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

Judgment Reserved on 31.1.2019
% *Judgment Pronounced on 09.08.2019*

\+ **EX.P. 99/2015**

GLENCORE INTERNATIONAL AG ..... Decree Holder

Through: Mr. Nakul Dewan with Mr. Moazzam Khan, Ms. Shweta Sahu, Mr. Brijesh Kumar, and Mr. Kartik Prasad, Advs.

versus

INDIAN POTASH LIMITED & ANR. ..... Judgement Debtor

Through: Mr. Arjun Singh Bhati, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

Preface

1. The captioned execution petition seeks enforcement of foreign award dated 12.3.2012 (hereafter referred to as 'Final Award') and the cost of the reference awarded in favour of the decree holder i.e. Glencore International AG. (hereafter referred to as 'Glencore') which was passed by the arbitral tribunal after the final award on 12.5.2015 (hereafter referred to as 'Cost Award').

2. Notice in the execution petition was issued on 23.3.2015. The judgment debtor i.e. India Potash Ltd. (hereafter referred to as 'IPL') entered appearance through its counsel on 29.4.2015. On that date, IPL was granted two weeks to file its objections to the award.

3. As would be evident, up until that stage, the cost award had not been rendered by the arbitral tribunal.

4. The record shows that on 22.5.2015, IPL's application i.e. EA(OS) No.523/2015 seeking an extension of time for filing objections was allowed by the Court. IPL was thus granted further three weeks from that date to file its objections in the matter. Glencore, on the other hand, was given two weeks to file its rejoinder thereafter. The application was disposed of in the aforesaid terms.

5. The record also shows that IPL filed an application i.e. EA(OS) No.709/2015 for issuance of directions to Glencore to file the complete arbitral record. On this application, notice was issued on 23.7.2015. The application was dismissed by the Joint Registrar (Judicial) on 25.8.2015. The Joint Registrar (Judicial) took the view that on earlier occasions time had been sought by IPL to file objections without adverting to the plea that in order to prefer objections the arbitral record was required. Furthermore, the Joint Registrar (Judicial) took the view, given the nature of the proceedings, that Glencore was not required to file the arbitral record and what was necessary to proceed in the matter was only a decree sheet which has been filed by Glencore.

6. As indicated at the very outset, the Cost Award came to be rendered by the arbitral tribunal post the pronouncement of the Final Award and due to this circumstance obtaining, Glencore moved an application i.e. EA(OS) No.870/2015 to bring on record the Cost Award dated 12.5.2015 passed by the Registrar, Singapore International Arbitration Centre (hereafter referred to as 'SIAC'). Consequently, the application seeking amendment of the execution petition for bringing on record the Cost Award was allowed on 8.1.2016 and the amended execution petition was taken on record. As a result of this development, IPL was granted four weeks to file objections to the amended

execution petition. The record shows that objections to the unamended petition were filed on 16.7.2015. However, though an opportunity was given, objections to the amended petition were not brought on record.

Backdrop

7. Given this preface, the following facts are required to be noticed to give the background as to how the captioned petition and the objections came to be filed. On 5.2.2010, Glencore executed an agreement with IPL (hereafter referred to as 'Contract'). As per this agreement, IPL was required to deliver 40,000 Wet Metric Tonnes (WMT) iron ore. One of the conditions incorporated in the Contract was that the iron ore should have iron (hereafter referred to as 'Fe') content equivalent to at least 61 percent and that if Fe content was below 60 percent, Glencore was to reject the cargo in terms of the penalty specifications obtaining in Schedule 1 of the contract obtaining between the parties.

8. Having executed the contract, Glencore entered into a sub-sale agreement with an entity by the name Hebei Tianxhu & Steel (Group) Co. Ltd. (in short 'Hebei') on 16.3.2010 in the hope that it would receive iron ore from IPL having the specified Fe content. The base price at which Glencore had entered into a sub-sale agreement with Hebei was USD 129/DMT. Apparently, on the date when the cargo was shipped by IPL to Glencore, which was on 31.3.2010, the chemical composition analysis carried out showed that the Fe content of cargo was 60.40 percent. However, upon arrival of the cargo at the port of discharge on 28.4.2010, its chemical composition analysis showed that it had Fe content equivalent to 57.70 percent. Consequently, on 6.7.2010, Glencore via its solicitors issued a notice of rejection. Through the notice of rejection, it was conveyed to IPL that the cargo was been rejected as it had Fe content of less than 60 per cent. This stand of Glencore was rebutted by IPL. IPL conveyed its

stand on the issue to Glencore vide communication dated 9.7.2010. Glencore being left with cargo which IPL was refusing to accept, executed an addendum to the sub-sale agreement dated 16.3.2010. Under the addendum, Glencore agreed to resell the cargo to Hebei at a reduced base price of USD 111.00/DMT on the premise that the Fe content would be at least 58 percent.

9. Simultaneously, Glencore served a Notice of Arbitration (hereafter referred to as 'NOA') on the same date i.e. 5.8.2010. *Inter alia*, via the NOA, Glencore indicated to IPL that it had commenced arbitration proceedings under SIAC rules. Besides this, Glencore also proposed the appointment of one Mr. Alan Thambiayah as the sole arbitrator.

10. In response thereto, IPL vide communication dated 19.8.2010 resisted the commencement of arbitration proceedings in its entirety and furthermore averred that invocation of arbitration proceedings by Glencore at that juncture was "void" as the "process of mutual talks" was on. It was also conveyed by IPL that it had instructed its lawyers to take further steps in the matter and, therefore, time for enabling IPL to take suitable steps in the matter should be extended by a further period of 30 days. Glencore responded to this communication through their solicitors on 24.8.2010.While noticing that IPL had sought an extension of time by 30 days, Glencore responded by stating that it had assumed that IPL had no objection to the applicability of the SIAC Rules. Accordingly, Glencore called upon IPL to give its response to the same before the close of business in Singapore on 25.8.2010. On 26.8.2010, IPL wrote back and indicated that the request for extension of time made should not be construed as if it had agreed to the commencement of arbitration proceedings or the applicability of the SIAC Rules.

10.1 Given this stance, *vide* communication dated 27.8.2010, Glencore conveyed its objection to SIAC to the request made by IPL for extension of time to respond to the NOA.

10.2 Further, *vide* communication dated 16.09.2010, Glencore conveyed its stand as to why SIAC Rules would apply to the arbitration proceedings.

10.3 On 12.11.2010, Registrar, SIAC informed IPL that he had carried out an exercise in pursuance to the provisions of Rule 25.1 of SIAC Rules, 2010 (in short 'SIAC Rules') and thereafter reached a *prima facie* conclusion that an arbitration agreement existed between the parties. IPL was thus called upon to give its response, *inter alia,* with regard to the claims preferred by Glencore.

10.4 Being optimistic that IPL would agree with the name suggested by Glencore for appointment as an arbitrator, its solicitors, vide communication dated 15.11.2010, wrote to IPL to seek confirmation in that behalf.

10.5 Since no response was received from IPL concerning the same, on 17.02.2011, Glencore triggered the Expedited Procedure under Rule 5 of the SIAC Rules by making a request in that behalf to the Registrar, SIAC.

11. The record shows that on 14.3.2011, the Chairperson, SIAC appointed one Mr. Chooi Yue Wax Kenny as the Sole Arbitrator instead of Mr. Alan Thambiayah whose name was proposed by Glencore. Furthermore, Chairman, SIAC also ruled that the arbitration proceedings will be conducted as per the Expedited Procedure as envisaged under the SIAC Rules.

12. Thereafter, pleadings in the matter were completed. Glencore filed its Statement of Claim (SOC) on 27.05.2011. Likewise, IPL filed its Statement of Defence (SOD) along with the counterclaim on 21.07.2011.Glencore filed its rejoinder and defence to the counterclaim on 08.08.2011.

13. The record shows that the Final Award, as well as the Cost Award, was passed based on the documentary evidence.

Submissions of the counsel

14. Given this backdrop, arguments in support of the objections filed on behalf of IPL were advanced by Mr. Arjun Singh Bhati, Advocate, while submissions in support of the execution petition were advanced by Mr. Nakul Dewan, Advocate.

15. It would be relevant to note that the record shows that IPL's objections to the execution petition were captured in the proceedings held on 17.01.2017. A perusal of the order dated 17.01.2017 shows that IPL has raised four-fold objections to the continuation of the execution petition. These being:

i. That the awards which include the Final Award and the Cost Award are not stamped. The contention is that since the awards are unstamped they would have to be impounded and that enforcement proceedings could be commenced only after they are stamped and that would assume (penalty is paid) in accordance with the law prevailing in this country. [**Objection No. 1**]

ii. Second, the arbitral tribunal was not constituted as per the agreement obtaining between the parties. Reference in this behalf was made to Section 48(1)(d) of the 1996 Act. The argument being that the parties had not agreed to the arbitration proceedings being conducted under the SIAC Rules. Therefore, the applicable law *qua* the arbitration proceedings ought to be the International Arbitration Act (Chapter 143 A) (in short 'the IA Act'). Consequently, parties were required to adopt the procedure for constituting the arbitral tribunal as provided under the IA Act even though, Chairman, SIAC was the specified authority for constituting an

arbitral tribunal (in the absence of agreement between parties) both under the IA Act and the SIAC rules. [**Objection No. 2**]

iii. Third, the failure of the arbitral tribunal to decide the objection as to its jurisdiction at the very threshold as required under the IA Act had deprived IPL of the opportunity to file a possible appeal if such a decision had been rendered before pronouncement of the Final Award. The procedure adopted had caused significant prejudice to IPL. [**Objection No. 3**]

iv. Lastly, the awards rendered by the arbitral tribunal were vitiated on account of breach of principles of natural justice in as much as Glencore was permitted to amend its pleadings on the date when final hearing in the matter was held without allowing IPL to contest the amendment. [**Objection No. 4**]

16. Mr. Arjun Singh Bhati, who appeared for IPL elaborated upon the objections articulated at the hearing held on 17.01.2017 before me, broadly, as follows:

16.1 The main thrust of Mr. Bhati's submission was that parties as per Clause 22 of the contract obtaining between them had agreed to be governed by the laws of Singapore and hence courts in Singapore would have supervisory jurisdiction over them.

16.2 Since the instant arbitration proceedings were in the nature of an international commercial arbitration conducted in Singapore, it could only be governed by the IA Act. The IA Act is pivoted on the model law on international arbitration adopted by the United Nations Commission on International Trade Law (in short "UNCITRAL"). Section 3 of the IA Act provides that subject to the provisions of that Act, the model law with the exception of Chapter VIII

thereof shall have the force of law in Singapore. Therefore, not only the IA Act but also the model law applies to international commercial arbitrations conducted in Singapore. Since in the instant case parties had not agreed on the number of persons who would constitute the arbitral tribunal, the arbitral tribunal could consist of only a sole arbitrator as per the provisions of Section 9 of the IA Act. In the given case, parties had also failed to agree on the procedure for constituting an arbitral tribunal. Therefore, an arbitral tribunal could have been constituted by taking recourse to Article 11(3)(b) of the model law at the proper stage and in an appropriate manner. Although, under Section 8(2) of the IA Act, the Chairman, SIAC is the competent authority for constituting an arbitral tribunal under Article 11(3)(b) of the model law, this power could only be exercised when parties were unable to agree on the constitution of an arbitral tribunal and thereafter one of the parties was to make a request for constituting an arbitral tribunal to the competent authority. In other words, request to the competent authority under Article 11(3)(b) of the model law was a recourse of last resort upon failure of the parties to reach mutually an agreement on the constitution of the arbitral tribunal. In this case, Mr. Chooi Yue Wax Kenny was appointed as the sole arbitrator even before the contingency envisaged under Article 11(3)(b) of the model law had arisen. SIAC assumed jurisdiction on an erroneous premise that the rules framed by it applied to the instant arbitration proceedings. To demonstrate this fallacy, reliance was placed on SIAC's letter dated 12.11.2010. Thus the act of SIAC in unilaterally assuming jurisdiction fell afoul of not only the provisions of the IA Act but also those of the model law.

16.3 Furthermore, parties were not *ad idem* and/or no agreement had been reached between them as regards rules of procedure applicable to the instant arbitration proceedings. Thus, had the arbitral tribunal been validly constituted, it would have been governed by the provisions of Article 19(2) of the model law. Article 19(2), *inter alia*, provides that in a case where there is no agreement

between parties as to the applicable rules of procedure, the arbitral tribunal may conduct proceedings in such manner as it considers proper, subject to the provisions of the model law. In other words, in absence of agreement between the parties as regards applicable procedure, the procedure laid down under the model law would have precedence over any other procedure that the arbitrator may adopt.

16.4 The learned arbitrator applied the expedited procedure as provided under Rule 5 of SIAC Rules which had no applicability. In sum, for the aforesaid reasons, the awards are not enforceable in India given the provisions of Section 48(1)(d) of the 1996 Act.

16.5 The reliance by Glencore on the judgment of the Supreme Court in the matter Pricol Ltd. v. Johnson Controls, (2015) 4 SCC 177 (in short '*Pricol'*) in order to buttress its argument that reference to "***Singapore International Arbitration of the Chambers of Commerce in Singapore***" in Clause 13.2 of the contract obtaining between parties could only mean SIAC was flawed for the following reasons:

i. The judgement in Pricol was passed in a Section 11 petition preferred under the 1996 Act.

ii. The Supreme Court in State of West Bengal & Ors. v. Associated Contractors, (2015) 1 SCC 32 (in short '*Associated Contractors'*) has held that an order passed in a Section 11 petition can have no precedential value being a judicial authority which is not a court of record.

iii. SIAC is not the only arbitral institution in Singapore. There are other institutions, such as, International Court of Arbitration of the International Chamber of Commerce (ICC), International Centre for Dispute Resolution (ICDR), the International Division of the American Arbitration Association (AAA), Arbitration and Mediation Centre of the

World Intellectual Property Organization (WIPO), Singapore Chamber of Maritime Arbitration (SCMA), and Singapore Institute of Arbitrators (SIArb).

iv. For the aforementioned reasons, SIAC had no jurisdiction in the matter. The rules framed by SIAC were wrongly applied to the arbitration proceedings.

16.6 IPL had in the very first instance raised objections concerning the jurisdiction of the arbitral tribunal constituted under the SIAC Rules. Despite such an objection being raised, the arbitral tribunal ruled on the same only at the stage when the Final Award was rendered in the matter. Under Section 10 of the IA Act, the arbitral tribunal was obliged to rule on the jurisdictional objection taken by IPL. Had the arbitral tribunal ruled dealt with the jurisdictional objection at the very threshold, IPL would have had the opportunity of challenging the decision in terms of Section 10(3) of the IA Act before the High Court of Singapore.

16.7 In other words, the arbitral tribunal having misconducted itself had acted contrary to the public policy of Indian law and therefore the awards rendered by it were not enforceable as per the provisions of Section 48(2)(b) of the 1996 Act. The conduct of the arbitral tribunal was thus not only contrary to the fundamental policy of the Indian law but was also contrary to the established principles of justice. In this behalf, reliance was placed on the judgement of the Supreme Court in Shri Lal Mahal Ltd.v. Progetto Grano Spa, (2014) 2 SCC 433.

16.8 The failure of the arbitral tribunal to rule on its jurisdiction in the first instance had deprived IPL of a fair hearing in the matter and an opportunity to present its case on the issue of jurisdiction. In this behalf, reliance was placed on IPL's letter dated 16.03.2011 and the following judgements:

i. Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245;

ii. Alagar Exports v. Shipping Lines of Tehran, 2008 SCCOnline Mad 751.

16.9 A serious breach of the principles of natural justice occurred upon the arbitral tribunal permitting amendments in Glencore's opening statement (Amendment No. 1 dated 11.1.2012) at the stage of final hearing without sufficient notice to IPL. This act of the arbitral tribunal violated the provisions of Section 48(2)(b) of the 1996 Act. In support of this contention, reference was made to amendments set out in pages 154 to 181 in the convenience compilation. In particular, my attention was drawn to pages 159, 160, 163-167 and 172-174.

17. In sum, it was contended that the enforcement of the award was barred under the provisions of Section 48(1)(b) and 48(2)(b) of the 1996 Act.

18. Mr. Nakul Dewan who appeared on behalf of Glencore briefly made the following submissions:

18.1 Stamping of a foreign award was not a prerequisite for its enforceability. In this behalf, learned counsel cited the following judgments:

i. Naval Gent Maritime Ltd. v. Shivnath Rai Harnarain (I) Ltd., 2009 SCC OnLine Del 2961.

ii. Vitol S.A v. Bhatia International Limited 2014 SCC OnLine Bom 1058.

iii. Narayan Trading Co. v. Abcom Trading Pvt. Ltd., 2012 SCCOnLine MP 8645

iv. RIO Glass Solar SA v. Shriram EPC Limited and Ors., MANU/TN/0458/2017.

18.2 Furthermore, the learned counsel submitted that an award which is a product of a foreign seated arbitration would not be exigible to stamp duty under

the Indian Stamp Act, 1899 (in short 'the Stamp Act'). It could not be the legislative intent, as captured under the 1996 Act, to require stamping of a foreign award as it would then have to be assumed that it would be enforced in a particular State in the Union of India. Such an interpretation would be contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (in short 'New York Convention') under which awards are enforceable in approximately 156 countries.

18.3 The submission that a foreign award is to be stamped as per the provisions of the Stamp Act is also contrary to Part II of the 1996 Act. Part II deals with enforcement of a foreign award which is defined under Section 44(b) as one made in a country to which the New York Convention applies. Notably, this provision uses the term foreign award as opposed to arbitral award as defined in Part I of the 1996 Act.

18.4 Pertinently, none of the grounds for raising objections *qua* a foreign award stipulated in Section 48 of the 1996 Act give the objector a right to resist the enforcement of a foreign award on the ground that it has not been stamped. Section 48 of the 1996 Act which is based on Article V of the New York Convention is a complete code in itself with regard to grounds on which objections to a foreign award can be entertained. Reliance in this behalf was placed on the excerpts from the following commentaries: Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, (Herbert Kronke, Pantricia Nacimiento, Dirk Otto and Nicola Christine Port, at Page 209-210); Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, XXVIII-(2003), at Page 650; and Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, XXXI-(2006), at Page 1231.

18.5 Furthermore, a foreign award is not an award as adverted to in Article 12 of Schedule-I of the Stamp Act. Any suggestion to the contrary would be

inconsistent with obligations undertaken by India under the New York Convention.

18.6 On the issue relating to the applicability of the SIAC Rules, the learned counsel relied on the findings returned by the arbitral tribunal which he said were robust and needed to be sustained. In this behalf, counsel sought to buttress his submission with the observations made in the *Pricol* case. The submission was that the construction placed by the arbitral tribunal was reasonable in the given facts and circumstances of the case and hence ought not to be interdicted by this Court. Furthermore, learned counsel submitted that the constitution of the arbitral tribunal by the Chairman, SIAC, by taking recourse to SIAC Rules, had not caused any prejudice to IPL for the reason that the IA Act which IPL states is applicable confers authority on the Chairman, SIAC, under Section 8(2), to constitute arbitral tribunal in the event of disagreement between parties on its constitution. The correspondence exchanged between the parties demonstrated that they could not reach a consensus on the appointment of the arbitrator and hence the Chairman, SIAC, proceeded to appoint an arbitrator who was different from the person proposed by Glencore. In this behalf, my attention was drawn to communications exchanged between parties, to which, I have already referred to above.

18.7 Besides this, Mr. Dewan submitted that recognition and enforcement of a foreign award can be declined only if it is based on a procedural defect which in real terms would alter the resulting award. In this behalf, my attention was drawn to provisions of Article V(1)(d) of the New York Convention. Contention was that the provisions of Article V(1)(d) of the New York Convention and Section 48(1)(d) being identical, the principle of causal nexus or a substantial defect between the procedure adopted and the resulting award captured in the treatise: Recognition and Enforcement of Foreign Arbitral Awards, A Global

Commentary on the New York Convention, (Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port) should hold good. Based on the aforestated reasoning, it was argued, since, concededly, the seat of arbitration was Singapore, whether the SIAC Rules applied or the provisions of the IA Act were made applicable, in the instant case, the authority conferred with the power to constitute the arbitral tribunal was the Chairman, SIAC. Therefore, according to Mr. Dewan, the challenge under Section 48(1)(d) cannot be sustained as the procedural defect, if any, speaking realistically would not have altered the final result.

18.8 The contention raised that an error had been committed by the arbitral tribunal in not ruling on the objection raised with regard to jurisdiction at the very threshold and thereby depriving IPL the right to challenge the said decision under Section 10(3) of the IA Act was misconceived as the arbitral tribunal had the discretion to rule on its jurisdiction either at the preliminary stage or at the time it rendered a final award in the matter. In this behalf, reliance was placed on the extracts at paragraph [9.054] and [9.059] of the book titled Arbitration in Singapore: A Practical Guide, (Editor-in-Chief: The Hon'ble Chief Justice of Singapore Sundaresh Menon). Furthermore, according to the learned counsel, the decision of the arbitral tribunal to enunciate its view concerning the jurisdictional issue along with its view on the merits of the matter in the final award aligns with Indian public policy as reflected in the judgements of the domestic courts. Reliance in this behalf was placed on the following judgements:

i. Maharshi Dayanand University v. Anand Coop. L/C Society Ltd., (2007) 5 SCC 295.
ii. Shakti Bhog Foods Limited v. Kola Shipping Limited, (2012) SCC OnLine Del 4300.

iii. Roshan Lal Gupta v. Shri Parasram Holding Pvt. Ltd., 2009 (SCC) OnLine Del 293.

18.9 The charge laid that the arbitral tribunal had permitted amendment of pleadings by Glencore at the stage of final hearing and had hence breached the principles of natural justice was untenable for the following reasons:

(i) Under Rule 17.5[1] of the SIAC Rules, the arbitral tribunal had the necessary power to allow amendment of pleadings keeping in mind the ingredients captured therein. The arbitral tribunal had allowed the amendment bearing in mind the following facts and circumstances.

(i)(a) Glencore had reduced its claims from USD 634,219.07 to USD 631,580.80.

(i)(b) Glencore had only tweaked its "legal argument" to efface its understanding of an assertion made by IPL.

(ii) Despite adequate opportunity being given to IPL to respond to the amendment, IPL failed to take benefit of the opportunity given in that behalf by the arbitral tribunal. In this context, reference was made to the fact that upon the arbitral tribunal granting Glencore leave to amend its pleadings and its opening statements at the hearing held on 11.01.2012, the information in that behalf was given to the counsel for IPL.

(ii)(a) Further, despite notice and pleadings being served on the counsel for IPL, IPL chose neither to file a reply nor raise any objection to the amendment.

(ii)(b) Besides this, Glencore served its closing submissions on the arbitral tribunal and IPL's counsel on 20.01.2012.

[1] SIAC Rules 17.5: A party may amend its claim, counterclaim or other submissions unless the Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim or counterclaim may not be amended in such a manner that the amended claim or counterclaim falls outside the scope of the arbitration agreement.

(iii) These facts, according to Mr. Dewan, demonstrated that this objection was an afterthought and had no merit. Mr. Dewan relied on paragraph 97 of the Final Award to buttress his submission that during the course of the arbitration proceedings the arbitral tribunal had given adequate notice and ample opportunity to IPL to present its case at each stage of the proceeding. It was sought to be emphasized that despite the arbitral tribunal acceding to IPL's request for extension of time, IPL failed to comply with the direction and have itself represented at the arbitration hearings. Therefore, according to Mr. Dewan, IPL was in no position to contend that it was not given a fair hearing or a reasonable opportunity to present its case. IPL's own conduct showed that it had failed to avail the opportunities provided by the arbitral tribunal. In this regard, reliance was placed by Mr Dewan on the observations made by the Supreme Court in paragraph 45[2] of the *Lal Mahal* Case.

19. Mr. Dewan concluded by submitting that the court while considering the enforceability of the foreign award cannot review the award on merits while exercising powers under Section 48 of the 1996 Act. According to the learned counsel, under Section 48(2)(b), the enforcement of a foreign award could be refused only if it is found to be contrary to (i) fundamental policy of Indian law; (ii) interest of India; (iii) justice or morality. Mr. Dewan submitted that this position continues to obtain even after the 1996 Act which was amended in 2015 via The Arbitration and Conciliation (Amendment) Act, 2015. My attention was also drawn to explanation (1) and (2) of Section 48(2)(b) of the 1996 Act which delineates the scope of the expression public policy of India. Besides this, the learned counsel submitted that since the arbitrator is the sole judge of the quality

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

and quantity of evidence placed before him, the Court charged with a duty to enforce the award cannot act as a court of appeal.

Analysis and Reasons

20. I have heard the learned counsel for parties and perused the record. I shall be dealing with the four objections raised by IPL.

Objection No. 1

21. The objection concerning stamping of a foreign award need not detain me any further than referring to the judgment of the Supreme Court on the issue. The Supreme Court in M/s Shriram EPC Limited v. Rioglass Solar SA, passed in Civil Appeal No. 9515/2018, has already ruled that foreign awards are not required to be stamped under the Stamp Act. Notably, at the proceedings held on 12.10.2018, this aspect was noticed by the Court. Besides this, I find merit in the submission made by Mr. Dewan that it could not be the intention of the legislature under the 1996 Act to insist on the stamping of a foreign award under the Stamp Act laws prevailing in India— as states in India have different rates for stamp duty, it would be well nigh impossible for the enforcer to pay stamp duty in every State before seeking enforcement of a foreign award. The fundamental premise which sustains enforcement proceedings pertaining to foreign award is that an enforcer can indulge in forum shopping and thus seek satisfaction of the award wherever the assets of the judgment debtor are found provided the foreign award gains the recognition of courts within whose jurisdiction assets of the judgement debtor are situate.

Objection No. 2

22. The objection taken that the SIAC Rules were erroneously applied to the instant arbitration proceeding is untenable for the following reasons. However,

before I do so it may be relevant to extract Clause 13.2 of the Contract obtaining between the parties based on which this objection is taken.

> *"Clause 13.2*
> *Any dispute between the Buyer and the Seller arising out of or in connection with the Agreement which has not been settled by mutual agreement within 60 days of one Party having given written notice to the other Party shall be referred and finally settled by arbitration in accordance with the Rules of Singapore International Arbitration of the Chambers of Commerce in Singapore in force on the date when the Notice of Arbitration is submitted in accordance with these Rules. The seat of arbitration shall be Singapore, Republic of Singapore. The arbitral proceeding shall be conducted in English language. The arbitration award shall be final and binding upon the parties to such arbitration and may be entered in any court having jurisdiction. The costs of arbitration are borne by the unsuccessful Party unless decided otherwise by the arbitral tribunal in accordance with the said Rules."*

23. A careful perusal of Clause 13.2 would show that upon eruption of disputes between the parties, they were in the first instance required to settle their disputes by resorting to mutual negotiations. For this purpose, a timeframe of 60 days is set forth. Failing an amicable settlement in the matter, upon a written notice by one of the disputants to the other, the dispute had to be referred and finally settled via arbitration in accordance with the "Rules of Singapore International Arbitration of the Chambers of Commerce in Singapore" in force on the date when NOA was submitted in accordance with the said Rules. Furthermore, parties had agreed to Singapore being the seat of arbitration. Therefore, while there was certainty as regards the prerequisite of having parties enter into mutual negotiations before triggering the arbitration proceedings and as regards the seat of arbitration, there was ambiguity about the institution whose rules were to apply to the arbitration proceedings. Concededly, there was no institution in existence on the date of issuance of NOA by the name Singapore International Arbitration of the Chambers of Commerce. Given this

circumstance, the arbitral tribunal, *inter alia*, took recourse to extrinsic evidence to interpret Clause 13.2 of the Contract obtaining between the parties. The extrinsic evidence taken recourse to by the arbitral tribunal pertained to the drafting history of Clause 13.2 of the Contract. A perusal of the award would show that parties appear to have made cosmetic changes to the original draft of Clause 13.2 by supplanting the word English and London, United Kingdom, with Singapore. This aspect is adverted to in paragraphs 70-77 of the award.

24. To my mind, the arbitral tribunal adopted the correct approach which is in consonance with the law of interpretation obtaining in India pertaining to written contracts. While no extrinsic evidence can be led to contradict, vary, add to or subtract from terms of a written contract if the court is satisfied that the written contract encapsulates the entirety of the agreement between parties, it can, however, resort to extrinsic evidence where there is an ambiguity or, as in this case, would have led to an absurd result of arbitration proceedings being a non-starter. Concededly, while parties had agreed to have their *inter se* disputes adjudicated upon through an arbitration mechanism, the forum referred to in Clause 13.2 was not in existence. The arbitral tribunal, in my opinion correctly, took recourse to an interpretative route and thereby reached to a reasonable conclusion which caused no prejudice to IPL. More importantly, as per Clause 13 of the Contract obtaining between the parties, the parent contract as well as the arbitration clause incorporated therein was to be interpreted and construed in accordance with the substantive laws of Singapore excluding the United Nations Convention on International Sale of Goods (April 11, 1980). A perusal of the award would show that the arbitral tribunal applied the law as prevailing in Singapore declared by Singapore Court of Appeal in the matter of Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte

Ltd, (2008) 3 SLR(R) 1029[3] in order to chart the course for admitting extrinsic evidence in the context of interpreting written contract. Therefore, apart from anything else, since, concededly, *lex arbitri* was the Singapore law which was applied in this case by the arbitral tribunal, I would be very slow in interfering with the enforcement of the final award even if law on this aspect in India was at variance with the Singapore law; which to my understanding is not so.

25. Therefore, I do not have to go so far as to rule whether or not the *Pricol* case is a binding precedent for this Court. The argument that because the *Pricol* decision was rendered by the delegate of the Chief Justice of India while

[3] To summarise, the approach adopted in Singapore to the admissibility of extrinsic evidence to affect written contracts is a pragmatic and principled one. The main features of this approach are as follows:
(a) A court should take into account the essence and attributes of the document being examined. The court's treatment of extrinsic evidence. at various stages of the analytical process may differ depending on the nature of the document. In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents (see [110]above).
(b) If the court is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to, or subtract from its terms (see ss 93-94 of the Evidence Act). In determining whether the parties so intended, our courts may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain al/ the terms of the parties' agreement (see [40] above). In other words, where a contract is complete on its face, the language of the contract constitutes prima facie proof of the parties' intentions.
(c) Extrinsic evidence is admissible under proviso (f) to section 94 to aid in the interpretation of the written words. Our courts now adopt, via this proviso, the modern contextual approach to interpretation, in line with the developments in England in this area of the law to date. Crucially, ambiguity is not a prerequisite for the admissibility of extrinsic evidence under proviso (f) to section 94 (see [114]-[120] above).
(d) The extrinsic evidence in question Is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context (see [125] and [128]-[129] above). However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go. towards proof of what the parties, from an objective viewpoint, Ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct Is concerned, we find the views expressed in McMeel's article ([62J supra) and Nicholls' article ([62J supra) persuasive. For this reason, there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for noncompliance with the requirements set out at [125] and [128]-[129] above. (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.) Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous (see [50]above; see also sub-para (e) below).
(e) In some cases, the extrinsic evidence in question leads to possible alternative interpretations of the written words (ie, the court determines that latent ambiguity exists). A court may give effect to these alternative interpretations, always bearing in mind section 94 of the Evidence Act. In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent (see [50] above). Furthermore, the normal canons of interpretation apply in conjunction with the relevant provisions of the Evidence Act, ie, ss 95-100 (see [75]-[80] and [13] above).
(f) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy (see [123] above).

exercising powers under Section 11 and therefore would have no precedential value as it is a decision of a judicial authority which is not a court of record, requires no further discussion in view of what is observed hereinabove. It may, however, be relevant to emphasize that even decisions rendered by judicial authorities which are not binding precedents can have persuasive value. The *Pricol* case fits that bill.

25.1 Besides this, one would have to deal with the argument advanced on behalf of IPL that the procedure for appointment had to be in consonance with the IA Act and/or the model law. This argument in the context of the facts obtaining in the present case is flawed for the following reasons:

25.2 Firstly, a perusal of Clause 13.2 would show that parties had agreed to have arbitration proceedings conducted as per the Rules of an institution which was not in existence. Therefore, once the arbitral tribunal via the interpretative route identified the institution which the parties had in mind, then the logical sequitur would be that only the Rules of that institution would apply to the arbitration proceedings.

25.3 Therefore, I find no error in the arbitral tribunal applying SIAC Rules to the arbitration proceedings. The accepted position even by IPL is that if provisions of Section 8(2) of the IA Act were to be applied then the person to whom parties had to look for constitution of the arbitral tribunal was the Chairman, SIAC.

25.4 The fact that Chairman, SIAC, is also the authority competent to perform functions under Article 11(3)(b) Model Law is not disputed by IPL. IPL's only objection is that the power exercised by the Chairman, SIAC, at the stage at which he did and the manner in which it was exercised was not proper.

25.5 Therefore while IPL concedes that in both situations i.e. whether SIAC Rules or the provisions of the IA Act and/or of the Model Law were to apply, the Chairman, SIAC, was the authority competent to appoint the arbitrator in the event of disagreement between parties on the procedure for appointment of arbitrator- it objects only to the stage and timing of exercise of power by the Chairman, SIAC.

25.6 The facts obtaining in this case show that not only the stage but the manner in which the power was exercised, to my mind, was proper. As noted hereinabove, via NOA dated 05.08.2010, Glencore not only commenced the arbitration proceedings under the SIAC Rules but also proposed appointment of one Mr. Alan Thambiayah as the sole arbitrator. IPL on its part vide communication dated 19.08.2010 resisted commencement of the arbitration proceedings in its entirety and alluded to the fact that invocation of arbitration proceedings was void as the process of mutual talks was on.

25.7 IPL with this premise, sought via the said communication extension of time by a further period of 30 days to take suitable steps in the matter. Glencore, via return communication dated 24.08.2010 sent through its solicitors while adverting to the fact that IPL had sought extension of time, flagged the issue as regards applicability of SIAC Rules. IPL responded to this communication on 26.08.2010 by stating that its request for extension of time should not be construed as if it had agreed either to the commencement of the arbitration proceedings or to the applicability of SIAC Rules. This response of IPL propelled Glencore to do two things. First, to write to SIAC on 27.08.2010 placing on record its objection to the extension of time sought by IPL, second, to respond to IPL *via* its communication dated 16.09.2010 and put its point of view across as to why according to it SIAC Rules would apply to the instant arbitration proceedings.

25.8 Pertinently, most of the correspondences exchanged between parties to which I have made a reference above, that is, communication dated 5.8.2010, 19.8.2010, 24.8.2010, 26.8.2010 and 16.9.2010 were marked to SIAC. It is in this backdrop, that on 12.11.2010, Registrar, SIAC ruled, while exercising his power under Rule 25.1 of the SIAC Rules that he was *prima facie* satisfied that an arbitration agreement existed between the parties and that SIAC had the necessary jurisdiction to proceed further in that matter under the Rules framed in that behalf.

25.9 Importantly, although IPL was called upon to respond to the NOA by the Registrar, SIAC, via the very same communication, IPL chose not to file a response to the same. This objection though was taken before the arbitral tribunal which was dealt with along with decision on merits while passing the final award.

30. The other important aspect which emerges *qua* this objection is: as to whether the constitution of the arbitral tribunal by Chairman, SIAC, caused any prejudice to IPL. To my mind, no prejudice was caused to IPL in view of the undisputed position that in the circumstance of the instant case where parties had not agreed on a procedure to be adopted for arbitration proceedings which included the constitution of the arbitral tribunal, Chairman, SIAC, had the necessary power to constitute the arbitral tribunal both under the SIAC rules as well as the IA Act. Therefore, even if one were to assume for the moment that it was as contended on behalf of IPL, a procedural defect, it could not, in my view, form the basis for refusing the recognition and/or enforcement of the awards as either way this defect would not have altered the result reached in the arbitration proceedings.

30.1 The courts, in my opinion, *qua* such procedural defects which are taken as objections at the stage of enforcement have to ascertain as to whether the defect led to failure of justice, if it did not, the award ought to be enforced.

Objection No. 3

31. The objection taken that failure on the part of the arbitral tribunal to rule in the first instance on the preliminary issue pertaining to its jurisdiction had resulted in depriving IPL the right to challenge the decision by approaching the High Court of Singapore under Section 10(3) of the IA Act is untenable.

31.1 There is, contrary to the assertion made on behalf of IPL, no such fundamental policy in Indian law that adjudicating authorities should mandatorily render decision on jurisdictional issues before hearing the matter on merits. The discretion in this behalf lies with the adjudicating authority. In case the adjudicating authority hears the matter both with regard to jurisdictional issues as well as on merits together, it would logically not give its views on merits if it were to sustain an objection ousting its jurisdiction in the matter.

31.2 A perusal of Section 10(2) of the IA Act is in sync with the aforesaid proposition. Section 10(2) of the IA Act says "*An Arbitral Tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings."* Sub-section (3) of Section 10 of the IA Act provides a right to the aggrieved party to apply to the High Court *qua* a decision taken against it on the issue of jurisdiction.

31.3 A plain reading of the provision suggests that the decision in that behalf as to what stage the preliminary objection is to be taken up for hearing is left to the wisdom of the arbitral tribunal. This would be the position even if the IA Act were to apply to the instant case. The extract from Arbitration in Singapore: A

Practical Guide, (Editor-in-Chief: The Hon'ble Chief Justice of Singapore Sundaresh Menon)[4] Commentary appears to be in line with this approach.

31.4 Furthermore if one were to take recourse to analogous provision contained in Order XIV Rule 2 of the Code of Civil Procedure, 1908, one would reach the same conclusion. Sub-rule (1) of Rule 2 of Order XIV states that notwithstanding that a case may be disposed of on a preliminary issue subject to the provisions of sub-rule (2), the court should pronounce judgment on all issues.

31.5 Sub-rule (2) goes on to state where issues both of law and fact arise in the same suit and the court is of the opinion that the case or any part thereof maybe disposed of on an issue of law only, it may try that issue first if it relates to jurisdiction of the court or a bar to the suit created by any law for the time being in force. It is in these circumstances that the court if it thinks fit may postpone the settlement of other issues until after that issue has been determined. The crucial aspect is that the issue of jurisdiction or bar to the suit created by law should be one that can be disposed of as an issue of law only. In other words if it is a mixed question of fact and law the court would ordinarily deal with such preliminary issues at the final stage of the matter.

31.6 However as to whether the court would go on to render the decision on merits would depend upon its conclusion *qua* the preliminary issue(s) pertaining to jurisdiction or bar to an action created by any law for the time being in force. In the instant case, the issue as to whether or not SIAC had jurisdiction was a

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[4] **5. TRIBUNAL'S POWER TO RULE ON ITS OWN JURISDICTION**

xxx xxx xxx

(b) Timing of jurisdictional objections

[9.054] A tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.

xxx xxx xxx

(c) Form of tribunal's ruling on jurisdiction

[9.059] A tribunal may rule on the issue of jurisdiction as a preliminary question (for example, in the form of an interim award on jurisdiction), or in an award on the merits.

mixed question of fact and law which required the arbitral tribunal to look at the material which concerned the drafting history of Clause 13.2 before it could conclude one way or the other. Thus the argument advanced on behalf of IPL that the decision of the arbitral tribunal to adjudicate upon the preliminary objection along with the final award was contrary to fundamental policy of India, in my opinion, is completely flawed.

Objection No. 4

32. IPL's objection that the permission given by the arbitral tribunal to Glencore to amend its pleadings on the date when final hearing in the matter took place led to breach of principles of natural justice, in the facts of this case, is not sustainable.

32.1 First and foremost, it is to be borne in mind that under Rule 17.5 of the SIAC Rules, the arbitral tribunal is empowered to allow amendment of pleadings which includes claims, counterclaims or even submissions. Having regard to the parameters set out in the Rule, the arbitral tribunal in deciding the appropriateness of the request made to it for amendment would have to have regard to the delay, if any, in making the request or prejudice that could be caused to the opposite party or any other circumstances. The overarching principle being that the amendment of claim(s) or counterclaim(s) sought should not fall outside the scope of the arbitration agreement. There is nothing in the aforementioned Rule which says that amendment to the pleadings or the submissions could not be allowed on the date of final hearing.

32.2 The arbitral tribunal, undoubtedly, had the power and has therefore proceeded to allow the amendment by exercising its discretion in the matter. While exercising this discretion, *albeit,* at the final hearing stage, the arbitral tribunal, admittedly, gave IPL an opportunity to respond which it failed to avail. Concededly, on 11.01.2012, when the arbitral tribunal allowed Glencore to

amend its pleadings, opportunity was afforded to IPL's counsel to file its reply and/or objection. The amended pleadings were undisputedly served on IPL's counsel.

32.3 Likewise, Glencore's closing submissions were also served on IPL's counsel on 20.01.2012. IPL for whatever reason chose not to respond. It is not IPL's case that the amended pleadings fell outside the scope of the arbitration agreement obtaining between the parties. The only objection taken is *qua* the stage at which amendment was allowed. This by itself, in my view, would not constitute breach of principles of natural justice as alleged or at all. In my opinion, this is not an objection which would fall within the realm of Section 48 of the 1996 Act.

33. Thus for the foregoing reasons, in my view, none of the objections taken on behalf of IPL have any merit. The logical fall out of this conclusion would be that both the Final Award and the Cost Award would have to be recognised as prayed. It is held accordingly. Consequently, both awards would be amenable to enforcement via the instant execution petition.

34. Resultantly, IPL is directed to deposit the awarded amounts with the registry of this court both as mentioned in Final Award and Cost Award within 4 weeks from today. In case IPL deposits the awarded amounts as directed hereinabove, the Registry will invest the same in an interest bearing security maintained with a nationalised bank.

35. Furthermore, IPL will also file an affidavit in Form 16-A Appendix-E of the Code of Civil Procedure, 1908 giving details of its assets which would include its bank accounts. The credit balance obtaining in the bank accounts maintained by IPL as on 08.08.2019 will also be reflected in the affidavit. The affidavit will be accompanied by the requisite bank statement(s).

35.1 Besides this, IPL is restrained from transferring, selling and/or creating third party interests in its assets, save and except, in the normal and usual course of business till further orders of the court.

36. List the matter for further proceedings on 11.10.2019.

(RAJIV SHAKDHER)
JUDGE

AUGUST 09, 2019