SUPREME COURT OF INDIA

Shri Lal Mahal Ltd.

Vs.

Progetto Grano Spa

C.A.No.5085 of 2013

(R.M.Lodha, Madan B. Lokur and Kurian Joseph JJ.)

03.07.2013

JUDGMENT

R.M. LODHA, J.

1. Leave granted.

2. The question for consideration in this appeal by special leave is whether appeal award no. 3782 and appeal award no. 3783 both dated 21.09.1998 passed by the Board of Appeal of the Grain and Feed Trade Association, London (for short, "Board of Appeal") in favour of the respondent are enforceable under Section 48 of the Arbitration and Conciliation Act, 1996 (for short, "1996 Act")?

3. By a contract dated 12.05.1994 between Shiv Nath Rai Harnarain (India) Company, New Delhi (sellers) and Italgrani Spa, Naples, Italy (buyers) a transaction relating to 20,000 MT (+/- 5%) of Durum wheat, Indian Origin (for short, "goods") for a price at US$ 162 Per MT was concluded. Some of the salient terms of the contract are as follows: "Commodity Durum Wheat Indian Origine new crop Test Weight 80 KG/HL.MIN Moisture 12 PCT.MAX Vitrious 80 PCT. MIN Broken 3 PCT. MAX Proteine 12 PCT. MIN Foreign Matter 2 PCT MAX Sprouted/Spotted 1 PCT. MAX Soft Wheat 1.5 PCT. MAX Quantity 20,000 MT With 5%+/- Sellers Option in 1 single shipment Shipment 1-30/June 1994 Quantity final at loading Quality, Conditions All final at time and place of loading As per first class Intl Company Cert.

> "S.G.S.", nominated by the buyers certificate and quality showed at the certificate will be the result of an average samples taken jointly at port of

loading by the representatives of the sellers and the buyers. Price US Dlrs 162,00 Per M. Ton FOB stowed Kandla, Buyers to give 10 days preadvise of vessels arrival Payment Against 100 PCT L/Credit irrevocable and confirmed for 100 PCT payable at sight against Foll. Shipping docs Other conditions All other terms and conditions not in contradictions with the above to be as per G.A.F.T.A Rules, 64/125 and its successive Amendments (In force at time and place of shipment date) which the parties admit that they have knowledge and notice."

4. The buyers opened a letter of credit (L/C) on 17.06.1994 in favour of the sellers. The sellers claim that all documents required under the L/C, including the S.G.S India Limited certificate, were submitted by them which were accepted by the buyers' bankers and payment was duly released to the sellers.

5. The buyers nominated M.V. Haci Resit Kalkavan as the vessel for loading of the goods. There was delay in shipment but that is not material for the purposes of this appeal. The ship completed loading on 13.08.1994 and sailed for discharge port. The Bill of Lading was dated 08.08.1994.

6. The sellers faxed a copy of SGS India certificate of weight, quality and packing to the buyers on 16.08.1994. The buyers passed a copy of that certificate to SGS, Geneva with the request to them to issue the necessary certificate under the sale contract which the buyers had entered with 'Office Alegerien Interprofessional das cereals' (OAIC). After the goods had reached the destination, the buyers sent a fax to the sellers on 23.08.1994 advising that analysis carried out by S.G.S. Geneva showed the wheat loaded was soft common wheat and not durum wheat as required under the contract. The buyers considered the sellers to be in breach of the contract for shipping uncontractual goods and held sellers responsible for all losses/damages both direct and indirect arising out of and the consequence of such breach.

7. The sellers on 31.08.1994 responded to the above communication and asserted that S.G.S. India was an inspection agency; the wheat supplied was inspected by S.G.S. India at the time of procurement and also before loading the vessel and the inspection agency had confirmed that the wheat supplied met typical characteristics of Indian durum wheat and complied with the specifications provided in the contract.

8. The buyers claimed arbitration on 04.11.1994 which was registered as case no. 11715A. The Arbitral Tribunal, GAFTA proceeded to arbitrate the dispute. The

Arbitral Tribunal, GAFTA in its award dated 04.12.1997 accepted the buyers' case that in appointing S.G.S. Geneva, their aim was to safeguard the performance of both contracts by having one company to coordinate all operations regarding inspection, control and the issue of certificate relating to the cargo and rejected the sellers' assertion that having loaded the goods, and presented a certificate provided by an international superintendence company, they had fulfilled their contractual obligations. The sellers' contention that S.G.S. India were nominated by the buyers and they were agents for buyers was rejected. The Arbitral Tribunal, GAFTA, concluded that wheat described on the certificate of quality and condition presented by the sellers as durum wheat of Indian origin was, in fact, soft wheat. The certificate was held to be uncontractual and with regard to description, it was held that sellers were in breach of contract and the buyers were entitled to damages based on the difference between the contract price and the FOB value of the goods as delivered and buyers were also entitled to any further proven loss directly and naturally resulting in the ordinary course of events from the breach. The Arbitral Tribunal, GAFTA passed the final award in the following terms:

> "We do hereby award that Sellers shall pay Buyers forthwith the sum of US $ 1,023,750.00 (One million twenty three thousand seven hundred and fifty United States dollars) being the difference between the FOB contract price-US $ 162.00 per tonne less US $ 2.00 per tonne penalty for extending the shipment period, i.e. US $ 160.00 per tonne, and the FOB price of the Soft wheat shipped on m.v. "HACI RESIT KALKAVAN" i.e. US$ 111.25 per tonne amounting to US $ 48.75 per tonne on 21,000 tonnes, equating to US $ 1023.750 together with interest thereon at the rate of 7% (Seven percent) per annum from 24th August 1994 to the date of this Award.
>
> We do further award that Sellers shall pay Buyers forthwith the sum of US $ 303,007.60 (Three Hundred and three thousand and seven United States dollars and 60 cents.) being the loss incurred in replacing the wheat shipped on m.v. "HACI RESIT KALKAVAN" with Durum wheat shipped on M.V. "EUROBULKER 1" and M.V. "SEA DIAMOND H" together with interest thereon at 7% (Seven percent) per annum on:
>
> US$ 276,512.40 (the loss on M.V. "EUROBULKER 1") from 1st October, 1994 to the date of this Award.
>
> AND

US$ 26,495.20 (the loss on M.V. "SEA DIAMOND H") from 5th December, 1994 to the date of this Award.

We do further award that sellers shall pay Buyers forthwith the sum of US $ 138,590.28 (One hundred and thirty eight thousand five hundred and ninety United States dollars and 28 cents) being demurrage incurred on M.V. "HACI RESIT KALKAVAN" amounting to 19 days 10 minutes at US $ 7,000 per day/pro-rata equating to US $ 138.590.28 together with interest thereon at a rate of 7% (Seven percent) per annum from 30th September 1994 to the date of this Award.

We do further award that Sellers claim for the return of US $ 42,000 fails."

9. It appears that following the commencement of arbitration proceedings, the sellers contested the jurisdiction of the Arbitral Tribunal, GAFTA. The sellers filed a petition in Delhi High Court for a declaration that there was no arbitration agreement between the parties. They also prayed for an order restraining the Arbitral Tribunal, GAFTA from proceeding with the arbitration initiated by the buyers. Although initially interim order was granted but the petition was finally dismissed by Delhi High Court. The special leave petition from that order was dismissed by this Court. In the meanwhile, the Arbitral Tribunal, GAFTA had passed an interim award on 16.10.1995 holding, inter-alia, that the arbitration claim was properly made and it had jurisdiction to decide both the preliminary and substantive issues. On 05.02.1997, buyers made a separate claim for arbitration for sellers' alleged breach of the arbitration agreement in bringing legal proceedings in India concerning the first dispute before it had been determined under the GAFTA Rules. As regards this claim also, the Arbitral Tribunal, GAFTA was constituted and an award No. 12159 dated 04.12.1997 came to be passed by the Arbitral Tribunal, GAFTA.

10. From the above two awards, namely, award no. 11715A and award no. 12159, the two appeals being appeal award no. 3782 and appeal award no. 3783 were filed by the sellers before the Board of Appeal. The Board of Appeal disposed of appeal award no. 3782 (arising out of award No. 11715A) on 21.09.1998 and passed the award in the following terms: "We do hereby award that Sellers shall forthwith pay to Buyers the sum of US$ 1,023,750.00 (one million, twenty three thousand seven hundred and fifty United States Dollars) being the difference in value of US$ 48.75 per tonne between the goods supplied and goods of the contractual description calculated on 21,000 tonnes, together with interest thereon at 7% (Seven per centum) per annum from 24th August, 1994 to the date of this Award.

We further award that Sellers shall forthwith pay to Buyers the sum of US $ 138,590.28 (one hundred and thirty eight thousand five hundred and ninety United States Dollars and twenty eight cents), being demurrage incurred at load, together with interest thereon at 7% (seven per centum) per annum from 30th September 1994 to the date of this Award.

We further award that Buyers' claim for consequential damages fails.

We further award that Sellers shall forthwith pay to Buyers the sum of £ 4,340.00 (four thousand three hundred and forty pounds sterling only), being the fees and expenses of Arbitration 11715A.

We further award that Sellers shall forthwith pay to Buyers the sum of £ 1,750 (one thousand seven hundred and fifty pounds only), being the costs and expenses of Buyers' Representative in preparing and presenting this case."

11. Appeal award no. 3783 (arising out of award no. 12159) was disposed of also on the same day by the following award: "We do hereby award that sellers shall forthwith pay to Buyers as part of their damages the sum of £ 1,762.90 (one thousand seven hundred and sixty two pounds and ninety pence), being the reasonable charges and disbursements of Middleton Potts incurred in considering and responding to the proceedings taken by Sellers in India.

We further award that Sellers shall pay to Buyers as the balance of their damages the sum of £ 15,924.00 (fifteen thousand nine hundred and twenty four pounds), being the total of O.P. Khaitan's four invoices nos. ATP/804 of 1995/6, ATP/206 of 1996/7, ATP/286 of 1996/7 and ATP/767 of 1996/7, or such lesser sum as shall be agreed by the parties or assessed by an appropriate officer or person in India, in either Indian rupees or sterling as being the reasonable fees, expenses, etc. incurred in considering and responding to the proceedings taken by Sellers in India. But we reserve to ourselves the right to assess these fees, expenses, etc. upon application of one or both of the parties, in the event that the parties are neither able to agree them, nor able to agree upon an appropriate officer or person in India to assess them.

We further award that Sellers shall forthwith pay to Buyers the costs and expenses of the first tier arbitration no. 12159 in the amount of £2,190.00

(two thousand one hundred and ninety pounds) together with £ 85.00 (eighty five pounds), being the fee for appointment of an arbitrator on Sellers' behalf. We further award that Sellers shall forthwith pay to Buyers the sum of £ 500 (five hundred pounds only) being the costs and expenses of Buyers' Representative in preparing and presenting this case."

12. The sellers challenged the appeal award no. 3782 in the High Court of Justice at London. The appeal was dismissed on 21.12.1998. The sellers did not challenge the award passed by the Board of Appeal in appeal award no. 3783. Both awards, thus, have attained finality.

13. It was then that buyers instituted a suit in the Delhi High Court for enforcement of the awards both dated 21.09.1998 passed by the Board of Appeal in appeal award no. 3782 and appeal award no. 3783. The sellers raised diverse objections to the enforcement of the above awards.

14. The appellant, Shri Lal Mahal Limited, is successor in interest of the sellers while the respondent Progetto Grano SPA is the successor in interest of buyers. When the proceedings were pending before the Delhi High Court, the substitution in the proceedings took place. This is how the parties are now described in the appeal. For the sake of convenience, we shall continue to refer the appellant as 'sellers' and the respondent as 'buyers'.

15. Inter alia, the submission of the sellers before the High Court was that the appeal awards passed by the Board of Appeal which are sought to be enforced are contrary to the public policy of India inasmuch as they are contrary to the express provisions of the contract entered into between the parties. The sellers submitted before the Delhi High Court that the Board of Appeal erred in accepting the test report by S.G.S. Geneva whereas under the contract, it was the test report of S.G.S.India that was material. The goods in question were inspected at the port of discharge in the absence of the sellers. In terms of the contract between the parties, the inspection certificate was given by S.G.S. India which was nominated by the buyers themselves. There was no requirement for any inspection at the point of discharge of the consignment. Responsibility of the sellers ceased after the said obligation was fulfilled.

16. On the other hand, it was submitted on behalf of the buyers before Delhi High Court that the plea raised before the Board of Appeal on the certificate issued by the S.G.S. Geneva was a matter of appreciation of evidence and determination of question of fact which is beyond the scope of the proceedings under Section 48 of

the 1996 Act. The buyers submitted that the sellers cannot be permitted to reopen questions of fact as already decided by the Board of Appeal which were affirmed by the High Court of Justice at London. Seeking enforcement of the awards of the Board of Appeal, it was submitted that there was nothing in the awards which could be said to be against the public policy of India.

17. Dealing with the submissions made on behalf of the parties, the High Court considered the objections of the sellers and recorded its conclusion as follows:

> "23. The above conclusion of the GAFTA Arbitral Tribunal is based on an appreciation of the evidence produced by the parties. The stark finding, confirmed by the reports of three independent analysts, two in Greece (one a private lab and another State lab) and the FMBRA in England, was that the consignment sent by the Defendant contained only 9% durum wheat. 90% was soft wheat. In the circumstances, the only conclusion possible was the one arrived at by the Arbitral Tribunal viz., "the wheat, described on the Certificate of Quality and Condition presented by Sellers as Durum wheat of Indian origin, was soft wheat." This conclusion has been affirmed by the impugned Appeal Award No. 3782 by the Board of Appeal, GAFTA. It has been further affirmed by the rejection by the High Court of Justice at London of the Defendant's petition challenging the Appeal Award No. 3782. The above conclusion cannot be held to be contrary to the terms of the contract or to the public policy of India. Further, this Court is not expected in enforcement proceedings, re-determine questions of fact. The grounds enumerated in Section 48 of the Act are meant to be construed narrowly and does not permit a review of the foreign award on merits."

18. Then in paragraph 25 of the impugned judgment, the High Court observed that there was no serious defence in opposition to the enforcement of two foreign awards. The High Court overruled the objections raised by the sellers to the enforcement of foreign awards and held that they were enforceable under Part II of the 1996 Act.

19. We have heard Mr. Rohinton F. Nariman, learned senior counsel for the appellant (sellers) and Mr. Jayant K. Mehta, learned counsel for the respondent (buyers) at quite some length.

20. Having regard to clause (b) of sub-section (2) of Section 48 of the 1996 Act, we shall immediately examine what is the scope of enquiry before the court in which foreign award, as defined in Section 44, is sought to be enforced. This has

become necessary as on behalf of the appellant it was vehemently contended that in light of the two decisions of this Court in Saw Pipes[1] and Phulchand Exports[2], the Court can refuse to enforce a foreign award if it is contrary to the contract between the parties and/or is patently illegal. It was argued by Mr. Rohinton F. Nariman, learned senior counsel for the appellant, that the expression "public policy of India" in Section 48(2)(b) is an expression of wider import than the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961. The expansive construction given by this Court to the term "public policy of India" in Saw Pipes1 must also apply to the use of the same term "public policy of India" in Section 48(2)(b).

21. Mr. Jayant K. Mehta, learned counsel for the respondent, on the other hand, placed heavy reliance upon the decision of this Court in Renusagar3 and submitted that what has been stated by this Court while interpreting Section 7(1)(b)(ii) of the Foreign Awards Act in that case is equally applicable to Section 48(2)(b) of the 1996 Act and the expression "public policy of India" in Section 48(2)(b) must receive narrow meaning than Section 34. Saw Pipes1 never meant to give wider meaning to the expression, "public policy of India" insofar as Section 48 was concerned. According to Mr. Jayant K. Mehta, Phulchand Exports2 does not hold that all that is found in paragraph 74 in Saw Pipes1 is applicable to Section 48(2)(b). He argued that in any case both Saw Pipes1 and Phulchand Exports2 are decisions by a two-Judge Bench of this Court whereas Renusagar[3] is a decision of three-Judge Bench and if there is any inconsistency in the decisions of this Court in Saw Pipes1 and Phulchand Exports2 on the one hand and Renusagar3 on the other, Renusagar3 must prevail as this is a decision by the larger Bench.

22. The three decisions of this Court in Renusagar3, Saw Pipes1 and Phulchand Exports2 need a careful and close examination by us. We shall first deal with Renusagar3. It is not necessary to narrate in detail the facts in Renusagar3 . Suffice it to say that Arbitral Tribunal, GAFTA in Paris passed an award in favour of General Electric Company (GEC) against Renusagar. GEC sought to enforce the award passed in its favour by filing an arbitration petition under Section 5 of the Foreign Awards Act in the Bombay High Court. Renusagar contested the proceedings for enforcement of the award filed by GEC in the Bombay High Court on diverse grounds. Inter alia, one of the objections raised by Renusagar was that the enforcement of the award was contrary to the public policy of India. The Single Judge of the Bombay High Court overruled the objections of Renusagar. It was held that the award was enforceable and on that basis a decree in terms of the award was drawn. Renusagar filed an intra-court appeal but that was dismissed as not maintainable. It was from these orders that the matter reached this Court. On

behalf of the parties, multifold arguments were made. A three-Judge Bench of this Court noticed diverse provisions, including Section 7(1)(b)(ii) of the Foreign Awards Act which provided that a foreign award may not be enforced if the court dealing with the case was satisfied that the enforcement of the award would be contrary to public policy. Of the many questions framed for determination, the two questions under consideration were; one, "Does Section 7(1)(b)(ii) of the Foreign Awards Act preclude enforcement of the award of the Arbitral Tribunal, GAFTA for the reason that the said award is contrary to the public policy of the State of New York?" and the other "what is meant by public policy in Section 7(1)(b)(ii) of the Foreign Awards Act?". This Court held that the words "public policy" used in Section 7(1)(b)(ii) of the Foreign Awards Act meant public policy of India. The argument that the recognition and enforcement of the award of the Arbitral Tribunal, GAFTA can be questioned on the ground that it is contrary to the public policy of the State of New York was negated. A clear and fine distinction was drawn by this Court while applying the rule of public policy between a matter governed by domestic laws and a matter involving conflict of laws. It has been held in unambiguous terms that the application of the doctrine of "public policy" in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when purely municipal legal issues are involved. Explaining the concept of "public policy" vis-à-vis the enforcement of foreign awards in Renusagar3 , this Court in paras 65 and 66 (pgs. 681-682) of the Report stated:

> 65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.
>
> 66. . . . . This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy

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

23. In Saw Pipes1, the ambit and scope of the court's jurisdiction under Section 34 of the 1996 Act was under consideration. The issue was whether the court would have jurisdiction under Section 34 to set aside an award passed by the Arbitral Tribunal, GAFTA which was patently illegal or in contravention of the provisions of the 1996 Act or any other substantive law governing the parties or was against the terms of the contract. This Court considered the meaning that could be assigned to the phrase "public policy of India" occurring in Section 34(2)(b)(ii). Alive to the subtle distinction in the concept of 'enforcement of the award' and 'jurisdiction of the court in setting aside the award' and the decision of this Court in Renusagar3, this Court held in Saw Pipes1 that the term "public policy of India" in Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it becomes final. Having that distinction in view, with regard to Section 34 this Court said that the expression "public policy of India" was required to be given a wider meaning. Accordingly, for the purposes of Section 34, this Court added a new category – patent illegality – for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against public policy. Award could also be set aside if it was so unfair and unreasonable that it shocks the conscience of the court.

24. From the discussion made by this Court in Saw Pipes1 in paragraph 18* (pgs. 721-722), paragraph 22** (pgs. 723-724) and paragraph 31*** (pgs. 727-728) of the Report, it can be safely observed that while accepting the narrow meaning given to the expression "public policy" in Renusagar3 in the matters of enforcement of foreign award, there was departure from the said meaning for the

purposes of the jurisdiction of the Court in setting aside the award under Section 34.

25. In our view, what has been stated by this Court in Renusagar3 with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must equally apply to the ambit and scope of Section 48(2)(b) of the 1996 Act. In Renusagar3 it has been expressly exposited that the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression "public policy" used in Section 7(1)(b)(ii) was held to mean "public policy of India". A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in Renusagar3. For all this there is no reason why Renusagar3 should not apply as regards the scope of inquiry under Section 48(2)(b). Following Renusagar3, we think that for the purposes of Section 48(2)(b), the expression "public policy of India" must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the three categories enumerated in Renusagar3. Although the same expression 'public policy of India' is used both in Section 34(2(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the Sections but, in our view, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

26. We are not persuaded to accept the submission of Mr. Rohinton F. Nariman that the expression "public policy of India" in Section 48(2)(b) is an expression of wider import than the "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act. We have no hesitation in holding that Renusagar3 must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in Saw Pipes1 would govern the scope of such proceedings.

27. We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in Saw Pipes1 is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).

28. It is true that in Phulchand Exports2 , a two-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression "public policy of India" in Section 34 in Saw Pipes1 must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in paragraph 16 of the Report that the expression "public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law and is overruled.

29. Having regard to the above legal position relating to the scope of "public policy of India" under clause (b) of sub-section (2) of Section 48, we shall now proceed to consider the submissions of the parties.

30. Mr. Rohinton F. Nariman, learned senior counsel for the appellant, argued that the appeal awards by the Board of Appeal cannot be enforced on the touchstone that they are contrary to public policy of India. It is so as both the Arbitral Tribunal, GAFTA and the Board of Appeal have gone beyond the terms of the contract between the sellers and the buyers. Despite the contract being FOB contract between the parties which specifically sets out that the certificate of quality obtained at the load port from the buyers' nominated certifying agency, i.e., S.G.S. would be final and the certifying agency in fact issued such a certificate, the Arbitral Tribunal, GAFTA as well as the Board of Appeal relied upon evidence procured unilaterally by the buyers from other certifying agencies beyond the terms of the contract which was based on quality specifications of a forward contract which the buyers had signed with OAIC Algiers. In this regard, learned senior counsel referred to the certificate issued by S.G.S. India which confirmed that weight, quality and packing of the goods met the contractual specifications both in terms of description and quality. The Merchandise was found to be sound, loyal, merchantable, free from living insects, defects, diseases and contamination of any nature. However, the buyers appointed Crepin Analysis and Controls, Rouen for testing the sample of the goods for their forward contract with OAIC Algiers. The said agency tested the goods on a completely different set of parameters as stipulated under the contract. Crepin did not even test the goods for their contents of vitreous and moisture.

31. Learned senior counsel for the appellant submitted that being an FOB contract the title of the goods and risk is passed on to the buyers the moment the goods were loaded on the ship. The goods were admittedly loaded on 08.08.1994 after

which the risk fell on the buyers. In this regard reliance was placed on a decision of this Court in D.K. Lall[4].

32. Mr. Rohinton F. Nariman vehemently contended that once parties had agreed that certification by an inspecting agency would be final, it was not open to the Arbitral Tribunal, GAFTA as well as Board of Appeal, to go behind that certificate and disregard it even if the certificate was inaccurate (which was not the case). In this regard, reliance was placed on two judgments of the English courts, namely, Agroexport[5] and Alfred C. Toepfer.[6]. He submitted that House of Lords in Gill & Duffus[7] has affirmed the decision in Alfred C. Toepfer6. It was, thus, submitted that the Arbitral Tribunal, GAFTA and the Board of Appeal having disregarded the finality of the certificate issued by S.G.S. India, the awards were plainly contrary to contract and, therefore, not enforceable in India. It was submitted on behalf of the appellant that it was not an issue in dispute and not the buyers' case before the Arbitral Tribunal, GAFTA and/or the Board of Appeal that the procedure adopted by SGS India was not in conformity with the contract. It was, therefore, not open to the Board of Appeal to render a finding which went beyond the scope of the buyers' very case. Accordingly, it was argued that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore, award cannot be enforced because it is contrary to Section 48(1)(c) of the 1996 Act as well.

33. Learned senior counsel for the appellant highlighted that the real problem in the present case was not that S.G.S. India did not properly certify the goods and/or that they did not meet the contractual specifications provided for under the contract between the buyers and sellers but because the buyers were unable to use it for their forward contract with OAIC Algeria. This is further fortified from the fact that the buyers entered into a further contract with the sellers on 09.09.1994 for a much larger quantity of the goods with the very same specifications. He, thus, submitted that the judgment of the High Court should be set aside and the appeal awards must be held to be not enforceable in India.

34. Mr. Jayant K. Mehta, learned counsel for the respondent, on the other hand, supported the impugned judgment and submitted that the High Court was justified in dismissing the objections of the appellant as no ground was established or proved by the appellant on which enforcement of the foreign awards could be refused under Section 48 of the 1996 Act.

35. Learned counsel submitted that the FOB contract has no relevance to the liability of a seller to sell the contractual goods or to the quality of the goods sold.

It is only relevant for determination of risk and liability during transportation of the goods which is not the issue in the present case. With reference to D.K. Lall4 relied upon by the learned senior counsel for the appellant, it was submitted that D.K. Lall4 was only on issue of insurance liability and in that context the nature of FOB contract had been discussed. D.K. Lall4 does not concern with the issue of sellers' breach in selling uncontractual goods.

36. Mr. Jayant K. Mehta submitted that the findings of the Arbitral Tribunal, GAFTA, as upheld by the Board of Appeal, are that (a) the contract specified that the certification of quality is final at the time and place of loading; (b) as per the contract certification by S.G.S. India was to be conclusive based on sampling at the time and place of loading; (c) two distinct aspects were required to be considered whether S.G.S. India was the contractual party and, if yes, whether S.G.S. India certificate was in the contractual form. While it was found that S.G.S. India was the contractual agency, the sellers failed to establish that the S.G.S. India certificate was in contractual form. Buyers, on the other hand, did establish that the S.G.S. India certificate was not in contractual form, (d) S.G.S. India's certification was uncontractual as there were two fatal errors in the certification, firstly, it did not follow the contractual specified mode of sampling in that the contract required the result to be of an average sample taken at the port of loading, not the weighted average of pre-shipment and shipment, secondly, the analysis done by S.G.S. India was doubtful; (e) as the buyers held the sellers to be in breach on the grounds of defective sampling and certification by S.G.S. India, the buyers requested the sellers to attend at discharge for joint sampling which was not accepted by the sellers and (f) the method used for determining soft wheat used by S.G.S. India obviously produced very different results to the methods used by Crepin and other laboratories. On the balance of probabilities, the Arbitral Tribunal, GAFTA found and the Board of Appeal agreed that the wheat described in the certificate of quality and condition was soft wheat and, therefore, buyers were entitled to damages.

37. Learned counsel submitted that the findings recorded by the Arbitral Tribunal, GAFTA and the Board of Appeal were in the realm of interpretation of the contract and appreciation of the evidence which cannot be reopened by arguing that the foreign award is contrary to the contract and, therefore, its enforcement would offend public policy of India. About the decisions of the English courts in Agroexport5 and Alfred C. Toepfer6 , learned counsel submitted that decisions of English courts cannot form part of public policy of India. This Court does not exercise appellate jurisdiction over the foreign awards and cannot be called upon to enquire as to whether foreign awards are contrary to the principles of English law.

Learned counsel submitted that in any case the judgments of the English courts in Agroexport5 and Alfred C. Toepfer6 do not apply to the fact situation of the present case. Learned counsel also submitted that the decision of House of Lords in Gill & Duffus7 has no application to the present case.

38. Learned counsel for the respondent argued that once the sampling by S.G.S. India has been found to be uncontractual, that certificate cannot bind the buyers and, therefore, no error or illegality was committed by the Arbitral Tribunal, GAFTA, or the Board of Appeal to look into the certificate issued by Crepin. Learned counsel for the respondent thus, submitted that the Delhi High Court was justified in rejecting the objections of the appellant.

39. It is not necessary to advert to the findings recorded by the Arbitral Tribunal, GAFTA as what is sought to be enforced by the buyers is the two awards of the Board of Appeal.

40. The challenge to the enforceability of the foreign awards passed by the Board of Appeal is mainly laid by the sellers on the ground that the Board of Appeal has gone beyond the terms of the contract by ignoring the certificate of quality obtained at the load port from the buyers' nominated certifying agency, i.e., SGS India which was final under the contract. The Board of Appeal, while dealing with the question whether the SGS India certificate was issued by the contractual party and in contractual form, noticed the clause in the contract in respect of quality and condition and it held that SGS India was an acceptable certifying party under the contract. As regards the other part of that clause that provided, "certificate and quality showed in the certificate will be the result of an average samples taken jointly at port of loading by the representatives of the sellers and the buyers", the Board of Appeal recorded its finding as follows:

> "The SGS India certificate shows that an inspection took place at the suppliers godowns inland, and representative samples taken. Sealed samples were inspected lotwise and the cargo meeting the contractual specifications was allowed to be bagged for dispatch to Kandla.
>
> Continuous supervision of loading into the vessel was also carried out at the port. The samples drawn periodically were reduced and composite samples were sealed; one sealed sample of each lot was handed over to the supplier, one sealed sample of each lot was analysed by SGS and the remaining samples were retained by SGS for a period of three months unless and until instructions to the contrary were given.

> The analysis section of the certificate states that "The above samples have been analysed and the weighted average Pre-shipment and Shipment results are as under:
>
> We find that this procedure was not in conformity with the requirements of the Contract, which required the result to be of an average sample taken at port of loading, not the weighted average of pre-shipment and shipment samples. Accordingly the certificate is uncontractual and its results are not final. In consequence the Board is obliged to evaluate all the evidence presented, including the evidence of the uncontractual SGS India certificate to decide whether or not the goods were of the contractual description, i.e. Durum wheat Indian origin."
>
> (Emphasis supplied by us)

41. Thus, having held that SGS India was the contractual agency, the Board of Appeal further held that the sellers failed to establish that the SGS India certificate was in contractual form. Two fundamental flaws in the certification by SGS India were noted by the Board of Appeal, one, SGS India's certification did not follow the contractual specified mode of sampling and the other, the analysis done by SGS India was doubtful. The Board of Appeal then sifted the documentary evidence let in by the parties and finally concluded that wheat loaded on the vessel Haci Resit Kalkavan was soft wheat and the sellers were in breach of the description condition of the contract.

42. It is pertinent to state that the sellers had challenged the award (no. 3782) passed by the Board of Appeal in the High Court of Justice at London. The three decisions; (i) Agroexport5 by Queen's Bench Division, (ii) Toepfer6 by Court of Appeal, and (iii) Gill & Duffus7 by House of Lords, were holding the field at the time of consideration of sellers' appeal by the High Court of Justice at London. In Agroexport5 , it has been held that an award founded on evidence of analysis made other than in accordance with contract terms cannot stand and deserves to be set aside as evidence relied upon was inadmissible. The Court of Appeal in Toepfer6 has laid down that where seller and buyer have agreed that a certificate at loading as to the quality of goods shall be final and binding on them, the buyer will be precluded from recovering damages from the seller, even if, the person giving the certificate has been negligent in making it. Toepfer6 has been approved by the House of Lords in Gill & Duffus7. The High Court of Justice at London can be assumed to have full knowledge of the legal position exposited in Agroexport5 ,

Toepfer6 and Gill & Duffus7 yet it found no ground or justification for setting aside the award (no. 3782) passed by the Board of Appeal. If a ground supported by the decisions of that country was not good enough for setting aside the award by the court competent to do so, a fortiori, such ground can hardly be a good ground for refusing enforcement of the award. Accordingly, we are not persuaded to accept the submission of Mr. Rohinton F. Nariman that Delhi High Court ought to have refused to enforce the foreign awards as the Board of Appeal has wrongly rejected the certificate of quality obtained from the buyers' nominated certifying agency and taken into consideration inadmissible evidence in the nature of certificates obtained by the buyers' for the purposes of forwarding contract.

43. 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.

44. In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report obtained by buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12.05.1994 and wrongly rejected the report of the contractual agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal.

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

46. The contention of the learned senior counsel for the appellant that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore, these awards cannot be enforced being contrary to Section 48(1)(c) is devoid of any substance and is noted to be rejected.

47. In the circumstances, we hold that appeal has no merit. It is dismissed with no order as to costs.