IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE S.MANU

TUESDAY, THE 31ST DAY OF MARCH 2026 / 10TH CHAITHRA, 1948

EP(ICA) NO. 1 OF 2024

ARBITRATION AWARD DTD.30.01.2023 IN SCC ARBITRATION V2020/199 OF THE ARBITRAL TRIBUNAL, SWEDEN

PETITIONERS/RESPONDENTS:

1 M/S CONCILIUM MARINE GROUP A B
PO BOX 502813105 NAKA, STOCKHOLM, SWEDEN
REPRESENTED BY ITS POWER OF ATTORNEY HOLDER ADITI DINENDRA KAMATH, AGED 37 YEARS, D/O DINENDRA ANANT KAMATH, RESIDING AT J, 6/5, JAL MANGAL DEEP, BANGUR NAGAR GAREGAON WEST, MUMBAI, PIN – 400090.

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BY ADVS.
SRI.MILLU DANDAPANI
SRI.ANIL XAVIER (SR.)

RESPONDENT/CLAIMANT:

SHARATH THAZHATHE VEEDU
S/O MUTHUKRISHNA VARIER VARANATTU HOUSE
PERUMBAVOOR, ERNAKULAM, KERALA, PIN – 683542.

BY ADVS.
SHRI.SAIBY JOSE KIDANGOOR
SHRI.BENNY ANTONY PAREL
SMT.PRAMITHA AUGUSTINE
SMT.NAZRIN BANU
SMT.IRINE MATHEW
SMT.ADRISYA S.
SMT.AFSANA KHAN
SHRI.SREERAJ S. RAJARAM
SMT.SNEHA J.
SMT.SANDRA ANIL

THIS EXECUTION PETITION (ICA) HAVING BEEN FINALLY HEARD ON 10.03.2026, THE COURT ON 31.03.2026 DELIVERED THE FOLLOWING:

[CR]

S.MANU, J.

E.P.(ICA)No.1 of 2024

Dated this the 31st day of March, 2026

JUDGMENT

Enforceability of an award for payment of costs rendered by an Arbitral Tribunal in Sweden is the issue arising for consideration in this case.

2. Petitioners are the respondents in Annexure 1 award. The respondent instituted arbitral proceedings against them before an Arbitral Tribunal in Sweden, consisting of three members. The Tribunal concluded that no arbitration agreement had come into existence and rejected the claims of the respondent. Nevertheless, the Tribunal directed that the respondent shall bear 100% of the costs of the arbitration. In this E.P.(ICA) the petitioners are seeking to execute the award,

contending that the respondent is liable to pay Rs.10,51,23,485/- along with interests and costs under the award.

3. The respondent entered appearance. He contends that the E.P. is not maintainable and even if it is assumed that the same is maintainable, the award is unenforceable.

Arguments advanced on behalf of the Respondent, objecting enforcement

4. The learned Counsel for the respondent Sri.Saiby Jose Kidangoor, raised serious objections regarding maintainability of this execution petition. The learned Counsel made extensive reference to the provisions of the Arbitration and Conciliation Act, 1996. He made specific reference to various provisions in Part-II Chapter I. The learned Counsel referred to Section 47 of the Act and contended that the party applying for enforcement of a foreign award shall, at the time of application, produce before the Court the original award or a duly authenticated copy

thereof, in the manner required by law of the country in which it was made. As provided under Section 47(1)(b), the original agreement for arbitration or a duly certified copy thereof shall also be necessarily produced before the Court. The learned Counsel pointed out that the language of Section 47(1) makes it clear that, the production of the original award or duly authenticated copy thereof as well as original agreement or a duly certified copy thereof are mandatory and they shall be produced at the time of filing of the application. He submitted that, if the application is filed without producing the key documents stipulated under Section 47(1)(a) and (b) at the time of filing of the application, the application shall be treated as not supported by evidence contemplated under Section 47 of the Act.

5. As an extension of the said contention, the learned Counsel submitted that production of the original arbitration agreement or a duly certified copy has been made mandatory

under Section 47 of the Act with a specific purpose. The learned Counsel made reference to the provisions of the First Schedule in this regard. He contended that, in the instant case, the finding of the Arbitral Tribunal is that there was no valid agreement between the parties for arbitration. He further pointed out that the said contention was raised by the petitioner herein in it's defense before the Arbitral Tribunal. The said contention was analyzed by the Arbitral Tribunal in detail. The learned Counsel referred to Paragraph Nos.71 to 90 of Annexure 1 award. He made specific reference to the decision of the Tribunal reflected in paragraph No.90. The learned Counsel submitted that, the Arbitral Tribunal entered into a categorical finding that there was no valid agreement. He reiterated that the said finding was actually invited by the petitioner. According to the learned Counsel, the petitioners cannot be permitted to contend that there was a valid arbitration agreement, differing with the finding of the Arbitral Tribunal in the award sought to be

executed. He submitted that the award has become final as it was not challenged under the Swedish law. Since the award has attained finality, the finding of the Tribunal regarding existence of a valid agreement has also undeniably become final. That being so, the learned Counsel submitted that the petitioner cannot be permitted to contend that there was a valid arbitration agreement. The learned Counsel further contended that, if there was no valid agreement then the petitioner cannot satisfy this Court regarding the existence of essential conditions mentioned under Section 47 of the Act. If the application for execution is not supported by evidence as contemplated under Section 47 of the Act, then the application cannot be treated as maintainable by this Court. The learned Counsel made reference to Section 44 of the Act. He pointed out that, 'foreign award' has been defined as an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India.

6. The learned Counsel pointed out that as provided under Section 44(a), the foreign award shall be one passed in pursuance of an agreement in writing for arbitration to which the Convention set forth in First Schedule applies. He submitted that in order to invoke the provisions of Part II, Chapter I of the Act, the award sought to be executed shall satisfy the definition of the foreign award under Section 44 of the Act. The learned Counsel hence submitted that unless there is an agreement in writing for arbitration, as clearly stipulated under Section 44(a), an arbitral award cannot be treated as a foreign award as defined under Section 44. He therefore submitted that such an award, that would not satisfy the requirements mentioned in Section 44 of the Act, cannot be sought to be enforced under Part II of Chapter I of the Act. The learned Counsel pointed out that the finding of the Arbitral Tribunal regarding non-existence of a valid arbitration agreement would stand in the way of the petitioner. The learned Counsel submitted that in view of the

requirements under Section 44 and 47 of the Act, this execution petition is not legally maintainable.

7. Further, the learned Counsel submitted that, the contention of the respondent in this case would fall under Section 48 (1) (a). If the agreement was not valid under the law to which the parties had subjected it, the same can be raised as a valid ground under Section 48 of the Act against enforcement of the foreign award. Learned Counsel submitted that, in the case at hand, the arbitration proceedings were conducted in Sweden and Swedish law was applicable. Tribunal concluded the proceedings by passing Annexure 1 award, holding that there was no valid agreement. Therefore, the learned Counsel submitted that as provided under Section 48(1)(a), the agreement was not valid under the law to which the parties had subjected it and therefore, the foreign award cannot be enforced in India.

8. The learned Counsel also submitted that the primary inquiry to be conducted by a court in India enforcing a foreign award is as to whether the foreign award falls within the parameters laid down in Part II Chapter I of the Act. He submitted that the award may be enforceable under Swedish law. However, the award, to be enforced in India, should satisfy the specific conditions mentioned in the provisions under Part II Chapter I of the Act. Therefore, he submitted that the award though has become final and may be enforceable under Swedish law, does not satisfy the basic requirements for enforcement under the provisions of Part II Chapter I of the Arbitration and Conciliation Act, 1996.

9. The learned Counsel made reference to Article II (1) of the first schedule of Arbitration and Conciliation Act, 1996. The said provision is extracted herein: -

> "1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any

differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration."

10. He also made reference to Article IV (1):-

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:—

(a)the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof."

11. He also made reference to Article V(1) which reads as under:-

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that — (a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon,

under the law of the country where the award was made; or

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

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

12. The learned Counsel pointed out that Article II specifically deals with an agreement in writing. An agreement in writing shall include an arbitral clause in a contract or an

arbitration agreement signed by the parties, or contained in an exchange of letters or telegrams. He submitted that requirement of production of original agreement referred to in Article II, or a duly certified copy thereof, is specified in Article IV(1)(b). The learned Counsel further submitted that, in view of Section 44 of the Act read in conjunction with the First Schedule, it clearly appears that the existence of a valid agreement and production of the same are two essential conditions for maintaining an application for execution of the foreign award under Indian law, and the instant application fails to satisfy those essential requirements.

13. The learned counsel further contended that the petitioners did not purposely produce before this Court statement of defence filed before the Arbitral Tribunal. The respondent has produced the same as Annexure-R1(a). Referring to paragraphs 296 to 299 of the statement of defence, the learned counsel submitted that the petitioners pleaded

before the Arbitral Tribunal that they would not be able to seek enforcement in India in case a cost award is passed in their favour. Further, they categorically stated in paragraph 297 that as there is no arbitration agreement between the parties, let alone a signed agreement, they cannot successfully seek enforcement under the New York Convention. They also stated, with reference to the various provisions of the convention, that the principles apply under Indian and UAE National Laws and the party applying for enforcement must supply the arbitration agreement to obtain enforcement. They specifically pleaded that consequently, it is highly unlikely that they can obtain enforcement of a cost award in their favour both under National and International Law. He therefore submitted that the petitioners were well aware even during the pendency of the arbitral proceedings that they will not be in a position to seek enforcement of an award in India for want of an agreement in writing. He hence argued that the petitioners are actually taking

this Court for a ride in the Execution Petition. He submitted that the principles of estoppel will undoubtedly apply in the situation and the petitioners are precluded from taking a position contrary to their pleadings before the Arbitral Tribunal. The learned counsel also contended that the non-production of the defence statement before this Court is a material suppression. He contended that the petitioners shrewdly omitted to produce the same as the pleadings therein would cut at the root of their case in the Execution Petition.

14. The learned Counsel submitted that the petitioners who disputed the validity of the agreement and got a favourable finding in that regard from the Arbitral Tribunal cannot be permitted to contend that the arbitral award is enforceable and it should be presumed that there was yet another agreement, limited in nature, to proceed with the arbitration in order to decide on the procedural issues.

15. The learned counsel disputed the contention of the learned Senior Counsel for the petitioners that the production of the agreement along with the Execution Petition is not mandatory to proceed with the enforcement of the award. The learned counsel contended that even the judgment cited by the learned counsel in this regard will not come to the aid of the petitioners. He sought to draw a distinction between the requirement of producing the agreement under Section 47 of the Act and recognition of the award under the New York Convention. He also submitted that the judgment of the Hon'ble Supreme Court in **PEC Limited v. Austbulk Shipping SDN BHD** [(2019) 11 SCC 620] relied on by the learned Senior Counsel was rendered in a case where there was no dispute regarding existence of the agreement. The only issue decided was as to whether the production of the agreement at the time of filing is mandatory. He submitted that the Hon'ble Supreme Court has not held that the production of the agreement is not

necessary for the enforcement of the award. He hence contended that the award cannot be enforced under part II of the Act unless the agreement is produced, even though the requirement can be excused at the time of the filing of the Execution Petition.

16. The learned counsel also submitted that the enforcement of the award may be refused also for the grounds under S.48(2) also. The dispute was not arbitrable under Indian law if there is no agreement. Further, award passed without an agreement would be contrary to the public policy of India. He submitted that in view of the provisions of Section 7(2) of the Act, an agreement in writing is essential to resort to arbitration. Therefore, it is a fundamental requirement of the policy of Indian law that there shall be an agreement in writing. In the instant case the Arbitral Tribunal having found that there is no valid agreement under the Swedish law, enforcing an award arising from the same arbitral proceeding by a court in India will

be in conflict with the public policy of India. The learned counsel made some further submission to distinguish the judgments cited by the learned Senior Counsel for the petitioners. He contended that the principles laid down therein actually support the case of the respondent.

Arguments advanced on behalf of the petitioners

17. Sri.Anil Xavier, the learned Senior Counsel for the petitioners refuted the submissions of the learned counsel for the respondent. He asserted that none of the contentions of the respondent would constitute valid objections under Section 48 of the Arbitration and Conciliation Act and hence the award is enforceable. The learned Senior Counsel further submitted that the endeavor of the Court shall be to give effect to the award and hence it should be enforced unless any of the inhibiting features under S.48 is established.

18. Regarding the contention of the respondent that the original copy of the arbitration agreement has not been produced, the learned Senior Counsel submitted that the production of the same at the time of filing is not mandatory. The agreement was subsequently produced as Annexure-A2. The Stockholm Chamber of Commerce forwarded all associated documents including the arbitration agreement to the petitioners when the respondent initiated arbitral proceedings. A true copy of the agreement forwarded by the Chamber of Commerce has been produced as Annexure-A2. The learned Senior Counsel submitted that production of copy of the agreement is not mandatory at the stage of filing of the execution proceedings as held by the Hon'ble Supreme Court in **PEC Limited v. Austbulk Shipping SDN BHD** [(2019) 11 SCC 620].

19. With respect to the contention regarding lack of a valid arbitration agreement, the learned Senior Counsel submitted that when the Chamber of Commerce forwarded the

matter to the petitioners, they objected on the ground that the agreement was invalid as it was not signed by the parties. Under the Swedish law even an unsigned arbitration agreement can be considered as valid, but the Arbitral Tribunal must adjudicate on it. In the agreement involved in the case on hand there is a specification that the agreement will become valid only when signed by the parties. However, the petitioners also appointed an Arbitrator and sought bifurcation to decide the validity of the arbitration agreement as a preliminary issue. The respondent opposed the request contending that unsigned agreements are also valid under the Swedish law and the issue can be decided only on the basis of the evidence. The request for bifurcation was rejected by the Tribunal and it entered into a full-fledged arbitration. The learned Senior Counsel submitted that though the arbitration clause forms part of a larger unsigned agreement, subsequently, the petitioners entered into a limited arbitration agreement by giving the Tribunal authority

to decide on procedural issues under Swedish law without which Swedish law would not apply. The said limited arrangement itself constituted a valid arbitration agreement. According to the learned Senior Counsel, there are two arbitration agreements, one for substantive disputes and another limited to procedural issues. Petitioners authorised only procedural adjudication.

20. The learned Senior Counsel further submitted that the Tribunal found that even for deciding procedural issues examination of evidence was essential. In arbitration proceedings, where a party is compelled to participate despite contending that no arbitration agreement exists, it is permissible to award costs to such a party, notwithstanding the Tribunal's finding that there was no arbitral agreement. Therefore, the Tribunal was correct in granting costs to the petitioners. According to the learned Senior Counsel, the respondent resisted the application filed by the petitioners before the Tribunal to pass an order for security for costs, by stating that a

cost award is also enforceable in India and that he owns sufficient assets in India to satisfy such an award. The respondent is therefore estopped from taking a contrary stand in the execution proceedings. The learned Senior Counsel therefore submitted that none of the objections raised by the respondent is valid and hence the award may be declared as enforceable.

21. Further elaborating on the nature of the award the learned Senior Counsel submitted that the Tribunal proceeded to decide on costs of arbitration as per the Swedish Law. He referred to Section 37 of the Swedish Arbitration Act which reads as under:-

> "Section 37 - The parties shall be jointly and severally liable to pay reasonable compensation to the arbitrators for work and expenses. However, if the arbitrators have stated in the award that they lack jurisdiction to determine the dispute, the party that did not request arbitration shall be liable to make payment only insofar as required due to special circumstances.
>
> In a final award, the arbitrators may order the parties to pay compensation to them, together with interest from the date occurring one month following the date of

> the announcement of the award. The compensation shall be stated separately for each arbitrator."

22. He also made reference to Section 42 of the Swedish Arbitration Act which provides power to Arbitral Tribunal to order compensation of costs. Section 42 of the Swedish Arbitration Act reads as under:-

> "Section 42- Unless otherwise agreed by the parties, the arbitrators may, upon the request of a party, order the opposing party to pay compensation for the party's costs and determine the manner in which the compensation to the arbitrators shall be finally allocated between the parties. The arbitrators' order may also include interest, if a party has so requested."

23. He therefore submitted that the Arbitral Tribunal passed the impugned award granting costs to the petitioners in accordance with the Swedish Arbitration Act. He also submitted that in International Arbitration, Arbitral Tribunals routinely award costs when they lack jurisdiction on merits of a dispute, which are called as ‘negative costs awards’. He further

submitted that the Arbitral Tribunal gets the authority to pass such awards mainly from three sources;i) specific agreements between the parties to arbitrate costs ii) the competence-competence principle or iii) the national arbitration laws.

24. The learned Senior Counsel, in response to the contention of the learned counsel for the respondent regarding the pleadings in the statement of defence filed before the Arbitral Tribunal, submitted that there was no admission as alleged. Contents of paragraphs 296 to 299 of the statement of defence reflect the apprehension of the petitioners and it cannot be construed as admissions. He referred to Annexure A6, decision on the application for security for cost. He pointed out that in paragraph 4 of the decision, the apprehension of the petitioners was taken note of by the Tribunal. In paragraph 14, the Tribunal noted the submission of the respondent that he has access to adequate resources to satisfy any adverse costs award. In paragraphs 22 and 23, the Tribunal considered as to

whether the respondent lacks funds and ability to satisfy an adverse cost award. The Tribunal accepted the contention of the respondent in this regard and rejected the request to direct furnishing of security. The learned Senior Counsel submitted that the respondent had thus submitted before the Arbitral Tribunal that in case of a cost award being passed, the enforcement of the same will not be defeated for want of funds.

25. The learned Senior Counsel submitted that the principle of estoppel would not apply against the petitioners as contended by the learned counsel for the respondent. He submitted that the essential element of obtaining any gain by adopting a contention is absent in the instant case and hence the doctrine of estoppel has no application to the facts of this case. Regarding the contention of the learned counsel for the respondent that the petitioners did not raise any challenge against the arbitral award, the learned Senior Counsel submitted that the award is in favour of the petitioners as the claims

against them raised by the respondent were not allowed and on the other hand cost was imposed on the respondent.

Precedents cited by both sides

26. Having narrated the contentions raised by both sides, I shall now refer to the judgments cited.

27. Learned Senior Counsel for the petitioners relied on the following judgments in support of their arguments;

i) **PEC Limited v. Austbulk Shipping SDN BHD** [(2019) 11 SCC 620].

ii) **B.L. Sreedhar and Others v. K.M. Munireddy(Dead) and others** (2003) 2 SCC 355.

iii) **Shri Lal Mahal Ltd. v. Progetto Grano Spa** [(2014) 2SCC 433].

iv) **Government of India v. Vedanta Limited (Formerly Cairn India Ltd.) & Others** [(2020) 10 SCC 1]

v) **Commonwealth Development Corp (UK) v. Montague [**[2000] QCA 252**]**

vi) **Ravfox Limited v. Bexmoor Limited** [2025 EWHC 1313 (Ch)]

28. In **PEC Limited v. Austbulk Shipping SDN BHD** [(2019) 11 SCC 620], the Hon'ble Supreme Court held as under;

> "11. The points that arise for our consideration in this case are:
> 11.1. Whether an application for enforcement under Section 47 of the Act is liable to be dismissed if it is not accompanied by the arbitration agreement?
> 11.2. Whether there is a valid arbitration agreement between the parties and what is the effect of a party not signing the charterparty?
>
> 12. The Foreign Awards (Recognition and Enforcement) Act, 1961 was repealed by the Act. Part II of the Act deals with enforcement of foreign awards. An arbitral award made in pursuance of an agreement in writing for arbitration, to which the Convention on the Recognition & Enforcement of Foreign Arbitration Awards, 1958 (hereinafter referred to as "the New York Convention") set forth in the First Schedule of the Act applies is defined to be a "foreign award". Section 47 of the Act postulates that the party applying for the enforcement of a foreign award "shall" produce before the Court at the time of application the following:
>
> > "47. (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and
(c) such evidence as may be necessary to prove that the award is a foreign award."

……..

14. Admittedly, an authenticated copy of the arbitration agreement was not placed on record by the respondent at the time of filing of the application for enforcement. It is clear from the record that the appellant placed the arbitration agreement along with its reply and thereafter the respondent also filed the original arbitration agreement in the Court. The submission made by the appellant is that production of the arbitration agreement at the time of filing of the application is mandatory, the non-compliance of which ought to have resulted in the dismissal of the application. The appellant sought support for this submission from the word "shall" appearing in Section 47. We do not agree with the submission made by the learned counsel for the appellant. We are of the opinion that the word "shall" appearing in Section 47 of the Act relating to the production of the evidence as specified in the provision at the time of application has to be read as "may".

……..

19. The Object and Purpose of the New York Convention is to facilitate the recognition of the arbitration agreement within its purview and the enforcement of the foreign arbitral awards. This Object and Purpose must, in the first place, be seen in the light of enhancing the effectiveness of the legal regime governing international commercial arbitration

> [Dardana Ltd. v. Yukos Oil Co., 2002 EWCA Civ 543 : (2002) 1 ALL ER (Comm) 819]."
>
> [Emphasis added]

29. In **B.L.Sreedhar and Others v. K.M.Munireddy (Dead) and others** [(2003) 2 SCC 355] the Hon'ble Supreme Court held thus;

> "30. If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which they otherwise might have abstained from, he cannot question the legality of the act he had sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

30. In **Shri Lal Mahal Ltd. v. Progetto Grano Spa** [(2014) 2 SCC 433], the three Judge bench of the Hon'ble Supreme Court made the following observations;

> "19. 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 [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] and Phulchand Exports [Phulchand Exports Ltd. v. O.O.O. Patriot, (2011) 10 SCC 300 : (2012) 1 SCC (Civ) 131], 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 Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] must also apply to the use of the same term "public policy of India" in Section 48(2)(b).

…….....

27. In our view, what has been stated by this Court in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must apply equally to the ambit and scope of Section 48(2)(b) of the 1996 Act. In Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] 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 Renusagar. For all this there is no reason why Renusagar should not apply as regards the scope of inquiry under Section 48(2)(b). Following Renusagar, we think that for the purposes of Section 48(2)(b), the expression "public policy of India" must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in Renusagar. 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."
>
> [Emphasis added]

31. In **Government of India v. Vedanta Limited (Formerly Cairn India Ltd.) & Others** [(2020) 10 SCC 1] the Hon'ble Supreme Court referred to the law laid down in **Shrilal Mahal Ltd.** *(Supra).* The Hon'ble Court surveyed a number of Indian and foreign judgments and held that the expression

public policy in Section 48 of the Act is to be understood in a narrow sense and the Court enforcing the award cannot review the award on merits. It was clarified that the review on merits is a matter within the domain of the Courts at the seat of arbitration.

32. In **Commonwealth Development Corp (UK) v. Montague** [[2000] QCA 252], the Court of Appeal of Queens Land held that the Arbitral Tribunal's decision with respect to costs could be enforced in Queens Land in the same manner as a judgment of a Queens Land Court.

33. In **Ravfox Limited v. Bexmoor Limited** [2025 EWHC 1313 (Ch)], the High Court of Justice of England and Wales considered the jurisdiction of the arbitrator to award costs. It is relevant to refer to the following paragraph of the judgment:-

> "22. I was not referred to the Queensland case or the journal article. As I have indicated, I do not consider that the Crest Nicholson case is authority for such a

> general proposition as is stated by Chitty. However, section 30 is highly material, in my view, because it confers jurisdiction on the tribunal to rule on its own jurisdiction. Section 31 confirms that it may do so by an award on jurisdiction. The proceedings on the jurisdictional challenge are therefore valid proceedings. There is thus no logical reason why a costs award in respect of those proceedings should be incapable of being made. The argument mentioned in footnote 699 in para 35-152 of Chitty, based on section 30, seems to me to have merit. Further, section 61 confers on the tribunal an express power to "make an award allocating the costs of the arbitration as between the parties". It might be said that, where there is no jurisdiction, there is no "arbitration", so that section 61 does not apply. I do not consider it necessary to reach that conclusion. "Arbitration" is not itself a defined word in the 1996 Act, but section 59 defines "the costs of the arbitration" and does so in terms that are, in my view, wide enough to cover the costs of the parties in respect of a jurisdictional challenge."

34. The Court referred to a consultation paper of Law Commission wherein the Law Commission opined as under:-

> "23. The Law Commission Consultation Paper 257. Review of the Arbitration Act 1996, considered this issue in the following paragraphs, reaching (albeit tentatively) the same conclusion as I have reached:
>
> .....
>
> 8.69 We think the latter proposition is unattractive. If the arbitral tribunal rules that it does have jurisdiction, the successful party

> would ordinarily recover its costs of meeting the challenge. If the arbitral tribunal rules that it does not have jurisdiction, the successful party would get nothing. Instead, the party who wrongly initiated arbitral proceedings would otherwise walk away free of consequences, in circumstances where it has triggered the costs of bringing arbitration proceedings in the first place and progressing them to the point of an award. That imbalance seems unfair.
> ……."

35. The Court further examined the issue as to whether a cost award can be considered as an award under the Arbitration Act, 1996. It was held as under:-

> "29. The second task, however, is to identify the "award" out of which the question of law arises. The claim form identifies only the Main Award. However, the case was presented to me on the basis that the Costs Award was the relevant award. But is the Costs Award an award for the purposes of the 1996 Act? This is a major issue between the parties. Russell on Arbitration (24th edition) states at para 6-002 (footnotes omitted):
>
> > "There is no statutory definition of an award in English arbitration law despite the important consequences which flow from an award being made in principle an award is a final determination of a particular issue or claim in the arbitration. It may be contrasted with

> orders and directions of the tribunal which address the procedural mechanisms to be adopted in the reference. Such procedural orders and directions are not necessarily final in that the tribunal may choose to vary or rescind them altogether. Thus, questions concerning the jurisdiction of the tribunal or the choice of the applicable substantive law are suitable for determination by the issue of an award, whereas rulings on the nature and timing of procedural steps to be taken in the arbitration or the extent of disclosure of documents are procedural in nature and are determined by the issue of an order or direction and not by an award. The distinction is important because an award can be the subject of a challenge or an appeal to the court, whereas a procedural order or direction in itself cannot be so challenged. A preliminary decision, for example of the engineer or adjudicator under a construction contract, which is itself subject to review by an arbitration tribunal, is not an award."

The second sentence of that paragraph reflects section 47 of the 1996 Act.

30. The informality of what I have called the Costs Award is not itself determinative. Section 52 of the 1996 Act makes provision for the form of an award. However, the consequence of a failure to comply with the requirements as to the form of an award is simply that it may give rise to a ground of challenge to the award under section 68. Such challenges will be rare, because a failure to comply with the requirements as to

> form will only amount to a serious irregularity for the purposes of section 68 if it "has caused or will cause substantial injustice to the applicant": section 68(2). See Russell on Arbitration, para 6-046."

36. Learned counsel for the respondents on the other hand relied on the following judgments to buttress his contentions:-

i) **Agritrade International Pte. Ltd v. National Agricultural Co-operative Marketing Federation of India Ltd.** [2012 SCC OnLine Del 896].

ii) **Cinergy Corporation Pte Ltd. v. National Agricultural Co-Operative Marketing Federation of India Ltd.**[2012 SCC OnLine Del 4956].

iii) **Kalmart Systems (M) SDN BHD v. National Agricultural Co-Operative Marketing Federation of India Ltd.**[2015 SCC OnLine Del 7811].

iv) **Virgoz Oils & Fats Pte. Ltd. v. National Agricultural Co-Operative Marketing**

Federation of India Ltd. [2018 SCC OnLine Del 12780].

v) **Pari Agro Exports v. Soufflet Alimentaire and Another** [2019 SCC OnLine P&H 1351].

vi) **Pasl Wind Solutions Private Limited Vs. GE Power Conversion India Private Limited.** [(2021) 7 SCC 1].

vii) **Jaldhi Overseas Pte Ltd. v. Steer Overseas Pvt. Ltd.** [2023 SCC OnLine Cal 1628].

viii) **Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. and others** [(2022) 1 SCC 753].

ix) **Smita Conductors Ltd. v. Euro Alloys Ltd.** [(2001) 7 SCC 728].

x) **National Thermal Power Corporation v. The Singer Company and Ors.** [(1992) 3 SCC 551]

xi) **Olam International Ltd. v. Manickavel Edible Oils Pvt. Ltd. and**

Olam International Ltd. v. YENTOP Manickam Edible Oils Pvt. Ltd. [(2025) SCC OnLine Mad 11018]

37. In **Agritrade International Pte. Ltd** (Supra) Delhi High Court made the following observations;

> "16. The first issue concerns the non-compliance with Section 47(1)(b) of the Act which requires a party applying for enforcement of a foreign award to mandatorily produce before the Court "at the time of the application", "the original agreement for arbitration or a duly certified copy thereof." In Austbulk Shipping SDN BHD v. P.E.C. Ltd., (2005) 2 Arb LR 6 (Del) it was observed that an application for enforcement not accompanied by the arbitration agreement may be returned to the applicant for filing a fresh application and further that the failure to file the agreement was not one of the grounds set out under Section 48 of the Act for rejection of the prayer for enforcement. However, in the present case even that stage has been crossed. Even while issuing notice on 30th March 2009 it was noticed that Agritrade had not filed a copy of the arbitration agreement. Agritrade was given an opportunity to file additional documents. None of the documents filed by Agritrade include an 'arbitration agreement' between it and NAFED within the meaning of Section 7 of the Act. What is sought to be relied upon is a combination of documents beginning with the document dated 11th May 2004, which was neither addressed to nor signed by NAFED, and correspondence between Global Commodities and

Agritrade to plead that there was an 'implied' agreement between the parties. For reasons to be discussed, the fact remains that there was in fact no arbitration agreement within the meaning of Section 7 of the Act. Consequently, the inescapable conclusion is that Section 47(1)(b) of the Act had not been complied with.

17. It is not that there are no consequences for the failure of a party to file a copy of the arbitration agreement. Section 48(2)(a) of the Act states that enforcement of an award may be refused if the Court finds that "the subject matter of the difference is not capable of settlement by arbitration under the law of India." The question to be asked is whether in terms of the law of India, the dispute between Agritrade and NAFED, in the absence of an arbitration agreement, was capable of settlement by arbitration? The obvious answer has to be in the negative. A reading of Sections 7 and 16(1) of the Act show that the existence of an arbitration agreement is what confers jurisdiction on the arbitral tribunal. At the threshold where a party is able to demonstrate to the satisfaction of the arbitral tribunal under Section 16(1) of the Act that an arbitration agreement does not exist or where it does it is not valid, that brings the arbitration proceedings to a close. Such dispute is therefore "not capable of settlement by arbitration" under Indian law in terms of Section 48(2)(a) of the Act. This is therefore one ground on which the enforcement of the foreign Award in question can be refused in the instant case."

[Emphasis added]

38. In **Cinergy Corporation Pte Ltd.** (Supra), the Delhi High Court made the following observations;

> "17. In addition to reiterating the above contentions, Mr. T.K. Ganju, learned Senior counsel appearing for NAFED, referred to Section 47(1)(b) read with Section 48(1)(a), Section 48(2)(a) and Section 7 of the Act. He submitted that in terms of the definition of "arbitration agreement" under Section 7 of the Act, even if there was no arbitration agreement in writing as such signed by the parties, such agreement had to be contained in a document signed by the parties or in an exchange of letters, telegraph, telex or other means of communication between them. He pointed out that in the instant case at no time did Cinergy get in touch with the officers of NAFED. There was no correspondence between NAFED and Cinergy which would prove the existence of an arbitration agreement between the parties.
>
> .....
>
> 32. In conclusion, the Court is satisfied that there was no valid arbitration agreement between the parties within the meaning of Section 7 read with Section 47(1)(b) of the Act. Consequently, the First Tier Award, the Appellate Award and the Final Foreign Arbitration Award cannot be enforced in terms of Section 47(1) read with Sections 48(1)(a) and 48(2)(a) of the Act."
>
> [Emphasis added]

39. In **Kalmart Systems (M) SDN BHD**(Supra), the following observations were made by the Delhi High Court:

> "1. The petitioner, by virtue of the instant petition seeks to enforce an award dated 14.04.2010, under the provisions of Section 48 of the Arbitration and Conciliation Act, 1996 (in short the Act). The ancillary provisions to which reference has been made is, Section 47 of the Act and Section 11 read with Order 21, Rule 10 of the Code of Civil Procedure, 1908 (in short the Code).
>
> 1.1 The petitioner avers that the aforementioned award is a foreign award passed qua the respondent herein and, therefore, the award being a decree should be enforced in the terms set out therein. The petitioner thus, claims to be a decree holder, seeking recovery of moneys awarded to it.
>
> 1.2 On the other hand, the central issue raised by the respondent in defence of the captioned petition, is that, the purported agreement based on which the arbitration proceedings were triggered is, not an agreement to which it is a signatory, and hence, no legal obligations can arise from the said agreement including the obligation to arbitrate. In sum, the respondent's stand is that, there is no arbitration agreement in existence.
>
> ……..
>
> 10.6 The two judgments cited by the petitioner, i.e., Smita Conductors Ltd. and Shakti Bhog Foods Ltd., are clearly distinguishable on facts. One cannot quibble with the fact that as per, Para 2, Article II of

> the New York Convention the agreement in writing would include exchange of letters and/or telegrams. The point for consideration, in this particular case is : as to whether the respondent had conveyed its acceptance to the offer of the petitioner contained in the sales contract dated 05.06.2008. Having come to the conclusion that in the facts of this case, there was no acceptance of the offer made by the petitioner, in my opinion, no concluded contract came into existence and, therefore, by logical corollary, one could safely say that there was no binding arbitration agreement subsisting between the parties.
>
> 11. In view of the foregoing discussion, I am not inclined to grant the reliefs prayed for in the petition. The petition is accordingly dismissed. Parties shall, however, be left to bear their own costs."

40. In **Virgoz Oils & Fats Pte. Ltd.** (Supra), the Delhi High Court recorded the following observations:

> "9. Seeking enforcement of the aforementioned award, the Appellant filed Execution Petition No. 149/2015 in this Court. One of the central questions addressed by the learned Single Judge was whether there was an arbitration agreement between the parties. It was held that from the plain language of Section 44(a) of the Act, for recognition of a foreign Award, it should have been rendered in respect of differences between parties pursuant to an agreement in writing for arbitration to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the 'New York

Convention' and mentioned in the First Schedule to the Act) applies.

10. The learned Single Judge also referred to Article-II of the New York Convention which states thus:

> "2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

11. The learned Single Judge then held that factually in the present case, it was seen that the Broker had signed the contracts in his own capacity and not for and on behalf of NAFED. Further, there was no correspondence between the Appellant and NAFED which could establish a meeting of minds. In effect, there was no agreement on the part of NAFED to refer any dispute to arbitration. By the letter dated 29th July, 2008 NAFED had merely requested the Broker to take up the matter of deferment of shipment with the seller i.e. the Appellant. However, this was not inconsistent with NAFED's contention that the bargain between the parties had not been finalized.

12. The learned Single Judge held that an arbitration agreement must be in writing; it must unequivocally indicate the intention of the parties to resolve their disputes by arbitration; it must be "signed by the parties or must be contained in exchange of letters or telegrams". Notwithstanding that Part-I of the Act did not apply to Foreign Awards, Section 7 of the Act could be referred to for interpreting the expression

> 'agreement in writing'. Although the definition under Section 7(4) of the Act was wider than Article - II of the New York Convention, even by that yardstick in the present case, it was not possible for the Court to conclude that there was a valid arbitration agreement between the parties. After referring to the case law, the learned Single Judge upheld the objections of NAFED that with there being no concluded contract between the parties, a foreign award could not be enforced."

41. In **Pari Agro Exports** (Supra), the Punjab and Haryana High Court proceeded to set out the following observations:

> "39. By referring to CR No. 2471 of 2016 titled National Aluminum Co. Ltd. v. Subhash Infra engineers Pvt. Ltd., decided on 22.10.2016 and Indowind Energy Ltd. v. Wescare (I) Ltd., (2010) 5 SCC 306, learned Senior Counsel for the petitioner submitted that the term agreement in writing, as applicable to part II, has been defined in First Schedule of Article II of The Arbitration and Conciliation Act, 1996 (for short 'the Act'). The definition is much narrower than Section 7 of the Act. Reference can be made to Virgoz Oils and Fats Pte Ltd. v. National Agricultural Co-operative Marketing Federation of India Ltd., 2017 (3) R.A.J. 627 (Delhi High Court). It is conceded position that incograin model contract which as per respondent No. 1 contained arbitration clause was never signed by the petitioner, nor the same was served upon the petitioner by way of exchange of letter/telegrams or

other means of E-mails. It cannot be treated to be concluded arbitration agreement inter se the parties by any legally conceivable manner. The award rendered by the Tribunal in such a scenario would be a nullity.

40. In the absence of any valid contract for arbitration, enforcement under Section 49 of the Act can be refused. Incograin contract No. 12 was never easily available. The English copy of incograin contract has been placed on record for the first time as Ex.I with the reply to the objections filed by the petitioner. The aforesaid contract itself provides for its availability on www.incograin.com. The aforesaid website is in French language. It is accessible only to members of Paris Grain Trade Association. The confirmation of contract under the aforesaid incograin model contract provides that the contract form in force on the date of signature of the contract. It has been provided that the written text must contain all agreed conditions. Concededly, the contract was never signed, nor the agreed terms inter se the parties made part of the contract. Therefore, no valid arbitration agreement ever existed between the parties.

.....

75. In the instant case, incograin model contract had an arbitration clause, but the same was neither signed by the petitioner, nor the same was ever served upon the petitioner by way of any exchange of letter or telegram or exchange of E-mails. In the absence of any concluded arbitration agreement inter se the parties, the award passed on such alleged concluded agreement is a nullity in the eyes of law and Tribunal had no jurisdiction to arbitrate upon

> such an issue. The availability of incograin contract being a model contract on the website i.e. www.incograin.com would give rise to many questions to be answered by respondent No. 1. The aforesaid website is in French language. The website is accessible only by the member of Paris Grain Trade Association. The copy of screenshot of the website was placed before this Court which clearly reflected non-access by any private persons to the aforesaid website. In the heading of confirmation of contract in incograin model contract, it was mentioned that the contract form in force on the date of signature of the contract. The written text must contain all agreed conditions. Since the contract was never signed by the petitioner nor any terms agreed inter se the parties, therefore, there was no valid arbitration agreement between the parties on the strength of incograin contract No. 12 which was vaguely recited in general conditions in the draft E-mail dated 03.12.2012."

42. In **Pasl Wind Solutions Private Limited** (supra), the Hon'ble Apex Court expounded the following principles:

> "85. It will thus be seen that where the law of India prohibits a certain act, the conflict of law rules as set down in Dicey's authoritative treatise will take care of this situation in most cases as the arbitrators would then apply these rules on the ground of international comity between nations in cases which arise between two Indian nationals in an award made outside India, which would fall within the definition of "foreign award" under Section 44 of the 1996 Act."

43. In **Jaldhi Overseas Pte Ltd.** (Supra), the Calcutta High Court held thus;

> "21. The following principles can be derived from the judgments cited and discussed above:-
> ……
> b) In circumstances wherein an arbitration agreement is evidently found lacking or there is no concluded contract, the enforcement of an award must be refused and shall fall prey to:—
>
> (i) Section 48(2)(a) - for the subject matter not being capable of settlement by arbitration under the law of India (as per the judgments in Agrigade International Pte. Ltd. [supra], Cinergy Corporation PTE Ltd. [supra] and Marina World Shipping Corporation Ltd. [supra]),
>
> (ii) Section 48(2)(b) of the Act - the enforcement of the award would be in conflict with the public policy of India as unilateral imposition of a contract upon an unwilling and unrelated party would be against the 'most basic notions of justice' and would shock the conscience of any court, as per the judgment in Ssangyong Engg. & Constriction Co. Ltd. (supra).
> ……
> 27. Keeping in mind the law with regards to Section 48 of the Act wherein my discretion is very limited, I do not find there was no concluded contract or no arbitration agreement which could have made (i) the matter being incapable of settlement by arbitration in India or (ii) shocked the conscience of the court in light of forceful imposition of a contract not entered

> into by the respondent. Therefore, the respondent's challenge to the enforcement of the award must fail.
>
> 28. In view of the above, the objections raised by the respondent with regard to enforceability of the award are rejected and it is ordered that the award is enforceable and executable as a decree of this court. The respondent is directed to disclose its affidavit of assets within eight weeks from date. The petitioner shall be at liberty to seek further directions for execution of the award, in accordance with law."

44. In **Gemini Bay Transcription Pvt. Ltd.**(Supra) the Hon'ble Supreme Court observed that Section 47 of the Arbitration and conciliation Act, 1996 is based on Article IV of the New York Convention. The Hon'ble Supreme Court also explained the necessary ingredients for an award being a foreign award under Section 44 of the Act.

45. In **Smita Conductors Ltd.**(Supra) the Hon'ble Supreme Court held as under:-

> "3.....
> In the case under consideration, however, the arbitration agreement was contained and explicitly mentioned in the sales contract itself. The reference

had as sold object the procedural regulation of the arbitration and, therefore, validly completed the arbitral clause mentioned above as it ascertained the existence and the specific contents of that regulation. But the Supreme Court, however, held that the arbitral clause was null and void because it was signed only by the seller who invoked the clause. Shri.Venugopal referred to another decision of the Italian Court in Corte DI Cassazione in Begro B.V. vs. Ditta Voccia & Ditta Autonio Lamberti ((1978) 3 Yearbook Commercial Arbitration, 278). The court interpreted Art. II, paras 1 and 2 of the Convention, as requiring a specific agreement to submit to arbitration signed by the parties or contained in an exchange of letters or telegrams. According to the court, such a specific agreement could not be found in an arbitration clause printed on the contract-form and signed by the parties and, therefore, held the arbitration clause to be without effect. Shri Venugopal next referred to the decision of Corte Di Cassazione in Societa Atlas General Timbers v. Agenzia Concordia [(1978) 3 Yearbook Commercial Arbitration, 267]. It was held therein that the validity of the arbitral clause in question had to be judged under the New York Convention. According to Art. II, para 2 of the Convention, the arbitration clause in writing means 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. This provision, therefore, requires clearly the signature as a minimum element for the effectiveness of the contract containing the arbitral clause. The Court concluded that not the arbitration clause itself, but the contract in which it is contained must be signed by both parties under Art. II, para 2 of the

> Convention. The court examined whether the requirement was met in the present case and found that the signature of the agent of the carrier was not sufficient since his power of attorney was not in writing and that the signature of the other party was also lacking and his endorsement does not replace the signature, since the former concerns only a transfer of title, whilst the latter is necessary for the formation of the contract.
>
> ……
>
> 6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para 2 of "Article II. If we break down para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing. ……..”

46. In **National Thermal Power Corporation** (Supra) the Hon'ble Supreme Court held as follows:-

> “37. A 'foreign award, as defined under the Foreign Awards Act, 1961 means an award made on or after October 11, 1960 on differences arising between persons out of legal relationships, whether

contractual or not, which are considered to be commercial under the law in force in India. To qualify as a foreign award under the Act, the award should have been made in pursuance of an agreement, in writing for arbitration to be governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and not to be governed by the law of India. Furthermore such an award should have been made outside India in the territory of a foreign State notified by the Government of India as having made reciprocal provisions for enforcement of the Convention. These are the conditions which must be satisfied to qualify an award as a 'foreign award' (Section 2 read with Section 9).

…….

41. A foreign award will not be enforced in India if it is proved by the party against whom it is sought to be enforced that the parties to the agreement were, under the law applicable to them, under some incapacity, or, the agreement was not valid under the law to which the parties have subjected it, or, in the absence of any indication thereon, under the law of the place of arbitration; or there was no due compliance with the rules of fair hearing; or "the award exceeded the scope of the submission to arbitration; or the composition of the arbitral authority or its procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the place of arbitration; or 'the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'. The award will not be enforced by

> a court in India if it is satisfied that the subject matter of the award is not capable of settlement by arbitration under Indian law or the enforcement of the award is contrary to the public policy."

47. In **Olam International Ltd.**(Supra) a learned Single Judge of the Madras High Court considered two cases for enforcement of two foreign arbitral awards. The respondent contended that there existed no valid, legal and enforceable arbitration agreement. The said contention was accepted by the learned Single Judge. The learned Single Judge finally held as under:-

> "44. A foreign award, which upholds the existence of an agreement based on surmises is, obviously, opposed to public policy and is not enforceable.
>
> 45. The jurisdictional pre-condition for reference to arbitration is the concluded contract between the parties and their intention to refer the dispute to arbitration. In the absence of such jurisdictional requirement, a foreign award passed by the Arbitral Tribunal would run contrary to the Public Policy of India.
>
> 46. In the light of the above findings rendered by this Court, it is not necessary for this Court to go into the other issue raised on the side of the respective

> respondent to the effect that they were intentionally kept in lull by means of the letter received from the PORAM dated 01.10.2020 informing that the arbitration proceedings were kept on hold till 30.11.2020 and that the Arbitral Tribunal was to be constituted whereas simultaneously the petitioner invoked the jurisdiction of the FOSFA and managed to get an ex parte order against the respective respondent.
>
> 47. The discussion on this issue becomes academic since this Court has already held that there were no concluded contracts between the parties and as a result, the jurisdictional pre-condition for reference to arbitration was missing and that therefore, the foreign awards become unenforceable under Section 48 of the Act."

Pertinent provisions of the Arbitration and Conciliation Act, 1996

48. As the learned Senior Counsel for the petitioner and the learned counsel for the respondent have advanced arguments pertaining to the real import of the provisions of Chapter I it is necessary to refer to the relevant provisions. Part II of the Arbitration and Conciliation Act, 1996 provides for enforcement of certain foreign awards. Chapter I deals with New

York Convention Awards. In the instant case the award sought to be executed is a New York Convention Award. Section 44 defines foreign award. The said provision is extracted hereunder:-

> "**44. Definition.-** In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—
>
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
>
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

49. Section 47 deals with 'evidence'. For the purpose of the present case reference to Section 47(1) is essential. The said provision is as under:-

> "**47. Evidence.**—(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court—

> (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
>
> (b) the original agreement for arbitration or a duly certified copy thereof; and
>
> (c) such evidence as may be necessary to prove that the award is a foreign award. ”

50. Section 48 lays down the conditions for enforcement of foreign awards. Section 48(1) delineates five situations wherein enforcement of a foreign award may be refused at the request of the parties against whom it is invoked. Section 48(1) reads as under:-

> “**48. Conditions for enforcement of foreign awards.**—(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—
>
> (a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

> (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
>
> (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

51. Under Section 48(2), two more situations under which enforcement may be refused are provided which are as follows:-

> "**48. Conditions for enforcement of foreign awards.—**
> ……
> (2) Enforcement of an arbitral award may also be refused if the Court finds that—
>
> (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India."

52. In **Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. and Ors.** [(2022) 1 SCC 753] the Hon'ble Supreme Court pointed out that there are six ingredients to an award being a foreign award under Section 44. The relevant paragraph of the judgment is extracted hereunder:-

> "**30.** A reading of Section 44 of the Arbitration and Conciliation Act, 1996 would show that there are six ingredients to an award being a foreign award under the said section. First, it must be an arbitral award on differences between persons arising out of legal relationships. Second, these differences may be in contract or outside of contract, for example, in tort. Third, the legal relationship so spoken of ought to be considered "commercial" under the law in India. Fourth, the award must be made on or after the 11th day of October, 1960. Fifth, the award must be a New York Convention award — in short it must be in pursuance of an agreement in writing to which the New York Convention applies and be in one of such territories. And sixth, it must be made in one of such territories which the Central Government by notification declares to be territories to which the New York Convention applies."
>
> [Emphasis added]

53. The Hon'ble Supreme Court further held in the same judgment regarding Section 47 as under:-

> "35. We now come to Section 47. As the marginal note indicates, this section provides that the prerequisites for the enforcement of a foreign award are : (1) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it is made; (2) the original agreement for arbitration or a duly certified copy thereof, and; (3) such evidence as may be necessary to prove that the award is a foreign award.
>
> 36. Section 47 is based on Article IV of the New York Convention which is contained in Schedule I to the Arbitration Act, 1996. Article IV reads as follows:
>
> "Article IV
>
> 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
>
> (a) The duly authenticated original award or a duly certified copy thereof;
>
> (b) The original agreement referred to in Article II or a duly certified copy thereof.
>
> 2. If the said award or agreement is not made in an official language of the country in which the award is

> relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

54. Still further it was held regarding Section 48 as under:-

> "**39.** We now come to Section 48 which deals with enforcement of a foreign award being refused. It is important to notice that when enforcement of a foreign award is resisted, the party who resists it must prove to the Court that its case falls within any of the sub-clauses of sub-section (1) or sub-section (2) of Section 48. Since some arguments were made as to the expression "proof" contained in Section 48(1), it is necessary to deal with the same. In *Emkay Global Financial Services Ltd.* v. *Girdhar Sondhi* [(2018) 9 SCC 49 : (2018) 4 SCC (Civ) 274], a question arose under the pari materia provision contained in Section 34 of the Arbitration Act, 1996 as to what the expression "proof" means therein. After referring to a number of High Court judgments, and to an amendment that has now been made to Section 34, in which the expression "furnishes proof that" is now substituted by "establishes on the basis of the record of the Arbitral Tribunal that", this judgment held that the expression "proof" cannot possibly mean the taking of oral evidence as it will otherwise defeat the object of speedy disposal of Section 34 petitions. This was so stated as follows : (SCC p. 63, para 21)

"*21*. It will thus be seen that speedy resolution of arbitral disputes has been the reason for enacting the 1996 Act, and continues to be the reason for adding amendments to the said Act to strengthen the aforesaid object. Quite obviously, if issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated. It is also on the cards that if Bill No. 100 of 2018 is passed, then evidence at the stage of a Section 34 application will be dispensed with altogether. Given the current state of the law, we are of the view that the two early Delhi High Court judgments [*Sandeep Kumar* v. *Ashok Hans*, 2004 SCC OnLine Del 106 : (2004) 3 Arb LR 306], [*Sial Bioenergie* v. *SBEC Systems*, 2004 SCC OnLine Del 863 : AIR 2005 Del 95], cited by us hereinabove, correctly reflect the position in law as to furnishing proof under Section 34(2)(*a*). So does the Calcutta High Court judgment [*WEB Techniques & Net Solutions (P) Ltd.* v. *Gati Ltd.*, 2012 SCC OnLine Cal 4271]. We may hasten to add that if the procedure followed by the Punjab and Haryana High Court judgment [*Punjab SIDC Ltd.* v. *Sunil K. Kansal*, 2012 SCC OnLine P&H 19641] is to be adhered to, the time-limit of one year would only be observed in most cases in the breach. We therefore overrule the said decision. We are constrained to observe that *Fiza Developers* [*Fiza Developers & Inter-Trade (P) Ltd.* v. *AMCI (India) (P) Ltd.*, (2009) 17 SCC 796 : (2011) 2 SCC (Civ) 637] was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary

> procedure. However, this judgment must now be read in the light of the amendment made in Sections 34(5) and 34(6). So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(*a*), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. We, therefore, set aside the judgment [*Girdhar Sondhi* v. *Emkay Global Financial Services Ltd.*, 2017 SCC OnLine Del 12758] of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22-9-2016. The appeal is accordingly allowed with no order as to costs."

40. Given that foreign awards in Convention countries need to be enforced as speedily as possible, the same logic would apply to Section 48, as a result of which the expression "proof" in Section 48 would only mean "established on the basis of the record of the Arbitral Tribunal" and such other matters as are relevant to the grounds contained in Section 48.

41. It is important to remember that the New York Convention, which our Act has adopted, has a pro-enforcement bias, and unless a party is able to show that its case comes clearly within Sections 48(1) or 48(2), the foreign award must be enforced. Also, the

grounds contained in Sections 48(1)(*a*) to (*e*) are not to be construed expansively but narrowly. Thus, in *Ssangyong Engg. & Construction Co. Ltd.*v.*NHAI*[(2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] ["*Ssangyong*"], it was held : (SCC pp. 172-74, para 45)

> "*45*. After referring to the New York Convention, this Court delineated the scope of enquiry of grounds under Sections 34/48 (equivalent to the grounds under Section 7 of the Foreign Awards Act, which was considered by the Court), and held : (*Renusagar case* [*Renusagar Power Co. Ltd.*v.*General Electric Co.*, 1994 Supp (1) SCC 644] , SCC pp. 671-72 & 681-82, paras 34-37 & 65-66)
>
> > `*34*. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (*a*) to (*e*) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the court was satisfied in respect of matters mentioned in clauses (*a*), (*b*) and (*c*). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (*See* Dicey & Morris, *The Conflict of Laws*, 11th Edn., Vol. I, p. 578.) It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through

arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (*a*) to (*e*) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (*a*) and (*b*) of clause (2) of Article V.*None of the grounds set out in sub-clauses (a) to (e) of clause (1) and sub-clauses (a) and (b) of clause (2) of Article V postulates a challenge to the award on merits*.

35. Albert Jan van den Berg in his treatise *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, has expressed the view:

"*It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator*. Furthermore, under the Convention the

task of the enforcement Judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration." (p. 269)

36. Similarly, Alan Redfern and Martin Hunter have said:

"The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted." (Redfern & Hunter,*Law and Practice of International Commercial Arbitration*, 2nd Edn., p. 461.)

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to

impeach the award on merits.

* * *

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 1837 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. Article V(2)(*b*) of the New York Convention of 1958 and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the

public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(*b*) of the New York Convention and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(*c*) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. 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 in original]

55. In **Pasl Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd.** [(2021) 7 SCC 1] the Hon'ble Supreme Court held that Part I and Part II of the Arbitration and Conciliation Act are mutually exclusive. It was held as under:-

> "**Part I and Part II of the Arbitration Act are mutually exclusive**
> **34.** The Arbitration Act is in four parts. Part I deals with arbitrations where the seat is in India and has no application to a foreign-seated arbitration. It is, therefore, a complete code in dealing with appointment of arbitrators, commencement of arbitration, making of an award and challenges to the aforesaid award as well as execution of such awards. On the other hand, Part II is not concerned with the arbitral proceedings at all. It is concerned only with the enforcement of a foreign award, as defined, in India. Section 45 alone deals with referring the parties to arbitration in the circumstances mentioned therein. Barring this exception, in any case, Part II does not apply to arbitral proceedings once commenced in a country outside India."
>
> [Emphasis supplied]

56. Regarding the ingredients of Section 44 of the Act it was held as under in the said judgment:-

> **"45.** Under Section 44 of the Arbitration Act, a foreign award is defined as meaning an arbitral award on differences between persons arising out of legal

> relationships considered as commercial under the law in force in India, in pursuance of an agreement in writing for arbitration to which the New York Convention applies, and in one of such territories as the Central Government, by notification, declares to be territories to which the said Convention applies. Thus, what is necessary for an award to be designated as a foreign award under Section 44 are four ingredients:
> (*i*) the dispute must be considered to be a commercial dispute under the law in force in India,
> (*ii*) it must be made in pursuance of an agreement in writing for arbitration,
> (*iii*) it must be disputes that arise between "persons" (without regard to their nationality, residence, or domicile), and the arbitration must be conducted in a country which is a signatory to the New York Convention. Ingredient (*i*) is undoubtedly satisfied on the facts of this case. Ingredient (*ii*) is satisfied given Clause 6 of the settlement agreement. Ingredients (*iii*) and (*iv*) are also satisfied on the facts of this case as the disputes are between two persons i.e. two Indian companies, and the arbitration is conducted at the seat designated by the parties i.e. Zurich, being in Switzerland, a signatory to the New York Convention."

Analysis

57. While analysing the facts of the instant case, it must be acknowledged that this case is unique with a rare factual backdrop. The respondent herein initiated the arbitral

proceedings. Reliefs sought are discernible from paragraphs 68 and 69 of Annexure-1 award. The relevant paragraphs are extracted hereunder: -

> "**VI. CLAIMS FOR RELIEF**
>
> 68. The Claimant's requests, as finally articulated, are set out at page 80 of the Reply, at which the Claimant requests that the Tribunal declare and order the following:
>
> "a. DECLARE that the Respondents have breached the CME Shareholders Agreement by inter alia illegally appropriating the value of Mr Sharath's shareholding in various companies including CME Holding and its subsidiaries and associated companies;
>
> b. ORDER the Respondents to pay the Claimant compensation for damage in an amount of USD 25.2 million, including interest pendente lite at USD Treasury Rate +4% per annum (calculated as on 28 February 2022) compounded quarterly;
>
> c. ORDER the Respondents to pay interest on all amounts awarded, at a commercially reasonable rate or such other rate determined by applicable law, from the date of award until full payment of the award;
>
> d. ORDER the Respondents to pay the costs incurred by Mr Sharath in relation to these proceedings, including all professional fees, attorneys' fees and disbursements and the costs of the arbitration"
>
> 69. The Respondent's requests, as finally articulated, are set out at paragraphs 362-365 of the Rejoinder, at which the Respondents seek the following relief from the Tribunal:

> "362. Respondents respectfully request the Tribunal to dismiss Mr Sharath's claims against Respondents on the grounds of the Tribunal's lack of jurisdiction over the dispute (Section 2 of the Swedish Arbitration Act).
> 363. Respondents respectfully request the Tribunal to dismiss Mr Sharath's claim for declaratory relief as the prerequisites for declaratory judgments under Swedish law are not met (Chapter 13, Section 2 of the Code of Judicial Procedure).
> 364. Should the Tribunal not dismiss the claims, Respondents respectfully request the Tribunal to reject Mr Sharath's claims against Respondents.
> 365. In any event, Respondents respectfully request the Tribunal to,
> (i) order that Mr Sharath as between the parties shall bear the costs for arbitration including the fee to the SC and interest calculated in accordance with Section 6 of the Interest Act (1975:635), from the date of the award until full payment of the award; and
> (ii) order Mr Sharath to compensate Respondents for their costs and expenses incurred in the arbitration including interest calculated in accordance with Section 6 of the Interest Act (1975:635) from the date of the award until full payment of the award."

58. The petitioners resisted the claims mainly contending that there was no valid arbitration agreement. This contention

was accepted by the Arbitral Tribunal. The following paragraphs of Annexure-1 award are to be noted: -

> "87. For the foregoing reasons, the Tribunal concludes that the Shareholders Agreement was not entered into by conduct, and that therefore there is no valid or effective arbitration agreement between the Claimant and the First Respondent.
>
> .....
>
> 89. All of the foregoing agreements provide for ad hoc arbitration, with the SCC designated as the appointing authority. None of these agreements provide for arbitration to be administered by the SCC pursuant to the SCC Rules, which is what is provided for at Clause 6.4 of the Shareholders Agreement. It follows that the Claimant has not been able to show that there is any established usage between the Parties for arbitration pursuant to the SCC Rules. The Claimant's argument that it was the Respondents who proposed the arbitration agreement in the Shareholders Agreement which calls for SCC arbitration does not assist the Claimant's position, as it appears that this is the first time that such a dispute resolution provision was proposed for use in an agreement between the Claimant and any of member of the Concejo Group.
>
> 90. Even if the Tribunal were to accept that the purported usage relied on by the Claimant conferred jurisdiction on the Tribunal – an issue which the Tribunal does not rule on – the Claimant has failed to establish that any such usage did in fact exist. As a consequence, no arbitration agreement has come into existence by virtue of the purported usage.
>
> ….....

> 95. As the Tribunal has already determined that there is no arbitration agreement in the first place, and that the First Respondent is not therefore bound by it, the Second Respondent cannot be bound by the arbitration agreement on the basis of the theory of piercing the corporate veil."

59. The Arbitral Tribunal held against the respondent on the pertinent aspect as noted above and then dealt with the issue of cost. It was observed in paragraph 114 as under:-

> "114. It is unequivocal that the Respondents have been victorious in these proceedings, as they have succeeded on their jurisdictional objections and the Claimant's claims for relief have been dismissed. On the basis of the foregoing principles, the Respondents are entitled to recover their reasonable costs. Despite its finding on jurisdiction, the Tribunal has authority to make orders as to costs pursuant to Article 37 of the Arbitration Act."

60. Finally, in the dispositive section of the award it was found and directed as under:-

> "128. Based on the Final Award above, the Tribunal hereby finds, orders and directs:
>
> A. The Tribunal lacks jurisdiction over the Claimant's claims, which are accordingly dismissed;
>
> B. The Claimant is directed to pay the Respondents SEK 11,405,267 for their legal and other costs;

> C. The Claimant is directed to pay the Respondents EUR 175,677.25, GBP 215.62 and SEK 289.50 for the Respondents' payment towards the costs of arbitration;
> D. The Claimant is directed to pay interest on the Respondents' costs at paragraphs B. and C. above, such interest to be calculated pursuant to Section 6 of the Swedish Interest Act as of the date of this award until the date of payment;
> E. The Claimant is ordered to bear its own legal and other costs;
> F. All other claims and requests for relief are dismissed."

61. Thus, the Arbitral Tribunal entered into a firm finding that there was no arbitration agreement and hence the Tribunal lacked jurisdiction over the respondent's claims. Since the petitioners emerged victorious, the respondent was directed to pay cost to them. Hence, Annexure-1 is virtually a cost only award. Peculiarity of this award is the fact that the same has been rendered with a finding that the Tribunal had no jurisdiction to entertain the claims as there was no valid arbitration agreement.

62. At this juncture it must be noted that the thrust of the entire arguments advanced on behalf of the respondent is regarding the conclusive findings of the Arbitral Tribunal that there was no valid arbitration agreement between the parties. It is also to be noted that the respondent did not challenge the arbitral award. In other words, as of now the award can be treated as concluded between the parties without any further challenge.

63. In view of the arguments raised by both sides pertaining to enforceability of the award, the primary task of the court at this juncture is to examine whether the award is enforceable under Part II of the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court has highlighted the importance of recognizing and enforcing valid foreign awards in the judgment in **Gemini Bay Transcription Pvt. Ltd.** (Supra).

64. The approach of the court shall normally be in favour of enforcement of foreign awards. Nevertheless, it goes without

saying that the statutory provisions of Part II of the Arbitration and Conciliation Act, 1996 shall be certainly followed. The Hon'ble Supreme Court has clarified that the provisions of Part I of the Act and those of Part II are mutually exclusive. Therefore, the scope and ambit of the provisions of Part II are distinct from those dealing with domestic arbitration.

65. It is also well settled that the power of the court under Part II is restricted in nature. It has no authority to set aside a foreign award or to interfere with the findings of the Arbitral Tribunal in any manner. Review of the foreign awards on merits is not within the purview of the enforcement proceedings under Part II of the Arbitration and Conciliation Act, 1996. Scope of the enquiry is confined to the enforceability of the award under the Indian law.

66. Conjoint reading of Sections 44 to 49 of the Act would show that the court has to initially satisfy that the award sought to be enforced is a ‘foreign award’ as defined under Section 44

of the Act. Unless the award satisfies the ingredients of the definition, obviously the jurisdiction under Part II cannot be invoked. Further, the court should satisfy that the party seeking enforcement of the award has produced evidence as contemplated under Section 47. If the party resisting enforcement furnishes proof to the court with respect to any of the factors mentioned in sub-sections (1) and (2) of Section 48, enforcement may be refused.

67. Having said that courts must lean in favour of enforcing awards rather than refusing to do so on technical grounds, it cannot be overlooked that enforcement of a foreign award under Part II can be resorted to only if the requirements of the provisions of that Part are fulfilled. Therefore, it is incumbent on the court to forensically analyse, when enforcement of a foreign award is sought, as to whether the requirements of Part II of the Arbitration and Conciliation Act, 1996 are satisfied before proceeding to enforce the award as a

decree of the court. The said analysis is indispensable when an award stated to be passed under another legal regime is sought to be executed under the Indian law as the conditions under the provisions of Part II are carefully and consciously fused into the Arbitration and Conciliation Act by the legislature with the obvious objective of preventing abuse of the process of Indian law. Notwithstanding the transnational commitments of reciprocity, the legislature has not contemplated that every foreign award shall be impulsively acknowledged and enforced by the Indian courts. Hence it is crucial that the award should pass the muster of Part II.

68. In this regard it is pertinent to refer to Article V of the New York convention extracted hereunder:-

> "ARTICLE V
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that-

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

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

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that-

> (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country."

A reading of Article V would reveal that the same also envisages retention of discretion by the signatory states in the matter of enforcing foreign awards. Hence the signatory states definitely have the freedom to enact laws providing for enforcement, however with thresholds, traversing of which would be essential to secure endorsement by the domestic courts of the State concerned. Needless to say, such riders cannot be irrationally stringent in that way frustrating the objects of the Convention. Provisions of Chapter I under Part II of the Arbitration and Conciliation Act, 1996 are framed ostensibly in tune with Article V.

69. Keeping the above principles in mind, I shall analyse the objections raised by the learned counsel for the respondent

in seriatim. The learned counsel had raised a preliminary contention that the execution petition was filed without producing any evidence as contemplated under Section 47 of the Act. He argued so for the reason that no copy of the original agreement was produced along with the execution petition. He further contended that Annexure-1 was not an original of the award or a duly authenticated copy thereof.

70. Scope and intent of the expression "evidence" under Section 47 of the Act cannot be understood like that of the standards of the Evidence Act. The apparent purpose of insisting that the original of the award, or a copy thereof duly authenticated in the manner required by the law of the country in which it was made, as well as the original arbitration agreement or a duly certified copy thereof, shall be produced, is to convince the court that what is sought to be enforced is a genuine foreign award pursuant to a valid arbitration agreement. Beyond the said requirement, no further necessity can be read

into the provisions of Section 47 of the Act. If there is dispute regarding the genuineness of the award or agreement, of course the court may require to insist for convincing evidence. Hence the standards of "evidence" may vary according to the facts and circumstances of each case. The avowed purpose of the Act is to ensure speedy resolution of the disputes. As a sequel, in the case of enforcement of foreign awards, making the process cumbersome would be against the goals of the law relating to arbitration. Review of the foreign award on merits is not within the province of the court called upon to enforce the award. Court is exercising only a constricted jurisdiction under Part II of the Act. Therefore, if the expression 'evidence' in Section 47 is reckoned as an expression signifying evidence of a high standard as required in criminal trials or in pure civil proceedings, it will be against the prime objectives of the arbitration law. The expression "evidence" ought to be

understood in the particular context of the provisions under Part II as well as the general scheme of the Act.

71. In the case at hand, the authenticated copy of the agreement was not produced along with the execution petition, but was produced later. As held by the Hon'ble Supreme Court in **PEC Limited** (Supra), it is not a reason to hold that the execution petition was defective and not liable to be entertained. Moreover, the said agreement was actually relied on by the respondent before the Arbitral Tribunal. Likewise, before hearing concluded, a certified copy of the award was also produced. The learned Senior Counsel for the petitioners clarified that the copies produced at the time of filing were those forwarded to the petitioners by e-mail from the arbitral institution, and that the said method is the normal mode of serving copies of pleadings and documents, as well as orders and the final award. This was not disputed by the learned counsel for the respondents. That being so I am of the view that the requirements of Section 47 of

the Act have been satisfactorily complied in this case. The materials produced are sufficient for the court to be satisfied that there was an arbitral proceeding between the parties and that the award produced is its outcome, since there is no dispute regarding the legitimacy of the documents. Hence, I hold that the objection raised by the respondent with reference to Section 47 of the Act is not sustainable.

72. Be that as it may, the next contention pertaining to Section 48(1)(a) that no valid arbitration agreement existed between the parties as found by the Tribunal and the same is a sufficient reason to refuse enforcement deserves to be considered independently. At the risk of repetition, it must be noted that the unequivocal finding of the Arbitral Tribunal was that there was no valid arbitration agreement. The said conclusion of the Tribunal is binding on both sides. The award has become final as no challenge was raised against it. The principles of resjudicata and fairness would demand that the

parties shall not contend that there was a valid agreement after having accepted the findings of the Tribunal to the contrary. The contention raised by the learned Senior Counsel for the petitioners that there was an agreement between the parties to the extent they agreed for adjudication by the Tribunal needs to be examined in this background. It is not impossible that such an agreement may also evolve. Nonetheless, even if the said contention is acknowledged for the sake of arguments, the crucial question is as to whether the same would be sufficient to satisfy the requirement of Section 48(1)(a).

73. It is relevant to note that in Section 48(1)(a) the opening words employed are, "the parties to the agreement referred to in Section 44". Therefore, the expression 'agreement' in Section 48(1)(a) shall be understood as stated in Section 44. Under Section 44(a), the agreement for arbitration shall essentially be in writing. Therefore, it is imperative that the agreement for arbitration shall be 'in writing' to satisfy the

requirements of the provisions of Part II of the Act, especially of Section 48(1)(a). To put it plainly, unless there is an agreement for arbitration in writing there cannot be a 'foreign award' as defined under Section 44 of the Act. Likewise, to satisfy the requirement of Section 48(1)(a), such an agreement shall not be invalid under the law to which the parties have subjected it. Hence, the requirements are two-fold; 1) the agreement for arbitration shall be in writing and 2) the same shall not be invalid under the curial law.

74. It was the case of the petitioners before the Arbitral Tribunal that there was no agreement for arbitration, binding on the parties. They effectively established the same before the Tribunal. The Tribunal refused reliefs to the respondent holding that it had no jurisdiction in the absence of valid arbitration agreement. Hence, it is no longer open to the petitioners to rely on the agreement produced in this execution petition. Similarly, the contention of the learned Senior Counsel for the petitioners

that from the conduct of the parties, an agreement for arbitration can be inferred also cannot save the case for the petitioners as the unequivocal requirement under the Indian law is 'agreement for arbitration in writing'. An agreement, admittedly not in black and white, but sought to be inferred from the conduct of the parties, cannot fulfil the requirements of the provisions of Part II of the Arbitration and Conciliation Act, 1996. Though an agreement contained in an exchange of letters or telegrams can also satisfy the requirement in this regard, no such agreement exists even for the purpose of a limited adjudication by the Arbitral Tribunal.

75. It is germane to note that, under the various Articles of the Convention incorporated under the First Schedule to the Act, the existence of an agreement in writing by which the parties undertake to submit to arbitration is essential. It is also necessary that the subject matter shall be capable of settlement by arbitration. Further, the agreement shall be in writing. Under

Article II(2), the term "agreement in writing" includes an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. Therefore, in the case on hand, the requirements of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as incorporated in the First Schedule of the Act, are also not satisfied.

76. I find substantial merit in the contention of the learned counsel for the respondent that the petitioners were well aware that the award would not be enforceable in India. In their statement of defence before the Arbitral Tribunal, it was plainly stated that they would not be in a position to seek enforcement under the New York Convention as there is no arbitration agreement between the parties. Relevant submissions of the petitioners in this regard are found in paragraphs 296-299 of the defence statement produced by the respondent as Annexure-R1(a). It is apposite to extract the same hereunder: -

"296. While both India and the UAE are party to the New York Convention - meaning that the countries must recognize arbitral awards as binding and enforce them in accordance with the convention - the Respondents would not be able to seek enforcement under the convention in the case of a costs award in their favour. The reason being that, under to the New York Convention, the arbitration agreement must be supplied to obtain enforcement, (Article IV), and the agreement must be in writing and signed by the two parties (Article II).

297. As there is no arbitration agreement between the parties, let alone a signed agreement, Respondents cannot successfully seek enforcement under the New York Convention.

298. The same principles apply under Indian and UAE national law. According to the Indian Arbitration and Conciliation Act, 1996, the party applying for enforcement must supply the arbitration agreement to obtain enforcement (Article 47.1.b), and an arbitration agreement shall be in writing and signed by the two parties (7.3 and 7.4a). Likewise, under Federal Law No. (6) of 2018 on Arbitration in the UAE, the party applying for enforcement must supply the arbitration agreement to obtain enforcement (55.1.b), and the agreement shall be in writing and signed by the two parties (7.1 and 7.2.a).

299. Consequently, it is highly unlikely that the Respondents can obtain enforcement of a costs award in their favour, both under national and international law. Respondents thus stand a great financial risk regardless of the outcome of the arbitration initiated by

> Mr.Sharath. This alone constitute exceptional circumstances under Article 38 of the SCC Rules."

77. The learned Senior Counsel for the petitioners attempted to defend the above-mentioned contention by stating that the pleadings extracted above reflected the apprehensions of the petitioners and the same are not liable to be considered as admissions. In the nature of the pleadings extracted above, the said contention of the learned Senior Counsel cannot be accepted. The pleadings in paragraphs 296-299 of Annexure-R1(a) are unambiguous and would show that the petitioners were well aware during the pendency of the arbitral proceedings that for enforcement of a foreign award under the Indian Arbitration and Conciliation Act, 1996 the party applying for enforcement must supply the arbitration agreement and it shall be necessarily in writing and signed by the parties. They candidly submitted so before the Tribunal and sought reliefs on the said premises. It must be said that the contentions raised in

this Execution Petition, in entirety, are inconsistent with the pleadings extracted above.

78. The learned Senior Counsel pointed out that, while resisting the plea before the Tribunal to insist on furnishing security, the respondent contended that he had sufficient assets in India to satisfy any award passed against him. He raised no objection regarding the enforceability of the award, even if it were a cost award, before the Tribunal. The learned Senior Counsel hence argued that the respondent's contentions regarding enforceability are liable to be rejected for this sole reason. True that the pleadings of the parties before the Tribunal produced before this Court do not reveal that the respondent had contended that the award would not be enforceable in India and on the other hand, he maintained that he has sufficient assets to satisfy if an award is passed against him. But from the point of view of the court, what requires to be examined first is as to whether the award is enforceable under Part II of the Act.

The said analysis cannot be compromised even if the party resisting enforcement had taken a stand at variance with that adopted before this Court. In that analysis, within the contours of the provisions of Part II, this Court has concluded that the award does not satisfy the requirements under Part II. Hence this contention is also of no help to the petitioners.

79. Relying on S.42 of the Swedish Arbitration Act and the judgments reported in **Commonwealth Development Corp (UK) v. Montague [**[2000] QCA 252**]** and **Ravfox Limited v. Bexmoor Limited** [2025 EWHC 1313 (Ch)], the learned Senior Counsel submitted that it was well within the authority of the Tribunal to pass a cost award and hence there is no illegality or impropriety and a cost award is also enforceable like any other award. Appraisal of S.42 of the Swedish Arbitration Act would show that the Arbitral Tribunals under the Swedish law are competent to grant costs and to pass cost awards. Learned Senior Counsel is right in contending that cost only awards are recognized in

international commercial arbitrations. Nevertheless, the concern of the enforcing court under the Indian law, as already stated, is as to whether the award is enforceable under Part II of the Arbitration and Conciliation Act,1996. For the reasons stated in the foregoing paragraphs, though a cost award may also be enforceable under the Indian law, the award in the instant cannot be enforced as it does not satisfy the requirements of Part II of the Arbitration and Conciliation Act,1996

80. A valid arbitration agreement is a baseline for a lawful arbitral proceeding in India. Agreement-less arbitration is inconceivable in Indian law. S.48(2)(a) stipulates that enforcement of an arbitral award can be refused if the court finds that the subject matter of difference is not capable of settlement by arbitration under the law of India. As the Arbitration and Conciliation Act, 1996 does not envisage a lawful arbitration without an agreement as articulated under S.7, for want of a binding agreement, the differences between the

petitioners and the respondent in this case were not capable of settlement by arbitration under the Indian law. Consequently, the award is hit by S.48(2)(a). For the same reason, in my view it attracts the disqualification under S.48(2)(b) too even though the expression "public policy of India" is understood in a restricted sense.

Conclusions

81. As noted supra, the Hon'ble Supreme Court has clarified the ingredients of the definition of "foreign award" in the judgment in **Pasl Wind Solutions (P) Ltd.**(Supra). An essential characteristic of a foreign award, as per Section 44(a), is that it must be passed in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies. The first part of Section 44(a) states about 'an agreement in writing,' for arbitration. In the case on hand, as already observed, the Arbitral Tribunal entered into an absolute conclusion that there was no valid arbitration

agreement binding the parties. Hence, the award cannot be treated as a foreign award as defined under Section 44 of the Act and therefore the enforcement of the same under Part II of the Act is impermissible. The parties had subjected the agreement and arbitral proceedings to Swedish law. Under the said law, the Tribunal concluded that there was no valid agreement. Therefore, the same is a valid ground to resist enforcement under Section 48(1)(a). The award sought to be executed itself can be considered as a sufficient proof available to the respondent in this regard.

82. Since it is essential under Indian law to have a valid arbitration agreement as the foundational prerequisite for arbitral proceedings, the enforcement of the award in the case on hand, in the absence of a valid arbitration agreement, deserves to be refused in view of the provisions of Section 48(2)(a) as well as Section 48(2)(b). The subject matter of difference is not capable of settlement by arbitration under the law of India

and an award passed without a valid arbitration agreement is against the public policy of India, even within a restricted sense of the said expression.

In the result, I hold that the award sought to be executed is not enforceable under Part II of the Arbitration and Conciliation Act, 1996. Consequently, the E.P.(ICA) is dismissed.

Sd/-

S.MANU
JUDGE

skj

APPENDIX OF EP(ICA) NO. 1 OF 2024

PETITIONER ANNEXURES

Annexure 1	**TRUE COPY OF THE ARBITRAL AWARD DATED 30.01.2023 IN SCC ARBITRATION V2020/199 OF THE HON'BLE ARBITRAL TRIBUNAL, SWEDEN**
Annexure 2	**POWER OF ATTORNEY OF THE 1ST PETITIONER IN FAVOUR OF THE DEPONENT DATED 26.08.2024 AND CERTIFIED ON 05.09.2024**
Annexure 2(a)	**POWER OF ATTORNEY OF THE 2ND PETITIONER IN FAVOUR OF THE DEPONENT DATED 26.08.2024 AND CERTIFIED ON 05.09.2024**
Annexure 3	**JUDGMENT OF THE HON'BLE HIGH COURT OF KERALA IN OP(ICA) 1 OF 2023 DATED 13.06.2024**

RESPONDENT ANNEXURES

Annexure R1	**True copy of the Judgement in Appeal (ICA) No.1 of 2024 dated 4.11.2024 of this Honorable High Court of Kerala**

PETITIONER ANNEXURES

Annexure A2	**. The certified copy of the complete set of documents submitted by the claimant for initiating the arbitration proceedings dated nil**
Annexure A3	**THE COPY OF THE DECISION OF BIFURCATION 22.04.2021**
Annexure A4	**THE COPY OF THE CLAIMANT'S REPLY TO THE RESPONDENTS' REQUEST FOR SECURITY FOR COSTS DATED 3.11.2021**
Annexure A5	**. THE COPY OF THE CLAIMANT'S COMMENTS TO RESPONDENTS' ADDITIONAL SUBMISSION**

	ON SECURITY FOR COSTS DATED 25.01.2022
Annexure A6	**THE COPY OF THE DECISION ON RESPONDENTS' APPLICATION FOR SECURITY FOR COSTS**
Annexure A7	**. THE COPY OF THE RESPONDENTS' STATEMENT OF REJOINDER DATED 2.05.2022**

RESPONDENT ANNEXURES

Annexure R1(a)	**TRUE COPY OF THE RESPONDENT/PETITIONER'S STATEMENT OF DEFENCE**

PETITIONER ANNEXURES

Annexure A8	**The certified copy of the final award passed by the Arbitral Tribunal dated 30.01.2023**
Annexure A9	**In order to certify that a letter is issued from the Arbitral Tribunal dated 19.02.2026**
Annexure A10	**The certified copy of the electronically certified judgment issued by the Court of Appeal, Dubai Courts, Government of Dubai, in Appeal No. 3 of 2025, Civil Appeal against an Order on Petition dated 15.04.2025**
Annexure A11	**The certified copy of the decision dated 28.07.2023 issued by the Dubai Court of First Instance, Eleventh Execution Circuit, Government of Dubai, in Case No. 104/2023 (Order on Petition for Writ of Execution) granting the executory formula for enforcement of a foreign arbitral award issued by the Stockholm Chamber of Commerce in Arbitration Case No. 199 of 2020**