Turning to the question of institution of more than one petition, the Explanation to Section 47 clearly does not expressly prevent the institution of proceedings under Chapter -1 of Part – II in more than one high court. Section 49, no doubt, uses the expression "deemed to be a decree of that Court". Since the expression decree of that court is used, can it have said that only one court in India should be approached for such purpose? There can be no doubt at all that an award holder may seek to enforce the relevant award or a part thereof in more than one country especially if the award debtor has assets in more than one country. As regards enforcement of a foreign award in India, given the Explanation to Section 47 of the Arbitration Act, the jurisdictional high court should be determined by raising the question as to which high court may exercise jurisdiction over the



questions forming the subject matter of the award, either in exercise of original or appellate civil jurisdiction. In turn, the answer to this question would depend on the location of the: (i) person or entity; or (ii) assets of such person or entity against whom/which the award is sought to be enforced.

21. In the context of an award under which multiple claims are decided for and against the various parties thereto, the jurisdictional high court would vary depending on the place of business and location of assets of the award debtor in such proceeding. Therefore, it is evident that more than one high court could validly exercise jurisdiction. Indeed, if tested on the facts of this case, a petition by the Company to enforce/execute the portion of the Foreign Award, which is in its favour, against NCCIHL would lie before a high court having jurisdiction over NCCIHL or its assets. This could be Hyderabad, where the registered office of NCCIHL is situated, or any other place where its assets are situated. On the contrary, a petition by NCCIHL to recognise and enforce the portion of the Foreign Award in its favour would only lie before the jurisdictional high court *qua* TAQA and its assets. Although **Atlanta Limited** was relied upon by TAQA to contend that



only one high court would have jurisdiction, the said judgment was in the

context of a challenge under Section 34 of the Arbitration Act. Therefore, such proceedings were subject to Section 42, which is in Part I of the Arbitration Act. By contrast, the present petitions under Part II are not governed or controlled by Section 42. If it is concluded that a petition may be filed in more than one high court in India, the consequence thereof would be that the award would be deemed to be a decree of each high court which recognizes and declares that the award is enforceable. No doubt, this leaves the door open to the possibility, albeit unlikely, of a part of the award being held to be enforceable and not the other, if the high courts concerned take decisions which are not entirely in consonance. In any event, such possibility cannot *per se* lead to the conclusion that a petition should not be filed in more than one high court. The question whether the part of the Foreign Award which is sought to be recognised and enforced by the respective Petitioner herein, should be recognised and declared as enforceable is addressed next.



22. Section 48 of the Arbitration Act sets out the grounds on

which the enforcement of a foreign award may be refused. The said Section

is set out below:

"48. Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that

—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted,



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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) 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



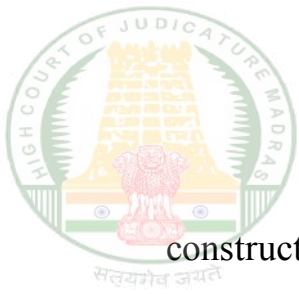
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on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

23. On examining the text of Sub-section 1 of Section 48, it is clear that the grounds set out therein are exhaustive, except to the extent specified in Sub-section 2 thereof. In the case at hand, TAQA/the Respondent did not contend that the Foreign Award should not be enforced on any of the grounds set out under Clauses (a) to (e) of Sub-section 1 of Section 48. For instance, it is not TAQA's case that the portion of the Foreign Award in NCCIHL's favour has not yet become binding. Therefore, it becomes necessary to turn to Sub-section 2. Clause (a) of Sub-section 2 is also clearly inapplicable and the Respondent did not contend that Clause (a) may be invoked. Therefore, the only question is whether the enforcement of the Foreign Award by instituting proceedings in respect thereof in more than one high court would be contrary to the public policy of India. The expression public policy of India, as contained in the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act) was interpreted in *Renusagar Power Co. Ltd v. General Electric Co* 1994 Supp. (1) SCC 644 (**Renusagar**). The said expression received a narrow



construction in the said judgment in the context of a foreign award. After

the enactment of the Arbitration Act and the consequent repeal of the

Foreign Awards Act, the appropriate construction of the expression public

policy of India, as contained in the Arbitration Act, was decided in *Shri Lal*

Mahal Limited v. Progetto Grano Spa (2014) 2 SCC 433 (Sri Lal Mahal).

In the said judgment, the Hon'ble Supreme Court concluded that it is the

narrow construction of public policy which should apply to the interpretation

of Section 48 of the Arbitration Act. While the Hon'ble Supreme Court

refused to declare a foreign award to be enforceable in *National*

Agricultural Co-operative Marketing Federation of India Ltd. v. Alimenta

S.A. 2020 SCC on line SC 381 (NAFED), the said judgment was rendered

in the context of the Government of India refusing permission to NAFED to

export the relevant commodity. On such basis, it was concluded that the

enforcement of the foreign award would contravene the fundamental policy

of India and the basic notions of justice. In other words, unless a foreign

award is contrary to the fundamental policy of Indian law or the most basic

notions of morality or justice it should be recognised and enforced.



24. Keeping in mind the fact that it may often become imperative to approach more than one high court for recognition and enforcement especially when the relevant foreign award may be enforced by and against parties with assets falling within the jurisdiction of different high courts, it cannot be said that the institution of petitions for recognition and enforcement of a foreign award, in more than one High Court, is *per se* contrary to the public policy of India.

25. The question whether the recognition and enforcement of a part of the Foreign Award is contrary to public policy, in the peculiar facts and circumstances of this case, is a separate and distinct matter. The expression “public policy” cannot be put into a straight jacket. As interpreted in **Renusagar** and subsequently in **Shri Lal Mahal**, the said expression is required to receive a narrow construction in the context of a foreign award. Nevertheless, it should receive a construction which is in consonance with the most basic notions of morality and justice. As discussed earlier, by the Foreign Award, NCCIHL, which is the Petitioner in Arb.O.P.No.410 of 2021, was directed to pay INR 904,480,000 and a further sum of INR 287,018,685 to the Company. Such amounts were also



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directed to be paid along with interest thereon. Although the Company and the Respondent herein were joint claimants before the Arbitral Tribunal, the above claims were awarded only in favour of the Company. The cost claim of the claimants, i.e. TAQA and the Company, of INR 18,500,000 was also directed to be paid by NCCIHL in the aggregate to both the claimants. The petition for recognition and enforcement before the Delhi High Court has also been filed jointly by the Company and the Respondent herein against NCCIHL. In addition, the Company has filed an affidavit before this Court confirming that the amounts awarded to it by the Arbitral Tribunal are for the benefit of the Respondent. In effect, the Foreign Award grants significantly higher monetary relief to the Company, and the Respondent herein claims beneficial rights over such amount. By comparison, the amounts awarded to NCCIHL and NCC are smaller. In these facts and circumstances, can it be said that the recognition and enforcement of the part of the Foreign Award in favour of the respective Petitioner, without considering and adjudicating the recognition and enforcement of the part of the Foreign Award in favour of the Company, is contrary to public policy? A significant aspect of the Foreign Award is that it does not provide for a set-off. The reasons for not doing so are not difficult to discern: the monetary



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claim of the Company was granted but not that of TAQA. On the other hand, the monetary counter claim of NCCIHL was granted against TAQA but not against the Company. The only exception is with regard to the grant of the claim of costs by the claimants, including TAQA, against NCCIHL.

26. If a set-off that enured to the benefit of TAQA had been provided for in the Foreign Award and recognition or enforcement was sought without reckoning such set-off, such petition may have fallen foul of public policy. While the Company has affirmed an affidavit indicating that amounts awarded to it under the Foreign Award are for the benefit of TAQA, such arrangements between the Company and TAQA cannot be recognised and given effect to in these proceedings. It is another matter that the Company may, upon realising amounts due to it under the Foreign Award, pass on the benefit to TAQA. Another way of approaching this issue is to ask the questions: what would be the consequence of allowing the respective Petitioner to enforce a part of the Foreign Award? Would it prejudice TAQA or even the Company? Without doubt, these proceedings do not act as a deterrent to the continued prosecution of the petition before the Delhi High Court by the Company and TAQA or the institution of proceedings for the



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recognition and enforcement of the part of the Foreign Award in favour of the Company or TAQA before any other jurisdictional high court *qua* NCCIHL. Indeed, it would be anomalous for a party to seek recognition and enforcement of a part of a foreign award and seek to prevent the recognition and enforcement of another part thereof on the ground of public policy.

27. Another aspect should also be noticed: as regards NCC, no part of the Foreign Award is enforceable against it and, therefore, its petition cannot be objected to at all on the ground that the petition before the Delhi High Court is pending.

28. For all these reasons, the respective Petitioner is entitled to an order declaring that the Foreign Award is recognised and is, consequently, enforceable as a decree of this Court. While a direction for payment has been sought, such direction is already contained in the Foreign Award. An interest claim at 18% per annum is made, which is not in consonance with the Foreign Award. In the event of non-payment in spite of this order, it is open to the respective Petitioner to enforce the Foreign Award by taking recourse



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to measures in accordance with applicable provisions of the Code of Civil Procedure, 1908.

29. Therefore, Arbitration O.P.Nos.410 and 412 of 2021 are allowed on the above terms without any order as to costs. Consequently, connected applications and original application are closed.

11.01.2022

Index :Yes
Internet :Yes
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SENTHILKUMAR RAMAMOORTHY, J

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