SUPREME COURT OF INDIA

LMJ International Ltd.

Vs.

Sleepwell Industries Co. Ltd.

SLP(Civil)No.540 of 2018

(A.M.Khanwilkar and Ajay Rastogi,JJ.,)

20.02.2019

JUDGMENT

A.M.Khanwilkar,J.,

1. These special leave petitions emanate from the judgment and orders dated 22nd August, 2017 passed by the High Court at Calcutta in G.A. No.3306/2016 in E.C. No.487/2013 and dated 9th July, 2018 in G.A. No.3307/2016 in E.C. No.488/2013, respectively. The special leave petitions pertain to two execution petitions filed by the respondent - award holder concerning two separate foreign awards. Since the questions raised in both these petitions are overlapping, the same are being answered together.

2. The parties had entered into separate contracts for sale of Non Basmati Parboiled Rice, Thailand origin, on the terms and conditions specified in the contracts. The contract contained a stipulation that the quantity would be final at the Port of loading as per the official weight certificate issued by SGS at the cost of the seller, meaning thereby the respondent. The consignments were shipped by the seller as per the said contract. The contract was an FOB contract and the goods were meant for the Government of People's Republic of Bangladesh. The contract in "other terms" envisage that on terms and conditions not in contradiction with the stipulated terms of contract shall be governed by GAFTA 48 and disputes to be resolved by Arbitration 125 as per GAFTA 125 in London. The buyer had opened letters of credit on different dates and the consignments were shipped by the seller. For each single shipment, invoices had been issued by the seller in accordance with the addendum to the contract. Shorn of unnecessary details, be it noted that some dispute arose regarding the inferior quality of rice and non-release of the payment towards the invoices raised by the seller in respect of certain shipment, which eventually became the subject matter of arbitration proceedings. The respondent, on 28th July, 2011, invoked the arbitration clause and eventually appointed Mr. R. Barber as its Arbitrator. As the petitioner failed to respond, the respondent requested GAFTA to appoint an arbitrator on their behalf in accordance with GAFTA Arbitration Rules 125. GAFTA duly appointed Mr. R. Eikel as the second Arbitrator on 22nd September, 2011. On 25th June, 2012 GAFTA appointed Mr. C. Debattista as the third Arbitrator and Chairman of the Tribunal.

3. The respondent filed its claim submissions dated 11th May, 2012 in the two independent arbitration proceedings, concerning contract-I and contract-II, respectively. These claim submissions came to be filed after giving various opportunities to the petitioner. Resultantly, the Arbitral Tribunal passed two separate awards in relation to the concerned contracts, being Arbitration Case No.14/456 (pertaining to contract-I) and Arbitration Case No.14/457 (pertaining to contract-II). Be it noted that the Arbitral Tribunal proceeded ex-parte against the petitioner as, despite notice, the petitioner refused to participate in the arbitration proceedings. Neither did it file any statement of defence or counterclaim nor did it adduce any evidence.

4. On 19th November, 2013, the respondent filed two execution cases, being Execution Case No.487/2013 (pertaining to contract-I) and Execution Case No.488/2013 (pertaining to contract-II), under Part-II of the Arbitration and Conciliation Act, 1996 (for short " the Act"), before the High Court at Calcutta for enforcement of the foreign arbitral awards. The learned Single Judge of the High Court passed a common order in the said execution cases rejecting the objection purportedly regarding the maintainability of the subject foreign awards vide judgment and order dated 4th December, 2014. The learned Single Judge noted that the petitioner did not file any affidavit or formal application to oppose the execution case, but chose to raise objections orally, only through his counsel, before the Court. The Single Judge noted the objections of the petitioner. The Court also noted that the Court ought to be satisfied that the foreign award was enforceable and must record its satisfaction in that regard, consequent to which, in view of Section 48 of the Act, the award shall be deemed to be a decree of the Court. The learned Single Judge then went on to record the five objections taken on behalf of the petitioner through its counsel, which read thus:

> "The first objection raised is that no prayer for declaration has been made in the application that the foreign award is enforceable. It is submitted that unless prayer is made seeking a declaration as to the enforcement of the award, the Court cannot assume jurisdiction. In this regard the learned Senior Counsel has referred to a Single Bench decision of the Bombay High Court in the case of Toepfer *International Asia Pvt. Ltd. versus Thapar Ispat Ltd., reported in*[1] paragraph 19.
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> The second objection is that a civil suit is pending between the parties in which there is a categorical observation both by the learned Single Judge as well as the Division Bench that any action taken by the parties to the suit during the pendency of the suit shall be subject to and abide by the result of the suit. It is submitted that a cross appeal was preferred by the decree-holder and this observation of the learned Single Judge was not interfered with and accordingly the execution application is premature and unless the suit is decided, the award does not attain its finality. The third objection is that the arbitration clause has not been properly invoked. It is submitted that arbitration clause is a two-tier clause. Before the arbitration clause could be invoked, the parties are required to first make an attempt to amicably settle their disputes and only upon failure, the parties could refer their disputes to the arbitration as per GAFTA clause for rice and arbitration rules 125. It is submitted that there is no averment in the petition that before invoking the arbitration clause there was any attempt to settle the disputes amicably. Since this stage has not been

reached, the invocation of Arbitration Clause is void ab initio. In this regard, the learned Senior Counsel has referred to an unreported decision of a single Bench of this Court in AP 112 of 2008 [Waidhan Engineering & Industries Private Limited vs. The Board Of Trustees For The Port Of Kolkata] decided on 5th May 2010. The fourth objection is that even if it is assumed for the sake of argument that this amicable settlement was not followed, even then Rule 3.1 was not followed with regard to the appointment of the sole Arbitrator. It is submitted that it was incumbent upon the decree-holder to inform the respondent about the appointment of a sole arbitrator and it was only on refusal to accede to such request that other procedures prescribed under the rules shall follow. The fifth and the last objection appears to be that the nominee arbitrator of the respondent was appointed de hors the provisions of GAFTA Rules and accordingly the procedure adopted is irregular from the very beginning and the award is not enforceable."

5. After considering the rival submissions, the Court rejected the aforementioned objections on the finding that the legislative intent underlying the Act was to circumscribe the supervisory role of the Court in arbitral proceedings and that it predicated limited interference. Further, it went on to observe that the objections raised by the petitioner were in a quagmire of despondency and a desperate attempt to resist the enforceability of an enforceable award rather than being any real challenge thrown towards the maintainability of the said petition. These observations would assume relevance because in the special leave petitions filed against the said common judgment dated 4th December, 2014, the questions of law and grounds articulated resonate with the objections taken by the petitioner regarding the subject foreign awards being enforceable or otherwise. To wit, the questions of law and grounds urged in Special Leave Petition (Civil) No.5612 of 2015 (pertaining to contract-I) read thus:

"QUESTIONS OF LAW :
That the following questions of law of general and public importance arise for consideration of his Hon'ble Court :-

i) Whether any order in an execution proceeding can be passed before the Court is called upon to decide and declare that the award is enforceable?

ii) Whether any declaration as to the enforceability of a foreign award is to be sought by the award holder before seeking to enforce the foreign award?

iii) Whether a foreign award which arises out of an arbitration agreement which is under challenge in a properly instituted civil suit, can be put to execution before the suit is heard and disposed of?

iv) Whether valid and proper invocation of the arbitration clause is a pre-requisite before seeking to enforce the foreign award arising out of the arbitration agreement between the parties?

v) Whether in a two-tier arbitration mechanism, it is necessary to exhaust the first-tier (i.e. negotiation) before proceeding to formally commence the reference?

vi) Whether the executing Court can assume jurisdiction without there being a declaration as to the enforcement of the foreign award?

vii) Whether the execution of the foreign award was premature before the outcome of the civil suit filed by the appellant?

viii) Whether the invocation of the arbitration clause was properly done by the award-holder?

ix) Whether the Arbitral Tribunal rightly applied the rules, principles and practice of GAFTA Arbitration Rules while delivering the foreign award?

x) Whether an award-holder can seek to apply for execution of a foreign award without first complying with the conditions laid down in Section 48 of the 1996 Act?

xi) Whether a foreign award can be said to be enforceable merely upon production of original award and a duly certified copy of the arbitration agreement?

xii) Whether it is necessary to file a formal application under Section 48 of the 1996 Act to resist the foreign award or objections as to the enforceability of a foreign award can be made even otherwise?

xiii) Whether recourse to Section 49 of the Arbitration & Conciliation Act, 1996 can be taken without satisfying the test laid down in Section 48 of the 1996 Act?

xiv) Whether the executing court can pass any order in aid of execution despite the pendency of a properly instituted civil suit which challenges the very basis of a purported foreign award?

xv) Whether the executing court an substantive pass orders in the execution ignoring the pendency of the civil suit and the observation of the Division Bench of the Calcutta High Court to the effect that "any action taken by the parties to the suit during its pendency shall be subject to and abide by the result of the suit?

xvi) Whether the executability of the foreign award can be decided without allowing the award debtor to file its affidavit or its objection in writing to defend a purported foreign award?

xvii) Whether any interim order can be passed in favour of a party relying upon a purported foreign award without going into at all the objections raised by the petitioner?

GROUNDS

a) For that the impugned order is untenable in law and facts of the present case.

b) For that the impugned order has been passed without giving any opportunity to the petitioner to file its affidavit or put its objection in writing to the executability of the foreign award.

c) For that the impugned order has been passed by a Single Judge of the Calcutta High Court totally ignoring the effect of the observation and finding of an order passed by another Single Judge of the Hon'ble High Court duly affirmed by the Division Bench arise out of a previously instituted civil suit.

d) For that there was no prima facie case in favour of the respondent and no interim order could have been granted to the respondent.

e)For that the High Court erred in failing to call upon the petitioner to file its affidavit on merits and to raise its objection in writing to the executability of the foreign award?

f)For that the High Court erred in holding that the affidavit disclosing the Bank Accounts filed by the petitioner in terms of the order dated 18.09.2014 gave a very bleak picture about the financial condition of the petitioner.

g) For that the High Court failed to appreciate that the decree-holder/respondent had not met or satisfied the test laid down in Sections 47 and 48 of the Arbitration & Conciliation Act, 1996.
h) For that the High Court failed to appreciate the purport and the scope of the Arbitration & Conciliation Act, 1996 and misdirected itself in law and in fact.

i) For that the High Court failed to appreciate that the impugned order will cause create hardship and inconvenience and would affect the day-to-day business of the petitioner.

j) For that the High Court erred in holding that sufficient opportunity was given to the petitioner to deal with the maintainability of the execution proceeding."

6. The aforementioned special leave petition came to be dismissed on 27th February, 2015. Similarly, the special leave petition filed by the petitioner, being SLP(C) No.6682 of 2015 (pertaining to contract-II involving similar questions and grounds), was dismissed on 17th August, 2015.

7. Later on, when the matter proceeded before the Single Judge of the High Court in the execution petition, the Court noted that it had already held in its earlier order dated 4th December, 2014, that the subject foreign awards were deemed to be decrees and hence enforceable, whilst rejecting the objections of the petitioner in both the cases with regard to the maintainability of the execution petition. The learned Single Judge directed the petitioner to examine its Principal Officer. The petitioner preferred an appeal against the said decision dated 17th March, 2015 which came to be disposed of by the Division Bench vide common order dated 1st December, 2015. These orders have been allowed to attain

finality. The petitioner then filed a review application in the execution case. The same was dismissed by the learned Single Judge of the High Court on 8th June, 2015, holding that the review application was a ploy to reopen the matter which had attained finality after the rejection of the special leave petitions. After the rejection of the review application, the petitioner was advised to file G.A. Nos.3306/2016 and 3307/2017 in the respective execution cases, purporting to raise objections regarding the enforceability of the foreign awards in terms of Section 48 of the Act. We may refer to the application filed in G.A. No.3306/2016 as to the grounds on which the objection regarding enforceability of the foreign awards came to be resurrected. The relevant extract thereof reads thus:

> "74. The said purported award dated April 10, 2013 is not enforceable, interalia, being vitiated by fraud and/or corruption as morefully stated above. The particulars of fraud and corruption are, without prejudice to the order challenges to enforceability of the purported award, summarized hereinbelow:-
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> (a) The award holder with intent to deceive and/or to perpetrate fraud on the petitioner actively concealed the factum of filing the suit being C.S.No.196 of 2011 (Sleepwell Industries Ltd. Vs. Bank of Baroda) for US$ 382,348.90 before the Arbitral Tribunal and procured the purported Award including the said sum for, Arbitral Tribunal.
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> (b) The award holder with an intent to deceive the petitioner, made a promise without any intention of performing it.
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> (c) By its letter and mail both dated February 14, 2011 the award holder accepted that it has sent inferior quality of rice and promised that it will send its inspectors to Bangladesh for joint inspection of the inferior quality of rice sent by it and forwarded the passports of its inspectors for obtaining VISA and agreed that it will accept 90% payment provisionally against their export bill of exchange and that balance 10% will be paid after joint inspection and settlement of claim towards the inferior goods supplied by the award holder.
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> (d) However, as soon as the 90% payment was released by the petitioner, as agreed between the parties, the award holder refused to send its representative for joint inspection and finalization of the claim and allegedly claimed that the inspection held at loading port was final and with an intent to deceive and/or to perpetrate fraud on the petitioner demanded the balance 10% amount of the bill of exchange.
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> (e) The award holder made a suggestion as to a fact that if the petitioner accept the Bill of Exchange for the inferior quality of goods and pays 90% of the bill amount, it will depute its representatives for joint inspection and the balance 10% will be settled after such joint inspection and finalization of the claim, which was not true and which the award holder did not believe it to be true.
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> (f) The award holder with an intent to deceive the petitioner procured the purported award in respect of 2.22% of the total amount due under the three consignments actively concealing that it has neither raised any invoice on the petitioner for all the

three consignments nor did it make any claim under the subsisting Letters of Credit through which the entire payments were made in respect of the first two consignments and further that it has not raised any Bill of Exchange for the balance 2.22% in respect of the third consignment sent through vessel M.V. Tu Man Gang.

(g) The award holder with an intent to perpetrate fraud on the petitioner gave a wrong email address to GAFTA and correct email address was given by its mail dated January 11, 2013 and February 12, 2013 after close of arbitration proceedings by the arbitral tribunal by its mail dated December 17, 2012.

(h) The award holder with an intent to perpetrate fraud on the petitioner suggested as a fact, which was not true and which the award holder did not believe to be true that the balance 2.22% or US$ 10/- per MT shall be payable on the basis that "certificate of inspection at the time of loading shall be final as to quality" by suppressing the addendum to the contract dated December 7, 2010, which provided that "the balance amount at the rate of US$ 10/- per MT will be payable after receipt of quality inspection report at destination port and in the process, the award holder procured a purported award for the amount US$ 137,148.20.

(i) The award holder with an intent to perpetrate fraud on the petitioner actively concealed from the arbitral tribunal that in respect of the third consignment being the consignment sent through the vessel MV Tu Man Gang, the balance 10% of their invoice amounting to US$ 382,348.90 was to be settled after inspection and finalization and by doing so, the award holder procured a purported award for the sum of US$ 382,348.90.

(j) The award holder with an intend to deceive the petitioner and to perpetrate fraud on the petitioner deliberately suppressed from the purported Arbitral tribunal that the award holder in its letters dated June 10, 2011 and July 11, 2011 had admitted its liability and agreed to pay demurrage charges on vessel Tu Man Gang to the extent of US$ 20,921,88. The petitioner is unable to disclose other particulars of fraud till disclosure of fuller and better particulars by the award holder. The petitioner craves leave to file a supplementary affidavit upon such disclosure of fuller and better particulars by the award holder.

75. In the premises, the purported award holder was in conflict with the Public Policy of India as the same was induced or affected by fraud and hence enforcement of the purported award holder be refused and/or the same should be held as unenforceable.

76. Without prejudice to the aforesaid and/or in addition thereto, the purported award is not enforceable, interalia, on the following grounds:-

A-1 The contract between the parties dated 25th October 2010 provides as follows:
"All other terms and conditions not in contradiction with the above as per GAFTA

48 Arbitration as per GAFTA 12 in London.

ARBITRATION

All disputes in connection with this contract or the execution thereof shall be settled amicably by friendly negotiations between the two parties. If no settlement can be reached, the case in dispute shall then be submitted GAFTA, LONDON for arbitration as per GAFTA clause for rice and amendment if any and Arbitration Rule 125".

A copy of the GAFTA 125 is annexed hereto and marked "OO". A copy of the GAFTA No.48 is annexed hereto and marked "PP".

A-2. On a perusal GAFTA No.48, it is apparent that it is a standard form of contract to be filled up in detail and is to be signed by the parties. In the instant case, the petitioner did not sign any contract with the award holder in GAFTA No.48. In view of the above, there was no contract between the parties herein in terms of and/or on the basis of GAFTA Form No.48.

A-3 However, the purported award was passed on the basis of GAFTA No.48. Therefore, the arbitral procedure was not in accordance with the agreement of the parties and the award is not enforceable under Section 48 (1)(d) of the said Act.
B-1. Assuming but not admitting that GAFTA No.48 was applicable, the same could not be applied if in contradiction with the agreement dated October 25, 2010. The agreement as amended by the Addendum dated December 7, 2-010 provided that " balance amount of US$10 Per Mt will be payable after receipt of quality inspection report of destination port."

B-2. However, the purported award was passed on the basis of clause 5 of GAFTA No.48 providing "Certificate of Inspection at time of loading shall be final as to quality".

B-3. Therefore, the arbitral procedure was not in accordance with the agreement of the parties and hence, the said purported award is not enforceable.

C-1. By a mail dated September 19, 2011, the Award holder informed the petitioner to appoint its arbitrator within three days therefrom and informed that on failing to do so, they will request GAFTA to appoint an Arbitrator on behalf of the petitioner. However, by a communication dated February 29, 2012 Mr. Bardia on behalf of the award holder informed GAFTA that he has received a purported letter dated September 22, 2011 from GAFTA appointing one Mr. R. Eikel as arbitrator on behalf of the petitioner in case No.14-456 and requested to appoint Arbitrator in Case No.14-457.

C-2. The time to appoint arbitrator by the petitioner was to expire on September 22, 2011. Only after that, the award holder was entitled to make an application to GAFTA to appoint an Arbitrator. Appointment of Mr. R. Eikel by GAFTA on September 22, 2011 without any application by the award holder was irregular and

not binding on the petitioner. In any event and as the award holder by its letter dated September 19, 2011 wanted the petitioner to appoint its Arbitrator within 3 days therefrom and as in computing the 3 days period the date of issuance being September 19, 2011 was to be excluded, no appointment of any Arbitrator, either of Mr. R. Eikel or otherwise, could not be made by GAFTA on September 22, 2011 and such alleged appointment is bad being contrary to the agreement between the parties and is not and cannot be binding on the petitioner.

C-3. Since the Arbitrator on behalf of the petitioner was not appointed in accordance with the procedure agreed, the composition of the arbitral tribunal was not in accordance with the agreement of the parties and the purported award cannot be enforced and its enforcement should be refused.

D-1. The purported award provides that -

"6.20 : The Tribunal THEREFORE FINDS THAT Buyers, with respect to Cl.6.1 of the GAFTA Sampling Rules No. 124 were obliged to provide a certificate of analysis latest 14 days after that message dated 5 February 2011, therefore, latest 20 February 2011.

6.21: The date of default shall therefore, be one day later, the 21 February, 2011 and SO WE DO FIND".

D-2. The GAFTA Arbitration Rules provide that a claimant can give a notice of his intention to refer a dispute to arbitration within the time limits prescribed therein. In the case of non-payment of amount, a Notice of Reference cannot be issued beyond 60 days from the date the dispute has arisen. A claimant can initiate arbitration proceeding or appoint an Arbitrator before expiry of the time limit.

D-3. The Notice of Arbitration was given and Arbitrator on its behalf was appointed by the award holder by two letters both dated July 28, 2011. Therefore, the Notice of Arbitration and appointment of Arbitrator was ex facie time barred under the Arbitration Rules of GAFTA and/or Agreement between the parties.

D-4. Further, GAFTA 124 does not find any place in the agreement between the parties and is wholly inapplicable in the instant case.

D-5. Therefore, the arbitral procedure and also appointment of arbitrators was not in accordance with the agreement of the parties and also not in accordance with law applicable, and hence, the said purported Award was not enforceable.

E-1 By a mail dated September 19, 2012, the arbitral tribunal allowed the award holder to file its further claim submissions till close of business of that date. No opportunity was given to the petitioner to file its defence submission. By a mail dated November 23, 2012 GAFTA requested the award holder as to whether address of the petitioner submitted by the award holder was correct. By a mail dated December 17, 2012, the Tribunal closed arbitration proceedings. By mails dated

January 11, 2013 and February 12, 2013 the award holder submitted the correct email address of the petitioner to GAFTA, i.e. after close of arbitration proceedings.

E-2. Therefore, the petitioner herein was not given proper notice of the appointment of the arbitrator. The petitioner was not given proper notice of the arbitral proceedings. The petitioner was unable to present its case. In the premises, the purported award is not enforceable.

F-1. From the mail of GAFTA dated September 26, 2012, it is clear that GAFTA can only accept hardcopies towards pleadings. From the mail dated September 25, 2012 of GAFTA, it appears that hardcopy of the claim submission was filed by the award holder on September 24, 2012, though the time limit was September 19, 2012.

F-2. In the premises, the arbitral procedure was not in accordance with the law applicable and enforcement of the purported award should be refused.

G-1. A Civil suit being C.S. No.185 of 2011 filed by the petitioner against the award holder challenging the purported notices both dated July 28, 2011 referring the alleged disputes to Arbitration and appointment of Arbitrator is pending disposal. In the said suit an order dated September 9, 2011 was passed by an Hon'ble Single Judge directing that any action taken by the parties to the suit shall be subject to and abide by the result of the suit. The said order was upheld by the Hon'ble Division Bench dismissing the Cross-Objection by the Award holder. The suit is still pending. The award holder did not challenge the order dated September 28, 2012 passed by a Division Bench of this Hon'ble Court dismissing both the appeals and the two cross objections. Having not done so, the award holder accepted that the observations made by the learned Single Judge to the effect that "any action taken by the parties to the suit shall be subjected to and abide by the results of the suit" would affect the enforcement of any award, which would be passed by the Arbitral Tribunal.

G-2. In the premises, the purported award did no and could not attain finality and hence not yet enforceable."

8. The learned Single Judge of the High Court (Executing Court) was once again called upon to consider the objections regarding enforceability of the subject foreign awards. At the outset, it has noted that such a challenge was not maintainable after the rejection of the objections in the first round had attained finality with the dismissal of the special leave petitions by this Court. It held that the objections now taken would be hit by the principles of res judicata. Despite that, the Court proceeded to examine the objections on merit and opined that the same were not falling within the purview of conflict with the public policy of India as such. On the other hand, it was an attempt to invite the Court to have a second look at the foreign awards. That could not be countenanced in view of the limited jurisdiction under Section 48 of the Act, considering the decisions cited at the Bar by both sides highlighting the distinction between the approach to be adopted while examining the question of enforceability of the foreign award and the domestic award, as delineated by

this Court in Shri Lal Mahal Ltd. Vs. Progetto Grano SPA , Renusagar Power Company Ltd. Vs. General Electric Co. , and Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. .In addition, the High Court went on to observe that the petitioner, having failed to participate in the arbitration proceedings despite the opportunity given to it and having notice of such proceedings, could not be heard to make a grievance that the respondent - award holder did not produce the relevant documents before the Arbitral Tribunal. On the other hand, the Court held that the respondent - award holder had placed all the relevant documents/materials before the Arbitral Tribunal and more particularly, because the subsequent correspondence between the parties disclosed very clearly that the respondent had categorically denied its obligation to produce any quality inspection report at the Port of destination. It also noted that the Arbitral Tribunal had jurisdiction to decide the issue one way or the other and in the present case, it had so decided. The High Court also noted that the petitioner had not alleged any fraud or bias against the Arbitral Tribunal as such. From the grievance of the petitioner, even if taken at its face value, it did not warrant interference under Section 48 of the Act. In substance, the learned Single Judge after adverting to the settled legal position and the factual matrix of the case on hand, concluded that the objections of the petitioner, regarding enforceability of the subject foreign award, were devoid of merit and thus rejected the same.

9. Aggrieved, the petitioner has once again approached this Court by way of the instant special leave petitions, broadly reiterating the objections taken before the High Court. In that, the subject foreign awards are vitiated by fraud; the awards are contrary to the terms of the contract and thus violative of Section 28(3) of the Act; the Arbitral Tribunal has considered an issue in respect of which there is no pre-existing dispute; the Arbitral Tribunal has made out a new case which was not even made out by the claimant in the statement of claim; the subject foreign awards are not supported by reason and are in violation of natural justice and in contravention of the fundamental policy of Indian law; and the Executing Court considering the application under Section 48 of the Act has acted as a First Court of appeal and assumed powers under Order 41 Rule 33 of CPC and sustained the arbitral award by supplying new reasons and facts, which is not the basis on which the impugned awards have been passed.

10. The respondent, on the other hand, has urged that the application filed by the petitioner was not maintainable as it was hit by the principles of res judicata, issue estoppel and cause of action estoppel and principles analogous thereto. The respondent has also invited our attention to the conduct of the petitioner which was indicative of an attempt to overreach the Court. In that, after the interim order was passed by the Court on 20th October, 2018, permitting the respondent to withdraw part of the amount deposited in the High Court in relation to the execution of the subject foreign awards, the petitioner changed its name on 23rd April, 2018 from LMJ International Ltd. to Sri Munisuvrata Agri International Limited. It then changed its registered office from Hemanta Basu Sarani to British India Street on or about 26th April, 2018. The petitioner then, without any compunction, proceeded to file a petition under Section 10 of the Insolvency and Bankruptcy Code, 2016 before NCLT, Kolkata on 27th April, 2018 so as to invoke a moratorium against the release of any further amount to the respondent, in the event the respondent succeeded in the present petitions. The purpose for which the petitioner invoked NCLT proceedings is, in fact, manifest from the averments in the petition filed by

the petitioner before the NCLT itself, claiming that the objective of initiating the corporate insolvency process was to prevent the respondents from receiving the proceeds. All these developments have been brought on record by the respondent. The same were not disclosed by the petitioner on its own, which it was obliged to do in law. For this reason alone, contends the respondent, no indulgence should be shown to the petitioner.

11. On merits, it is submitted that the grounds urged by the petitioner would not come within the purview of Section 48 of the Act, which is very narrow and does not require the Court to have a second look at foreign awards. The grounds, at best, could be urged by the petitioner in the appeal to be filed against the foreign award governed by English Laws (UK Arbitration Act, 1996). The petitioner has allowed the said awards to attain finality having failed to file such appeal. Even the argument of fraud on the basis of the allegation that the relevant documents were not brought to the notice of the Arbitral Tribunal by the respondent - award holder, is baseless and only a subterfuge for protracting the recovery of dues. In that, the respondent had produced a swift message dated 3rd June, 2011 sent from the respondent bank to the petitioner bank and the subsequent correspondence between the parties to which reference has been made by the Arbitral Tribunal while deciding the matter. There is no allegation that the respondent concealed the stated correspondence between the parties with a view to obtain an arbitral award through fraud. The specific ground taken by the petitioner was that the award holder, with intent to deceive, perpetuated fraud on the petitioner. That is not enough to hold that the subject foreign awards were unenforceable within the meaning of Section 48 of the Act. The petitioner had sufficient notice of the arbitration proceedings but it chose not to participate in the said proceeding for reasons best known to it. Therefore, now it cannot turn around and make a grievance about non-consideration of any document. More so, the grievance is in the nature of inviting the Executing Court to have a second look at the award which is not the scope of Section 48 of the Act. The respondent has also refuted the ground urged on behalf of the petitioner regarding awarding of compound interest at the rate of 4% per annum calculated at quarterly rests, being in conformity with the governing laws. The respondent has also relied on the dictum in Shri Lal Mahal Ltd. (supra) and Renusagar Power Company Ltd., (supra). The respondent has also distinguished the judgments cited by the petitioner on the scope of interference in domestic awards on the ground of its enforceability as opposed to the foreign awards in the present cases. The respondent submits that these petitions be dismissed with exemplary costs and while doing so, appropriate directions be issued to the Registrar (OS), High Court at Calcutta to forthwith encash the FDs of approximately Rs.2 crores, in the credit of both the execution cases and forthwith remit the entire receipts, including the accrued interest in US Dollars, to the respondent, as was ordered earlier vide orders dated 5th January, 2018, 5th March, 2018 and 20th April, 2018, respectively, after obtaining prior permission of the Reserve Bank of India in that regard. The respondent also seeks direction against the petitioner for securing the deficit amount, which would remain after appropriation of the amount under the FDs, lying with the Registrar (OS), Calcutta High Court. The respondent would contend that such direction is necessary in the peculiar facts of the present case and to obviate any complication due to moratorium, as the petitioner has invoked proceedings under the Insolvency and Bankruptcy Code.

12. We have heard Mr. A.K. Sinha, learned senior counsel appearing for the petitioner and

Mr. Shyam Divan, learned senior counsel appearing for the respondents.

13. We first proceed to examine the preliminary issue as to whether it was open to the petitioner to raise grounds regarding enforceability of the foreign awards despite the judgment of the High Court dated 4th December, 2014, rejecting the objections in the context of maintainability of the execution petition and which decision had attained finality consequent to rejection of the special leave petitions by this Court and including the review petition by the High Court. The petitioner contends that on the earlier occasion, the objections were limited to the questions of maintainability of the execution case on grounds as were urged at the relevant time and not in reference to the enforceability of the subject foreign awards as such. This argument, to say the least, is an attempt to indulge in hair-splitting and nothing more. It is an argument in desperation only to protract the execution of the foreign award on untenable grounds. Indeed, the petitioner had not filed any formal application to raise the issue of maintainability of the execution case but the Court had permitted the petitioner to orally urge "all available grounds". The learned Judge had then reproduced the five points, which alone were orally urged on behalf of the petitioner through its counsel, as extracted in paragraph 4 above. The High Court examined the said grounds which, obviously, were transcending in the realm of enforceability of the subject foreign awards. In the special leave petitions filed before this Court, the petitioner had articulated questions of law and the grounds also in reference to the scope of Section 48 of the Act which included the enforceability of the subject foreign awards. That can be discerned from the close reading of Questions and Grounds in the previous SLPs, reproduced in paragraph 5 above. Additionally, the learned Single Judge of the High Court vide order date 17th March, 2015 had made it amply clear that the subject foreign awards were deemed to be decrees, which presupposes that the same were enforceable. That order came to be upheld by the Division Bench whilst disposing of the appeals preferred by the petitioner. These orders have become final and have not been challenged by the petitioner. The petitioner thereafter unsuccessfully resorted to the remedy of review before the High Court. Even the order passed in review petition has become final.

14. Be that as it may, the grounds urged by the petitioner in the earlier round regarding the maintainability of the execution case could not have been considered in isolation and de hors the issue of enforceability of the subject foreign awards. For, the same was intrinsically linked to the question of enforceability of the subject foreign awards. In any case, all contentions available to the petitioner in that regard could and ought to have been raised specifically and, if raised, could have been examined by the Court at that stage itself. We are of the considered opinion that the scheme of Section 48 of the Act does not envisage piecemeal consideration of the issue of maintainability of the execution case concerning the foreign awards, in the first place; and then the issue of enforceability thereof. Whereas, keeping in mind the legislative intent of speedy disposal of arbitration proceedings and limited interference by the courts, the Court is expected to consider both these aspects simultaneously at the threshold. Taking any other view would result in encouraging successive and multiple round of proceedings for the execution of foreign awards. We cannot countenance such a situation keeping in mind the avowed object of the Arbitration and Conciliation Act, 1996, in particular, while dealing with the enforcement of foreign awards. For, the scope of interference has been consciously constricted by the legislature in relation to the execution of foreign awards. Therefore, the subject application

filed by the petitioner deserves to be rejected, being barred by constructive res judicata, as has been justly observed by the High Court in the impugned judgment.

15. There is an additional reason which dissuades us to show any indulgence to the petitioner. We find force in the grievance made by the respondent that the conduct of the petitioner is indicative of an attempt to overreach this Court. For, after an interim order was passed in favour of the respondent, permitting withdrawal of part of the deposited amount, the petitioner lost no time in changing the name of the company within three days thereafter on 23rd April, 2018. The petitioner also changed its registered office address on 26th April, 2018 and had no compunction in moving the NCLT, Kolkata on 27 th April, 2018 to prevent the respondent from enjoying the fruits of the subject awards, and saying so brazenly in the petition filed by it under Section 10 of the I & B Code. Strikingly, attention of this Court was invited to these facts by the respondent by moving a formal application. The petitioner has not offered any explanation, much less a plausible one. On this count also, the special leave petitions deserve to be rejected.

16. Having said this, we do not wish to examine any other argument of the petitioner, including on merits of the enforceability of the subject foreign awards. Even if we were to do so, we would have agreed with the High Court that the grounds urged by the petitioner to question the enforceability of the subject foreign awards are untenable, not being within the purview of Section 48 of the Act. Be that as it may, we find that the High Court has considered every aspect of the grounds urged by the petitioner; and the view so expressed by the High Court in reference to each of the points considered by it is a possible view. The High Court has correctly noted the limited scope for interference in the matter of foreign awards under Section 48 of the Act, keeping in view the principles enunciated by this Court. The High Court has justly noted that the attempt of the petitioner was to call upon the executing court to have a re-look at the award. That cannot be countenanced. We would also agree with the High Court that all the relevant documents submitted to buttress the claim of the respondent before the Arbitral Tribunal, have been adverted to in the award and the findings reached in the award are based on the interpretation and meaning given to the said documents. That can be discerned from the discussion and findings recorded by the Arbitral Tribunal in the award under consideration. The relevant extract thereof reads thus:

> "6. DISCUSSION AND FINDINGS
>
> 6.1 The disputed issues submitted for our determination concern three different aspects first of all, the question whether the contractual quality had been delivered by sellers and received by Buyers. Secondly, the matter of the balance to the full contractual quantity and thirdly, and subsequently to the first two issues, the payment of the invoices.
>
> 6.2 As respondents elected not to participate in the round of submissions the Tribunal is bound to base its discussion and subsequently its findings on the submission and evidence filed by claimants only.

6.3 As a starting point on the first issue, whether the contractual quality had been delivered by sellers and received by buyers, the tribunal focuses on the provisions of the governing contract and, as far as relevant, to its amendments.

6.4 The contract agreed between the parties was for the sale and purchase of 15000 metric tons of Thai Non-basmati Parboiled Rice on FOB Bangkok terms.

6.5. The contract provided in his context under the quality clause that:-

"Rice to be supplied 'Rice to be supplied shall be 15000MT (5 percent more or less) of Non-basmati Parboiled rice 15 percent (Maximum) Broken. Latest Clop of 2009-2010 Thailand origin In good condition, 'fit for human consumption without any unpleasant odour, free from any sign or mould, fermentation or deterioration and free from obnoxious and deleterious matters and poisonous weed seeds. Rice must be free from insect infestation and shall have the following specification".

i) Moisture (Maximum): 13 PCT

ii) Broken Grains (Maximum): 15 PCT (Rice size of 3/4th and below will be considered as broken and less than 1/4th Broken should not be more than 2 percent

iii) Foreign Mater (Maximum) : 0.3 Percent

iv) Dead, Damaged and Discoloured Grains (Maximum): 3 Percent in Total

iv) Radio Activity (Maximum) : 50 DO/KG 01 737 SC/134 CS (Relaxable for the Crop of SAARC and South-East Asian Country)

6.6 In relevance to this dispute and under consideration of the Quality Clause of the Contract, same was amended on 7th December 2010 and altered:

"2. Specifications: Clause II - to be amended to 17 Pct Max I/0 15 Pct. Clause IV - to be amended to 6 Pct. Max I/0 3 Pct in Total. All other specifications will be remain unchanged."

6.7 Three partial shipment had been performed by claimants as follows:-

1. 1,610.00 mt on board of MV Sturdy Falcon on 27th December 2010

2. 3,430.00 mt on board of MV Genius Mariner on 31st December 2010

3. 8,689.55 mt on board of MV Tuman Gang (sic) on 17th January 2011

6.8 Subsequently, 133,729.55 metric tons had been delivered by Sellers to Buyers and Sellers provided for each shipment various documents under the Contract, including so-called "pre-shipment Inspection Certificates issued by SGS" as under

the Payment Clause, yet altered by Amendment to the Contract dated 7 December 2010 to same issued now by "ISC".

Those pre-Shipment inspection Certificates were indeed Issued by ISC for all three shipments displaying the following analysis results:

If we disregard the alterations envisaged by the Amendment to the Contract dated 7th December 2010, granting an even higher level for "Broken Grains" end "Dead, damaged and Discoloured Grains", the results provided by ISC were well Within the parameters foreseen for the quality under the Contract.
6.11
6.12.
The Tribunal therefore FINDS THAT the quality of the cargo shipped on the three vessels was within the amended contractual specifications. In addition to the above, the provision DI the Quality Clause 5 of GAFTA Contract No.48, being Tale Quale contract as such, states, Inter alia:

"Certificate of Inspection at time o/ loading -shall be final as to quality".

6.13 Consequently, and under consideration of the Payment Term of the- Contract providing for payment

"on receipt 01 the shipping documents', inter alia the above Pre-Shipment Certificates as issued by ISC and provided by Sellers, Sellers were duty entitled to trigger payment under the Contract.

6.14WE THEREFORE FIND THAT Sellers' claim for payment of IJSD 440.00 per metric ton all three partial shipments succeeds.

6.15 In reference with the balance of USD 10.00 per metric ton for each partial shipment, as agreed under the Amendment dated 7th December 2010, the Amendment Provided that the "Balance amount@ US$10.00 per MT will be payable after receipt of quality inspection report of destination port".

6.16 This indeed establishes an alteration to the original provision of the Contract that the quality would be final at the port of loading, at least as far as the balance of USD
10.0 per metric ton is concerned. On interpretation and construction of the Contract itself and its Amendment dated 7th December 2010, the Tribunal notes that the Amendment itself defines in

" 1. Quantity" that the weight in accordance with the Contract would be still "final at loading" while the amended payment term now states that "a balance amount of US$
10.0 per MT would only "be payable after receipt of a quality inspection report of destination port."

6.17 WE THEREFORE FIND THAT the Contract had been validly altered to the provision that Sellers could only have triggered payment of the balance of USD 10.00 per metric ton after presentation of a quality inspection report from the port of destination, i.e. Bangladesh.

6.18 As no such quality Inspection had been presented by Buyers, despite various reminders from Sellers, until the present day, the GAFTA Sampling Rules No.124, cl. 6:1 provide that a "certificate of analysis should be sent to the other party "within 14 consecutive days" after dispatch of the samples to the analyst.

6.19 Buyers in their message of 5th February 2011 firstly explained that the quality of the cargo on the last vessel i.e. MV Tu man Gang, was inferior.

6.20 The Tribunal Therefore finds that buyers, with respect Tribunal THEREFORE FINDS THAT with respect to cl. 6:1 of the GAFTA Sampling Rules No.124 were obliged to provide a certificate of analysis Latter that message dated 5th February 201 1 therefore latest 20th February 2011.

6.21. The date of default shall therefore be one day later, the 21st February 2011 and SO WE DO FIND.

6.22 As Buyers failed to forward the certificate within this limit of 14 days, any claim for rejection or for an allowance in respect of any matters dealt with under the Contract, and its Amendments. shall be deemed to be waived and absolutely barred, AND SO WE DO FIND.

6.23 THE TRIBUNAL THEREFORE FINDS THAT Sellers' claim for payment of balance invoices of USD 10,00 per metric ton succeeds.

6.24 There is no apparent disputes as far as the quantity of the shipment under the contract is concerned as the contract provided for the shipment of 15000 metric tons, +-5% in buyers option and sellers only shipped 13,729.55 metric tons.

6.25 Buyers nevertheless informed Sellers 5th February 2011 that the original Letter of Credit as foreseen for payment under the Contract not be extended and Buyers therefore planned to "establish Fresh LC for the balance quantity of 2000 ton in the old contract".

6.26 The Tribunal has not seen any new letter of credit for this purpose and as Buyers have not filed such, the Contract came to its end,

6.27 WE THEREFORE FIND THAT Sellers' calculations for sums and interest due should be based on a quantity of 13,729.55 metric tons.

6.28

WE FIND AND DECLARE THAT:

1) Sellers' claim for payment of balance of USD 10.00 per metric ton for each of the three shipments amounting to USD 137,148.20 succeeds. Interest to run from 29th June 2011. The date of Buyers' email stating that they would not be "obliged and/or liable to pay any sum" to Sellers.

2) Sellers' claim for the balance of as deducted from the invoice in reference to the shipment on board of MV Tuman Gang amounting to USD 382,348.90 succeeds. Interest to run from 20th February 2011, the date by which Buyers should have provided a 'quality inspection report at destination port'. Buyers shall pay compound interest on the above sum of USD 137,148.20 at the rate of 4% (four per cent) per annum calculated at quarterly rests, from 29th June 2011 to the date of payment.

7.2 Buyers shall forthwith pay to Sellers USD 382,348.90 (three hundred & eighty-two thousand, three hundred and forty eight United States dollars and ninety cents). Buyers, shall forthwith pay to sellers USD 332,348.90 at the rate of 4% (four percent) per annum calculated at quarterly rests, from 20th February 2011 to the date of payment.

7.3 WE THEREFORE AWARD THAT Buyers shall pay the fees, costs and expenses of this arbitration as per the attached schedule."

17. Suffice it to observe that the Arbitral Tribunal has considered all aspects of the matter and even if it has committed any error, the same could, at best, be a matter for correction by way of appeal to be resorted to on grounds as may be permissible under the English Law, by which the subject arbitration proceedings are governed. We may not be understood to have expressed any opinion on the correctness of those issues.

18. In view of the above, these special leave petitions are dismissed with exemplary costs, quantified at an aggregate amount of Rs.20,00,000/- (Rupees Twenty Lakh only). The amount towards costs be paid to the respondent within six weeks from today.

19. Although we are dismissing the special leave petitions, we accede to the request of the respondent to pass a specific order to direct the Registrar (OS), Calcutta High Court to forthwith encash the FDs lying deposited in the credit of the concerned stated execution case and, after obtaining the Reserve Bank of India's permission forthwith, remit the entire amount, including the interest accrued in US Dollars, to the respondent. That shall be done within eight weeks from today and compliance report be submitted in the Registry of this Court within two weeks thereafter. We further clarify that the above directions shall be complied with by the Registrar (OS), Calcutta High Court, irrespective of any order passed by any other Court/Tribunal in India. We are required to pass such a directions in the peculiar facts of the present case.

Judgment Referred.

[1]*(2000) 1 Arb. LR 230 (Bom)*