IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
MCC No. 3164 of 2024
(PERKIN ELMER US LLC Vs *ILISHAN BIOTECH PRIVATE LIMITED (F/K/A BIOTECH INTERNATIONAL))*

Dated : 05-03-2026

Shri Dinesh Pednekar with Shri Amol Shrivastava and Shri Harshvardhan Yadav - Advocate for the petitioner.

Shri Vijay Kumar Assudani with Shri Rakshit Assudani - Advocate for the respondent.

Reserved on : 03.12.2025
Pronounced on : 05.03.2026

This application has been filed for enforcement of award dated 24.02.2021 in terms of Section 47 of the Arbitration and Conciliation Act, 1996 (for brevity 'Act of 1996') passed by the Sole Arbitrator Ms. Lucy Greenwood in case No. 01-19-0003-4190 administered by the International Centre for Dispute Resolution (ICDR).

Before adverting to the dispute which is going to be decided by this order, it would be profitable to have a little background of the case at hand which has been divided in different heads for the sake of convenience -

Basic facts of the case :

2.1 The petitioner is a Delware limited liability company incorporated under the laws of United States of America. It is an assignee of the foreign award which is sought to be enforced. The arbitration award was originally passed in favour of Bioo Scientific Corporation (for brevity 'Bioo') however, later on the same has been assigned to the present petitioner who has filed the application for its enforcement.

2.2 Bioo Scientific Corporation is a biotechnology company which develops food and feed safety testing products and services. It is having its headquarters in Austin, Texas, USA. The Bioo being the original claimant and award-holder under a Business Transfer Agreement dated 13.03.2023 assigned its assets including the present arbitration award which is sought to be enforced through the present petitioner under a Master Contribution Agreement dated 13.03.2023.

2.3 The respondent company is indulged in the business of food safety diagnostic testing kits and is based in Indore, India. It is the judgment-debtor and one of the parties to the original contract.

2.4 The Bioo Scientific Corporation and the respondent initiated discussions in the year of 2015 where Bioo proposed the respondent to market and sell its food and feed safety products in the Indian market. Pursuant to discussions, on 15.05.2015 Bio and respondent entered into a Distributorship Agreement in terms of which Bioo appointed the respondent as its exclusive distributor for its specific products in India. This agreement has been placed on record as Exhibit-B which is an Apostilled copy. The said Distributorship Agreement expired by lapse of time on 31.012.2016 however, Bioo and the respondent continued to carry on their business under the said Distributorship Agreement. However, the respondent stumbled on several payments for the products supplied to it by Bioo. As the dues started to escalate, Bioo and the respondent started negotiations to extend the terms of Distributorship Agreement and to provide a payment plan for the respondent so as to satisfy the outstanding dues.

2.5 In furtherance to the negotiations as aforementioned, on 16.04.2019 Bioo forwarded an amendment distributorship agreement to the respondent which the respondent returned after signing the amendment to the distributorship agreement on 22.04.2019. In terms of the amendment, it was agreed between the parties that the sum overdue to the tune of USD 637,000 will be paid by the respondent to the Bioo in installments. The dates for such installments (8 in number) were fixed. However, respondent failed to make payment of the above installment.

<u>Invocation of Arbitration Clause of proceedings thereupon :</u>

3. In this background of facts, on 28.10.2019, Bioo invoked Clause 14 of the Distributorship Agreement and initiated arbitration proceedings against the respondent by filing a notice of arbitration agreement against the respondent to ICDR. Pertinently, the above said Clause 14 was with respect to Dispute Resolution Agreement. As per the said clause, the place of arbitration is Austin, Texas, USA and the claims were to be heard by a single Arbitrator unless the claim amount exceeds USD 2,000,000.00 in which case the dispute shall be heard by a panel of three Arbitrators. The said Clause 14 sub-clause (3) and (9) explicitly provides that the arbitration shall be governed by the laws of the State of Texas. The Clause 14.5 of the said agreement provides that the arbitration shall be based on the submission of documents and there shall be no in person or oral hearing.

4. On invoking arbitration clause vide notice dated 28.10.2019, the ICDR acknowledged the receipt on 05.11.2019 and informed the parties that an administrative conference call is scheduled for 14.11.2019 however, on

13.11.2019 ICDR informed both the parties that the administrative conference has been re-scheduled to 25.11.2019 which accordingly took place on the scheduled date, pursuant to which communication letter dated 03.12.2019 was sent by ICDR thereby informing both the parties that as per the discussions, both the parties have agreed and confirmed that international dispute resolution procedures shall apply in the proceedings of arbitration. Accordingly, on 15.01.2020, the ICDR appointed Ms. Lucy Greenwood as the Sole Arbitrator in the matter.

5. The respondent objected to the jurisdiction of the Sole Arbitrator to hear the dispute vide email dated 16.01.2020 which was repeated in its written submissions dated 14.02.2020 as also during the preliminary hearing on 17.02.2020. Accordingly, the Sole Arbitrator passed the Procedural Order No. 1 for setting out schedule to hear objections of the respondent. On 26.02.2020, the respondent submitted its objections to jurisdiction of the Sole Arbitrator by filing application in terms of Article 19 of the International Arbitration Rules of ICDR to which Bioo responded by filing its response. On 19.03.2020, the hearing was scheduled for deciding the objections however, at the request of respondent, it was deferred and ultimately vide Procedural Order No. 2 dated 24.03.2020, the parties were directed to send written comments on the aforesaid issue. Thereafter, on 30.03.2020, ICDR issued a notice of hearing to the parties informing that the hearing on jurisdiction would be held by telephonic conference call on 30.04.2020 and accordingly the hearing took place on the said date. Both the parties set out their positions, whereafter on 05.05.2020, the Sole Arbitrator

passed Procedural Order No.3 rejecting the respondent's objections on the jurisdiction of Sole Arbitrator. On 08.07.2020, the ICDR issued a letter to both the parties suspending the arbitration proceedings until all requested payments were made. The respondent submitted its reply to the notice of arbitration and also the counterclaim against Bioo raising quality issues with respect to the goods supplied by the Bioo. The Sole Arbitrator on 13.08.2020 passed Procedural Order No.6 thereby directing both, the claimant as well as the respondent to file their full briefs along with supporting documents and witness evidence by 21.09.2020.

6. The Bioo accordingly submitted its initial briefs with witness declaration, supporting documents and the authorities on 24.08.2020. As regards the counterclaim of the respondent, the ICDR on 28.08.2020 sent a communication to the respondent thereby pointing out that it has to pay the initial filing fee for the counterclaim which should be paid by 05.09.2020 with a caveat that failure would entail return of the counterclaim. As the respondent did not pay the filing fee, on 08.09.2020, the ICDR notified the respondent that its counterclaim is deemed returned for the failure of payment of filing fee. Responding to this communication, the respondent on 09.09.2020 made an application to Sole Arbitrator seeking an extension of time to pay initial filing fee for the counterclaim. Accordingly, despite objection by Bioo, the time was extended upto 12.10.2020.

7. The respondent instead of complying with the extended timeline for paying filing fee, challenged appointment of Sole Arbitrator in terms of Article 14 of the ICDR Rules on 30.09.2020 and sought appointment of a

new Arbitrator. In line with the same, on 09.10.2020 another application was filed by the respondent thereby seeking stay on the arbitration proceedings till decision on the application filed under Article 14 of the ICDR Rules. Bioo filed its reply on 14.10.2020.

8. The ICDR vide communication dated 15.10.2020 refused to stay the proceeding and on 21.10.2020, the International Administrative Review Council/ICDR dismissed the respondent's challenge to appointment of the Sole Arbitrator. The Sole Arbitrator accordingly passed the Procedural Order No. 7 on 23.10.2020 whereby the counterclaim of the respondent was struck down for not paying the filing fee. The respondent instead of contesting the case on merits, again filed a complaint to the ICDR case manager on 29.10.2020 which was ultimately dismissed on 09.11.2020.

Award by the Arbitrator :

9. As the respondent did not comply with the Procedural Order No. 7, thus on 03.02.2021 the Sole Arbitrator notified the parties that proceedings were formally closed as of that day and the Sole Arbitrator will decide the matter based on the documents which were placed on record by the parties. Accordingly, on 24.02.2021 the Sole Arbitrator passed the final award whereby the claim by the Bioo was upheld and respondent was held to be liable to make payment of a sum of USD 623,169.37 to Bioo within a period of 30 days beyond which 5% simple interest will accrue on the amount of final award. It is this award which is being sought to be enforced in the present proceedings.

10. As already stated above, the Bioo has transferred its assets and

liabilities including its rights under the final award to the present petitioner i.e. PerkinElmer US LLC under a business transfer agreement.

11. This Court issued notice to the respondent and after receiving notice, the respondent has filed its reply-cum-objections in terms of Sections 47 and 48 of the Act of 1996.

Objections raised by Respondent :

12. The respondent by filing reply primarily raised objections in terms of Section 48 of the Act of 1996 on several grounds. The respondent contends that the present application has been filed in non-compliance to the mandatory provisions of Section 47(1)(a) and 47(1)(b) of the Act of 1996 in as much as the original award and the agreement for arbitration have not been filed and only notarized copies of award and agreement have been filed which is in total non-compliance of the provisions of Section 14 of the Notaries Act 1952.

13. The respondent has also contended that the present petitioner has no locus to file the enforcement application for the arbitral award in question for the reason that it is not the original claimant in the arbitration proceeding. The claimant was Bioo Scientific Corporation and in view of the provisions of Section 46 of the Act of 1996, a party to the agreement or the claim proceeding only can enforce a foreign award. It has also been contended that even the assignment in view of the document placed on record is not forthcoming. It has further been stated that the respondent was earlier operating its business in the name and style of Bio Tech International. The respondent prior to entering into agreement with the

claimant Bioo used to sell its products on commission basis. However, as there was quality issue thus, on a query it was informed that on commission basis second quality products are being supplied and it is only to the distributors that the first quality products are supplied by Bioo. It is on this promise that the Distributorship Agreement was executed on 15.05.2015 however, the quality issue remained as it is and for the poor quality of goods, the dispute arose. The respondent further submitted that the claimant, in various correspondence, has admitted that the quality of kits was not as per standard and therefore, promised to improve the quality of kits and as the issue of quality was not resolved the respondent was forced to stop making payments to the original claimant i.e. Bioo. It was duly made clear to Bioo that payment shall be made subject to resolution of quality issue and with this in mind a Novation Agreement was executed on 15.04.2019 wherein it was explicitly agreed that the payment will be made subject to resolution of quality issues. It was also agreed that the claimant will supply adequate and standard quality products. Even after this Novation Agreement, the Bioo failed to improve quality of its products, as such payment could not be made. The respondent further submits that instead of addressing the issue of quality, the claimant Bioo vide letter dated 19.08.2019 terminated the distributorship agreement which was duly responded by the respondent vide letter dated 19.08.2019 whereby it was asserted that termination notice should be withdrawn and the quality issue should be resolved and when no such steps were taken, the respondent and one customer filed a civil suit which was registered as Civil Suit No. 393B/2019 for recovery of money

against the Bioo to the tune of Rs. 8,06,51,000/-. However, the Bioo without addressing the issue has invoked the arbitration clause vide notice dated 28.10.2019.

14. The respondent raised objections against the jurisdiction of the Arbitrator however, the ICDR appointed Ms. Lucy Greenwood as the Sole Arbitrator by incorrectly recording in the letter dated 05.12.2019 that the respondent agreed to the application for International Dispute Resolution Procedures which in fact was an agreement only for resolution of dispute through mediation.

15. The objection was raised against the jurisdiction of the Arbitrator and when the matter was slated for hearing of such objection, respondent by application dated 16.04.2020 sought time on the ground that in view of Covid-19 pandemic, curfew was imposed in the city of Indore and as such, the lawyer of the respondent is not able to prepare written brief as the file is not available at his residence. This application was rejected by Procedural Order No. 3 dated 05.05.2020. Thus, the respondent was precluded from submitting written brief in support of its objections to the jurisdiction of the Sole Arbitrator. It has also been stated that on 15.06.2020, the respondent submitted a list of documents to be relied upon. However, on 08.07.2020 the ICDR suspended the arbitration proceedings whereafter on 17.07.2020 claimant submitted an amended schedule of deadline and on 31.07.2020 Arbitrator granted time extension which was circulated by claimant on 01.08.2020. Accordingly, on 12.08.2020, the respondent submitted its answer to notice of arbitration and raised counterclaim of an

amount to the tune of Rs. 8,15,00,000/- along with interest.

16. The said counterclaim was incorrectly returned by the Arbitrator without granting time and has illegally ignored that the Covid-19 pandemic duration has to be excluded and extension of time to pay the filing fee should have been given.

17. Apart from the above, it has also been raised by the respondent that on 14.08.2020, it sought direction to provide access to documents relied upon by the claimants, however ICDR vide its communication dated 28.08.2020 informed that aforesaid counterclaim can only be considered on payment of filing fee and ultimately the same was returned on 08.09.2020. The extension, though was granted, but only upto to 05.10.2020 and ultimately vide Procedural Order No.7 dated 23.10.2020 the counterclaim of the respondent was arbitrarily struck out without considering extension of time in view of Covid-19 pandemic. The respondent also stated that it is only on 24.09.2020 that it got the access of documents submitted by the claimants. Thus, respondent was not given proper time to respond to the claim by Bioo as there was no sufficient time to prepare its response. In view of the above facts, learned counsel for the respondent submits that the arbitral award has been passed in utter and grave violation of principles of natural justice as the respondent was unable to present its case before the Sole Arbitrator and thus, the enforcement of award should be refused in terms of Section 48(1)(b) of the Act of 1996.

18. It has further been stated by the learned counsel for the respondent that it was never the case of the respondent that it sought waiver

of filing fee for taking counterclaim on record but it was only a request for extension of time in view of Covid-19 pandemic however, the same was brazenly refused. He further submits that had the counterclaim of the respondent been taken on record, then the issue of quality would have come in the proper perspective of the Arbitral Tribunal and the award against the respondent would not have been passed. It has also been argued that the Arbitrator on one hand granted time to the claimant and on the other hand plainly refused to extend time for payment of filing fee even in view of the Covid-19 pandemic which shows that the parties were treated differently by the Arbitrator. As such the respondent was precluded from presenting its case before the Sole Arbitrator.

19. It has further been stated by the learned counsel for the respondent that no opportunity of oral hearing was provided to the parties and the Sole Arbitrator has wrongly decided the issue on the basis of documents. Although, parties have specifically agreed in arbitration clause contained in the distribution agreement that the arbitration shall be administered in accordance with ICDR Arbitration Rules which provides for oral hearing. Learned counsel for the respondent would also argue that the reliance as placed by the Sole Arbitrator on Clause 14.5 of the Agreement is misplaced as the same was applicable only when the dispute is for an amount of USD 500,000 which is not the case in the present matter. Learned counsel would next argue that in terms of Clause 14 of the Agreement, the Arbitrator was to be selected by mutual consent of the parties and it is only if parties could not have agreed upon an Arbitrator that the ICDR could have

appointed a person to act as Sole Abitrator. However, in the present case the claimant has directly invoked the arbitration before the ICDR who appointed the Sole Arbitrator without first resorting to the provisions of Clause 14.2 for appointment by mutual consent. As such, the appointment itself is contrary to the agreed procedure and for this reason also the enforcement should be refused.

20. It has further been contended that the arbitration clause has prematurely been invoked without making any efforts for resolution of the dispute by mutual negotiations and corporation. The claimant straightaway terminated the agreement vide its notice dated 09.08.2019 which is contrary to the original Distribution Agreement as well as the Novation Agreement as no efforts were made to resolve the dispute by mutual negotiation. He submits that it is a well settled law that agreed arbitration procedure must necessarily be followed prior to invocation of the arbitration clause and defaulting party cannot be allowed to take advantage of its wrong and as the pre-arbitration procedure of mediation and informal negotiation between the parties was not followed which was a condition precedent, the arbitration itself was premature and same amounts to contravention of the fundamental policy of Indian Law. As such, it is contrary to the public policy of India and for this reason in view of the provisions of Section 48(2)(b) of the Act of 1996, enforcement should be refused.

21. It has also been argued that infact the Sole Arbitrator agreed that there was quality issues involved however, it took an unreasonable view that the obligation of payment was not contigent upon the quality of product and

the respondent did not have a right to withhold payments to the claimant on the basis of quality issue which is contrary to the terms of Novation Agreement. Learned counsel would submit that the Sole Arbitrator has incorrectly held that the Novation Agreement was a stand alone agreement.

22. It has also been argued by the learned counsel for the respondent that the arbitral award is beyond the terms of the agreement as Clause 14.7 of the same restricts the liability. Limitation of liability is the issue which was raised before the Arbitrator however, the same has wrongly been decided contrary to the provisions of Clause 14.7 as the Sole Arbitrato has considered the aforesaid clause however, it has held that in view of the Novation Agreement the same is not applicable. Learned counsel has also argued that the conduct of the Arbitrator through different proceedings indicates prejudice and bias in favour of the claimant. Thus, the arbitral award cannot be enforced as it is contrary to the terms of Section 48(2)(b) of the Act of 1996. It is infact also against Article 20(1) of the ICDR Arbitration Rules which provides for equal treatment of the parties.

23. It has also been argued that the Sole Arbitrator did not have jurisdiction to decide the issue also for the reason that the respondent already preferred a civil suit against the claimant before the Court of Learned XXVI Additional District Judge, Indore and once it was pointed out to the Arbitrator, the Arbitrator could not have proceeded ahead in the matter. Learned counsel for the respondent has also argued that the subject matter of the arbitration was fraud as alleged by the claimant against the respondent, thus the said subject matter was not arbitrable.

24. In support of his submissions, learned counsel for the respondent has placed reliance on the judgment rendered in the case of ***Vishranti CHSL vs. Tattva Mittal Corporation Pvt. Ltd., 2020 SCC Online Bom 7618; Vijay Karia vs. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1; Union of India vs. Vedanta Ltd., (2020) 10 SCC 1; Cognizance for Extension of Limitation, In re (2022) 3 SCC 117***; ***Chandra Proteco Ltd. and Hopgoodganim (2015 SCC OnLine Cal 5690), National Agricultural Cooperative Marketing Federation of India vs. Alimenta S.A., (2020) 19 SCC 260*** and ***Olam International Ltd. vs. Manickaval Edible Oils Pvt. Ltd., 2025 SCC OnLine Mad 11018*** (HC) (paragraph Nos. 43, 44 and 48).

Reply by the Petitioner :

25. Learned counsel for the petitioner straightaway submits that it is now trite law that in enforcement proceedings merits of the arbitral award are not to be looked into. As regards the filing of Apostilled arbitral award and agreement, he submits that in fact the application has filed in full compliance of the provisions of Section 47(1)(a) & (b). He points out that the respondent has not argued that the final award or agreement is incorrect or invalid or is there any deviation from the original award. He submits that Apostilled copies of documents are admissible as India and the United State of America are signatories to the Hague Apostille Convention and this issue has already been decided by the Hon'ble Apex Court in case of ***Lakshmi Kant Pandey vs. Union of India, (2010) 13 SCC 735***. He further submits that as regards the issue of assignment of rights under arbitral award, the same is not only valid but duly provided by the Distributorship Agreement in terms

of Clause 11. He submits that Section 46 does not preclude the assignment of rights arising from the agreement. As such in view of Clause 11 assignment is valid. In support of his submissions he has placed reliance on judgment of the Hon'ble Apex Court in case of ***Cox and Kings Ltd. vs. SAP India (P) Ltd., (2024) 4 SCC 1.***

26. He further points out that it is also not the case that the petitioner took the respondent by surprise infact, the respondent was well aware about the fact that Bioo has been acquired by the petitioner as is evident from the pleadings of the plaint filed by the respondent in which it is plaintiff No.1 wherein the fact of taking over Bioo by PerkinElmer has specifically been pleaded.

27. Learned counsel for the petitioner then submits that the issue of mutual negotiation was not a condition precedent to the institution of arbitration proceedings for which he refers to the provisions of arbitration clause i.e. Clause 14 of the Distribution Agreement itself and submits that the words used are 'where possible' thus, it was not a precondition but merely a suggestion for an effort. He also submits that in any case parties had exchanged several letters addressing alleged breaches thus, it would constitute pre-arbitration negotiations. He then submits that institution of suit by respondent before the trial Court i.e. Civil Suit No. 393B of 2019 has obviated the entire possibility of any negotiations or resolution of dispute by settlement. Thus, this plea of the respondent does not hold any water that before arbitration the dispute was not tried to be resolved by mediation. He further submits that as regards the challenge to appointment and jurisdiction

of the Sole Arbitrator, the contention of learned counsel for the respondent is misplaced. In fact the terms of the agreement are that the Arbitrator was to be appointed after invocation of arbitration clause by mutual agreement of the parties within 30 days of submission of the dispute and if the parties cannot agree on Arbitrator within such period then the ICDR shall appoint the Arbitrator. In the present case, notice was issued on 28.10.2019 and ICDR after completion of 30 days period informed the parties that as they have failed to appoint Arbitrator by mutual consent, thus, now it will be appointed by the ICDR.

28. Learned counsel for the petitioner also submits that the challenge to the final award has to be governed by the curial law of the seat. Undisputedly, the arbitration was conducted under the ICDR Rules with Texas as the designated seat. As such, it will be the Texas laws which will govern all aspects of arbitral process including procedural matters, the conduct of arbitration and any challenges to the award. Thus, the merits of the award cannot be assailed on any ground including jurisdiction or procedural lapse before a Court in India. In support of his submissions, he has placed reliance on the judgment of the Hon'ble Apex Court rendered in the case of ***Doszo India (P) Ltd. vs Doosan Infracore Co. Ltd., (2011) 6 SCC 179***; ***Eitsen Bulk A/S vs. Ashapura Minechem Ltd., (2016) 11 SCC 508*** . He further relied on the judgment rendered in case of ***Videocon Industries Ltd. vs. Union of India, (2011) 6 SCC 161***. He also placed reliance on para 112 of the judgment of the Hon'ble Supreme Court in case of ***Vijay Karia (supra)***.

29. Learned counsel then submits that the same would apply to the plea with respect to the arbitrability of the subject matter as the issue of fraud is involved. He submits that the Texas law permitted the arbitration on the said issue, the same cannot be assailed here in the enforcement proceedings. In support of his submissions learned counsel for the petitioner has placed reliance on the judgment in case of ***Booze Allen & Hamilton Inc. vs. SBI Home Finance Ltd., (2011) 5 SCC 532 and; A.Ayyasamy vs. A.Paramsivam & Ors., (2016) 10 SCC 386.*** He further placed reliance on the order passed by this Court in the case of ***Ganga Infratech & Ors. vs. M/s Johari Land and Finance & Ors., Misc. Petition No. 1033 of 2023***.

30. Learned counsel for the petitioner then submits that even in India, fraud can be a subject of arbitration which has been held by the Hon'ble Apex Court in case of ***Rashid Raza vs. Sadaf Khan, (2019) 8 SCC 710***. He further refers to ***Avitel Post Studioz Limited & Ors. vs. HSBC PI Holdings (Mauritius) Limited & Ors., 2020 SCC OnLine SC 656; Vidya Drolia vs. Durga Trading Corp., (2020) SCC OnLine SC 1018; N.N.Global Mercantile Pvt. Ltd. vs. Indo Unique Flame Ltd., (2021) SCC OnLine SC 13*** and; ***Indian Household & Health Care vs. L.G.Household & Health Care Ltd. (2007) 5 SCC 510***.

31. On the point of arbitral bias and violation of principles of natural justice, learned counsel submits that the issue touches upon the merits of the arbitral award which cannot be examined in the enforcement proceedings. Nevertheless, he submits that as the proceedings would show there was complete absence of any bias in the mind of the Sole Arbitrator and it is not

only the Sole Arbitrator but the Council of ICDR and case manager that rejected the objections raised by the respondent repeatedly.

32. As regards the return of counterclaim, learned counsel for the petitioner submits that the issue of limitation was never involved but it is the absence of payment of filing fee because of which the counterclaim was returned. He points out that except an application, without any supporting documents and details, nothing was placed on record so as to show that the respondent was in a distressed financial condition. He points out that extension of time was given to the respondent by the Sole Arbitrator however, when it failed to pay the filing fee even within the extended time, the counterclaim was rejected.

33. As regards the issue of not providing oral hearing, he submits that infact oral hearing was not to be done in view of clear provisions of Clause 14.5 of the Arbitral Agreement.

34. Learned counsel for the petitioner with respect to public policy of India submits that the respondent has completely failed to demonstrate as to how enforcement of the final award can be said to be contrary to the public policy of India. In similar manner, he submits that even perversity, patent illegality cannot be a ground for refusing enforcement of arbitral award.

35. As regards the issue of limitation of liability, learned counsel would submit that the Arbitrator has decided this issue against the respondent and the respondent failed to challenge the same before the competent court at Texas in accordance with the provisions of curial law i.e. laws of Texas. He

submits that the laws of Texas would provide for a period of 90 days for challenging the award. However, the respondent failed to challenge the award before the said Court. Hence, now this issue cannot be raised in these enforcement proceedings. Learned counsel for the petitioner further submits that respondent cannot rely on Covid-19 exemption to cover its procedural defaults. The respondent was unable to pay the filing fees for taking on record the counterclaim. In fact the extension of time as provided by the Hon'ble Apex Court in the case of ***Cognizance (supra)*** was not applicable to foreign awards. In case of ***Bharat Aluminium Co. vs. Kaiser Aluminimum Technical Services Inc., (2012) 9 SCC 552***, the Constitution Bench of the Hon'ble Apex Court has held that Part I of the Act applies solely to the arbitration seated only in India and Part II governs the recognition and enforcement of foreign awards. As the order in ***Cognizance (supra)*** refers to Section 29A of the Act of 1996 thus it is clearly with respect to Part I. This position was reinforced by the Hon'ble Apex Court in case of ***Tata Sons (P) Ltd. vs. Siva Industries & Holdings Ltd., (2023) 5 SCC 421***. He thus submits that resultantly the plea of extension of time is not available to the respondent. Apart from this there is complete absence of any document to show that the respondent was suffering from any financial hardship.

Heard learned counsel for the parties. Perused the record.

36. In view of the pleadings and rival submissions, following are the issues required to be decided by this Court so as to decide the question of enforceability of the foreign award in question:

- Non-filing of original award and agreement
- Locus of the petitioner being a assignee of the claimant

- Invocation of arbitration being premature in absence of efforts to resolve the issue of mutual negotiations
- Jurisdiction of the Arbitrator
- Violation of principles of natural justice and return of counter claim
- Limitation of liability provision as well as merits of award
- Arbitrability of Fraud
- Maintainability of arbitration on account of pendency of Civil Suit No. 393B/2019

The issues as framed above are being dealt with hereunder :

<u>(i) Non-filing of original award and agreement</u>

37. The respondent has taken preliminary objection against the enforceability of the award by referring to the provisions of Section 47 of the Act of 1996 as the original award has not been produced before this Court and also original agreement has not been filed. However, apostille copies of these documents have been filed. The requirement in terms of the provisions of Section 47 is that the party applying for the enforcement of a foreign award shall at the time of application produce before the Court original award or a copy thereof duly authenticated in the manner duly required by the law in the country in which it was made. As regards agreement, Section 47 provides that original agreement for arbitration or a duly certified copy thereof has to be filed. Before adverting to this objection of the respondent, it is to be noted that the respondent has not questioned the correctness of the award or even the agreement. It is not the case of the respondent that the foreign award which is sought to be enforced is not the correct copy or even the agreement which is being relied upon is not the correct agreement. However, the objection is merely with respect to the absence of the original copies. The award (Annexure A) would show that it contains an apostille

dated 03.08.2022 certified at Boston, Massachusetts by the Secretary of the Commonwealth. It certifies that the attached document is a true, exact, complete and unaltered copy of the final award dated 24.02.2021 passed in the matter of Bioo Scientific Corporation and Ilishan Biotech Pvt. Ltd. Similarly, the agreement also carries with it an aspostille of Stacey Ashley Metcalfe, Notary Public, State of Colorado dated 12.02.2024. As such, both the documents are authenticated in USA. Now, the question before this Court is whether this apostille copies of the award as well as the agreement can be accepted as a valid fulfillment of the requirement under the provisions of Section 47 of the Act of 1996.

38. Learned counsel for the petitioner has referred to Office Memorandum dated 18.11.2020 issued by the Ministry of External Affairs whereby it has been provided that the Hague Apostille Convention, 1961 abolishes the requirement of legalization of foreign document for use in any member country once an apostille certificate (including e-apostille) has been issued by a competent authority of the country where the document originates. It provides that in order to avoid unnecessary hassle caused to general public by demand of further legalization or attestation of an apostille document, this information is being issued that an apostille document should be treated as legalized document in India by all concerned, which is in accordance with the International obligation under the Hague Apostille Convention. It is thus clear that as per the abovesaid memorandum, once a document is certified in the manner abovestated, no further attestation of an apostille document is needed. The Hon’ble Apex Court has considered this

aspect in the case of ***Lakshmi Kant Pandey (supra)*** and held in para 5 as under :

> *"5. We also see that along with the application, Annexure 1-A dated 14-5-2008 has been filed whereby the Ministry of External Affairs has issued directions to its High Commissions and Embassies that as India was a signatory to the Convention with effect from 29.08.2007, the procedure prescribed therein should be followed for authenticating documents. We see absolutely no reason that as to why documents executed under this procedure should not be acceptable to courts in India and taken into evidence for the purpose of adoption."*

39. The learned counsel for the respondent has also referred to Section 14 of the Notaries Act, 1952 and submitted that reciprocal arrangement for recognition of notarial acts done by foreign notaries are to be made and in the present case, there is no such notification under Section 14 by the Central Government with respect to notarial acts in USA.

40. As India and the United State of America are signatories to the Hague Apostille Convention thus, there is reciprocity between the two countries regarding notarial acts of Notaries. This facts is clear from the memorandum of Ministry of External Affairs dated 18.11.2020 itself. Thus, as Section 14 only requires reciprocal arrangements and as in the present case, India and USA being signatories of the Hague Apostille Convention, in the considered view of this Court, the reciprocity as required under Section 14 of the Notaries Act, 1952 is very much there. In view of the above analysis and the law as laid down by the Hon'ble Apex Court in the case of ***Lakshmi Kant Pandey (supra)***, the objection regarding absence of original award / agreement and inadmissibility of apostille award and agreement is hereby rejected.

(ii) <u>Locus of the petitioner being assignee of the claimant</u>

41. The second objection regarding maintainability of the present enforcement application is with respect to locus of the present petitioner. It has been contended by the respondent that the claimant in the arbitration proceedings was one Bioo Scientific Corporation with whom alleged agreement which contained the arbitration clause was executed and the petitioner claims itself to be the assignee of the said claimant. However, there is no privity of contract between the petitioner and the respondent and in view of the provisions of Section 46 of the Act of 1996, a foreign award can be enforced by the person who was party to the proceedings. In other words, the award is binding and enforceable for all purposes on the persons between whom it was made and petitioner is not the person who was present before the Arbitrator. Thus, the assignment of award to the present petitioner by Bioo (the original claimant) is contrary to law and not enforceable in view of Section 46 of the Act of 1996.

42. A perusal of the agreement (Exhibit B) would show that as per Clause 11.2, the claimant i.e. Bioo was given rights to assign its rights under the agreement for receiving payments without prior consent of the distributor i.e. the present respondent. It is thus clear that the agreement itself provided an unqualified condition in favour of the claimant Bioo for assignment i.e. assignment can be done without the consent of the respondent. After passing of the final award, the present petitioner entered into a business transfer agreement with Bioo (Exhibit HH) whereby Bioo transferred its relevant assets and liabilities including rights under the final award to the PerkinElmer Health Sciences Inc. Subsequently, under the master

contribution agreement (Exhibit II), the said assignee further assigned its rights to the present petitioner. These transactions were part of a broader restructuring plan detailed in Amended and Restated Master Purchase and Sale Agreement (Exhibit JJ). As such the assignment is demonstrated which is undisputed. The case of the respondent is not that the assignment was never done but the objection is that the assignment is not going to give locus to the present petitioner in view of the clear provisions of Section 46 of the Act of 1996. This contention of the respondent in the considered view of this Court is not tenable.

43. The Hon'ble Apex Court had already decided this issue long back in the case of ***Cox & Kings (supra)***. The Hon'ble Apex Court held that rights of assignee to enforce contract and arbitrable award are consistent with Indian Law. In para 135 of the said judgment, the Hon'ble Apex Court has held as under :

> *"135. The Arbitration Act does not define the phrase "person claiming through or under" a party. A person "claiming through or under" a party is not a signatory to the contract or agreement, but can assert a right through or under the signatory party. Russel on Arbitration states that an assignee can invoke the arbitration agreement as a person "claiming through or under" a party to the arbitration agreement. An assignee takes the assigned right under a contract with both the benefit and burden of the arbitration clause. Similarly, the English courts have held that a transferee or subrogate can claim through or under a party to the arbitration agreement. Under the English law, the typical scenarios where a person or entity can claim through or under a party are assignment, subrogation, and novation. In these situations, the assignees or representatives become successors to the signatory party's interests under the arbitration agreement. They step into the shoes of the signatory party, from whom they derive the right to arbitrate, rather than claiming an independent right under the arbitration agreement."*

44. There is one more aspect of the matter that is it not that the respondent was not aware about the acquisition of Bioo's rights by the

present petitioner which can be gathered from the fact that the respondent filed Civil Suit No. 393B/2019 before the Commercial Court at Indore against Bioo Scientific Corporation. In para 8 of the plaint, averment was made to the effect that the quality started even deteriorating as Bioo Scientific Corporation was taken over by PerkinElmer. It is thus clear that the acquisition of Bioo by the present petitioner was in the knowledge of the respondent and at no stage of proceedings, any objection regarding the same was made by it. In view of the above, the objection regarding locus of the present petitioner in filing this enforcement petition is rejected.

(iii) Invocation of arbitration being premature in absence of efforts to resolve the issue of mutual negotiations

45. The respondent has also contended that as per Clause 14.1 there must be efforts to resolve the dispute by way of negotiation and co-operation however, the claimant directly addressed the notice of arbitration dated 28.10.2019 to the ICDR thereby completely by-passing the mandatory provisions of the arbitration clause. Though, objections were raised by the respondent vide letter dated 26.11.2019 against initiation of the arbitration proceedings and the jurisdiction of ICDR. However, the Sole Arbitrator was appointed by the ICDR. Thus, the entire arbitration proceedings are contrary to the very provisions of clause 14.1.

46. A perusal of clause 14.1 would show that it provides that it is the intention of the parties to use their reasonable best efforts to informally resolve, where possible, any dispute arising out of the performance of this agreement by mutual negotiation and cooperation. In the event that the

parties are unable to informally resolve any dispute, the same shall be resolved by arbitration administered by the International Centre for Dispute Resolution in accordance with its international arbitration rules.

47. The record would show that there were several letters by the claimants and the respondents before invocation of arbitration clause. Even in para 11 of the civil suit filed by the respondent, explicit reference has been made to these letters. Thus, in the considered view of this Court, there was informal negotiations. However, they failed thus the arbitration proceedings were instituted.

48. Even irrespective of the above referred letters, a bare perusal of clause 14.1 would show that it was not a condition precedent for invocation of arbitration proceedings that there must be efforts for resolution of dispute by mutual consent. It was only a suggestion in the best intention of the parties to resolve dispute by mutual consent. However, wording adopted in clause 14.1 would not suggest that it was a condition precedent for invocation of arbitration. Apart from this, the notice of arbitration was given by the claimant on 28.10.2019 however, before that the respondent itself had filed civil suit No. 393B of 2019 before the Commercial Court at Indore on 24.09.2019. As such, after institution of suit by the plaintiff, the claim that efforts for resolution of dispute by mutual negotiation were not made, in the considered view of this Court are not sustainable. As such, the objection regarding premature invocation of arbitration clause is also rejected.

(iv) Jurisdiction of the Arbitrator

49. The respondent has then raised an objection regarding

jurisdiction of ICDR and Sole Arbitrator. It has been stated that respondent vide letter dated 05.12.2019 addressed to the ICDR has made it clear that it has never agreed for the application of International Dispute Resolution procedure and has merely stated that mediation was condition precedent for initiation of arbitration proceeding which fact has been incorrectly recorded in the letter dated 03.12.2019 and the objections raised by the respondent have incorrectly been rejected by the Sole Arbitrator and thereafter by the ICDR. The respondent submits that appointment of Arbitrator could only have been done by mutual consent by the parties and as in the present case, the Sole Arbitrator was appointed by the ICDR without there being any consent by the respondent, the Sole Arbitrator did not have any jurisdiction to rule upon the dispute.

50. A perusal of clause 14.2 of the agreement would show that the Sole Arbitrator was to be selected by mutual agreement of the parties within 30 calendar days of submission of dispute. It further provided that if the parties were not able to agree on an arbitrator within a period of 30 days then the ICDR shall appoint Arbitrator in accordance with its rules within following 30 calendar days. The notice of arbitration was given by the claimant on 28.10.2019 pursuant to which ICDR issued letter dated 05.11.2019 thereby informing the parties about the commencement of arbitration proceedings and provided ICDR's Enhanced Arbitrator Selection Fact Sheet as well as the Arbitration Information Sheet (Exhibit E). However, the respondent did not provide its nominee for appointment of arbitrator consequent to which the ICDR vide its letter dated 03.12.2019

(Exhibit G) informed both the parties that as the parties have not confirmed their agreement on an arbitrator therefore, the ICDR shall appoint an arbitrator in accordance with the rules and eventually, the Sole Arbitrator was appointed on the failure of parties to agree for a person to act as an arbitrator. This Court does not see any infirmity in the procedure adopted by the ICDR and this objection of mutual consent in the considered view of this Court holds no water in view of the above facts and provisions of arbitration agreement. As such, this objection is also hereby rejected.

(v) Violation of principles of natural justice and return of counterclaim

51. The respondent has contended that it was not provided proper opportunity of hearing as its counterclaim was not taken on record and it was not permitted to submit written brief on the question of jurisdiction. The respondent was not having access to Bioo's documents and no opportunity of oral hearing was given to the parties.

52. A perusal of the procedural orders and the final award would show that it is not that the respondent did not participate in the arbitration proceedings. He was even represented by a counsel. The respondent has claimed that in view of Covid 19 Pandemic, the financial condition of the respondent was not good thus, it was not able to deposit fee for maintaining counterclaim. A request was made for extension of time for depositing the fee however, the same has not been provided. The arbitration proceedings commenced on 29.10.2019. In terms of Article 3 of ICDR rules, the respondent was required to file its reply including counterclaim within 30

days i.e. by 28.11.2019. However, the respondent filed its reply and counterclaim on 12.08.2020. The Sole Arbitrator vide its letter dated 28.08.2020 informed the respondent that its counterclaim will be taken on record subject to payment of initial filing fees (Exhibit R). The respondent however was not able to file fees thus, on 08.09.2020 ICDR informed the respondent that the counterclaim was deemed returned. However, the respondent vide its letter dated 09.09.2020 sought extension of time to pay fee for counterclaim (Exhibit S). This request was accepted by the ICDR despite objection by the claimant and extension was granted till 12.10.2020 for payment of counterclaim filing fees vide letter dated 22.09.2020 (Exhibit U). However, despite extension of time respondent did not pay the filing fee and consequently vide Procedural Order No. 7 passed on 23.10.2020, the counterclaim of the respondent was returned. In view of the above facts, the objection as raised by the respondent regarding lack of opportunity of hearing appears to be illusory. It may also be relevant to point out that even the Covid 19 Pandemic exemption would not come to the rescue of respondent in this behalf as the extension of limitation by the Hon'ble Apex Court in the case of ***Cognizance for Extension of Limitation (supra)*** was not applicable in the international arbitration proceedings as has been clarified by the Hon'ble Apex Court in the case of ***Tata Sons (P) Ltd. Vs. Siva Industries & Holdings Ltd., (2023) 5 SCC 421*** wherein para 25 and 29 reads as under :

> *"25. After the amendment, Section 29A(1) stipulates that the award "in matters other than international commercial arbitration" shall be made by the arbitral tribunal within a period of twelve months from the date of the completion of the pleadings under Section 23(4) of the Act of 1996. The expression "in*

matters other than an international commercial arbitration" makes it abundantly clear that the timeline of twelve months which is stipulated in the substantive part of Section 29A(1), as amended, does not apply to international commercial arbitrations. This is further reaffirmed in the proviso to Section 29A(1) which stipulates that the award in the matter of an international commercial arbitration "may be made as expeditiously as possible" and that an "endeavour may be made to dispose of the matter within a period of 12 months" from the date of the completion of pleadings. The expression "as expeditiously as possible" coupled with the expression "endeavour Section 23(4) of the Arbitration Act, as inserted by Act 33 of 2019, provides that "The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing of their appointment." may be made" demonstrate that the intent of Parliament is that the period of twelve months for making the award is not mandatory in the case of an international commercial arbitration. In an international commercial arbitration, the arbitral tribunal is required to endeavour, that is, make an effort to render the arbitral award within a period of twelve months or in a timely manner. In a domestic arbitration, Section 29A(1) stipulates a mandatory period of twelve months for the arbitrator to render the arbitral award. In contrast, the substantive part of Section 29A(1) clarifies that the period of twelve months would not be mandatory for an international commercial arbitration. Hence, post amendment, the time limit of twelve months as prescribed in Section 29A is applicable to only domestic arbitrations and the twelve-month period is only directory in nature for an international commercial arbitration.

29. The Committee indicated that international arbitration institutions had been critical of the setting up of timelines for conducting international arbitrations. International arbitral institutions with their own machinery for case management were of the view that they did not require the monitoring of timelines by the intervention of the court. The Committee also noted that in other jurisdictions, timelines for arbitral proceedings are usually agreed by the parties themselves in accordance with the nature and complexity of the dispute. The intervention of the court in the extension of timelines was criticized by arbitral institutions and eventually led to the formulation of the amended provisions of Section 29A which have expressly kept international commercial arbitrations outside the purview of the mandatory timelines provided in Section 29A. Hence, in terms of the amended provisions of Section 29A, arbitral tribunals in international commercial arbitrations are only expected to make an endeavor to complete the proceedings within twelve months from the date of competition of pleadings and are not bound to abide by the time limit prescribed for domestic arbitrations."

53. As such, the objection regarding not providing opportunity to place his case is also overruled.

<u>Oral Hearing</u>

54. As regards, the absence of oral hearing, the case of the

respondent is that the Sole Arbitrator ought to have granted the responded an opportunity to conduct deposition in accordance with the terms of the Distributorship Agreement. However, no such opportunity was granted. It has also been contended that in view of the fact that the amount in controversy was more than USD 500,000 and therefore, in terms of ICDR Arbitration Rules, oral hearing should have been granted.

55. A perusal of clause 14.5 of the Distributorship Agreement (Exhibit B) would show that it provides that arbitration will be based on the submission of documents and there shall be no in-person or oral hearing. The Arbitrator while passing Procedural Order No. 7 noted the requirement of clause 14.5 and rule that the respondent has not submitted a response to the claim within the deadline and once the required deposits have been paid to the ICDR, the Sole Arbitrator will proceed to determine the claim on the basis of the documents before her as the arbitration agreement itself states that the arbitration will be based on the submission of the documents and there will be no in-person hearing. Thus, the last two lines of clause 14.5 have been considered by the Sole Arbitrator to mean that there were no requirement as per agreement for oral hearing or in-person hearing. In the considered view of this Court, this satisfaction recorded by the Sole Arbitrator is a question of merit which cannot be looked into by this Court in the present proceedings of enforcement in terms of Section 47 and 48 of the Act of 1996. The Hon'ble Apex Court in the case of ***Vijay Karia (supra)*** has held in para 81 as under :

> "*81. Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression "was*

> *otherwise unable to present his case" occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this expression would be a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Read along with the first part of Section 48(1)(b), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in Ssangyong (supra). A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award liable to be set aside on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48.*"

56. In view of the above position of law and the facts as recorded above, the objection regarding absence of oral hearing is also rejected.

<u>Non-supply of documents in time:</u>

57. This objection of the respondent is based on an allegation that the respondent was denied access to the documents filed by the claimant before the ICDR. However, the respondent filed application dated 09.09.2020 before the sole arbitrator, who directed the petitioner vide its letter dated 23.09.2020 to send copies of the requested document in batches to ensure that the respondent have access to them. Accordingly, documents were sent by the petitioner. Now, the same ShareFile Link was accessible to the Sole Arbitrator, who confirmed vide its letter dated 25.08.2020 that she accessed and downloaded those documents. Even after this the petitioner sent instructions in detail thereby providing step by step instructions to the respondent for opening the documents. All these facts have also been

considered by the Sole Arbitrator. In view of the above facts this objection also does not hold any water and the same is also rejected.

(vi) Limitation of liability of provisions as well as merits of award

58. The respondent has further raised objection about the limitation of liability in terms of clause 14.7 of the Distribution Agreement. It has been contended that although the Sole Arbitrator considered clause 14.7 however, unreasonably concluded that the said clause will not apply in the present case as the same is not relevant to the objections allegedly raised by the respondent. It is thus contended that the Sole Arbitrator fell into an error of law and fact while coming to the conclusion that novation agreement was a standalone and independent obligation even though, the debt arose as a result of the Distributorship Agreement.

59. Apart from this, even on the question of merits of the dispute, assertions have been made by the respondent in its objection. It has been contended that it was admitted by the claimant that there was deficiency in the quality of the goods supplied to the respondent.

60. The Sole Arbitrator in para 52 of the award has dealt with this objection of the respondent. The Arbitrator ruled that the limitation of liability provision in the Distributorship Agreement is not relevant to the obligation that Ilishan accepted by agreeing to the novation agreement. The respondent/Ilishan committed breach of this subsequent obligation and that led to this arbitration namely obligation to comply with the payment schedule set out in the Extension Letter.

61. Now this reference to Extension Letter is the acknowledgment of

the respondent whereby it was agreed to repay the debt on certain prescribed terms. The Sole Arbitrator treated this as an agreement as standalone obligation and independent from the provisions of the Distributorship Agreement.

62. This conclusion of the Sole Arbitrator in the considered view of this Court cannot be assailed in the present proceedings. The curial law in the present matter is the law of Texas namely Civil Practice and Remedies Code of Texas. Chapter 171 of the same provides for arbitration. Challenge to an award passed by an Arbitral Tribunal has to be made in terms of Section 171.088 which provides as under :

> *"Sec.171.088. VACATING AWARD. (a) On application of a party, the court shall vacate an award if:*
> *(1) the award was obtained by corruption, fraud, or other undue means;*
> *(2) the rights of a party were prejudiced by:*
> *(A) evident partiality by an arbitrator appointed as a neutral arbitrator;*
> *(B) corruption in an arbitrator; or*
> *(C)misconduct or wilful misbehavior of an arbitrator;*
> *(3) the arbitrators:*
> *(A) exceeded their powers;*
> *(B) refused to postpone the hearing after a showing of sufficient cause for the postponement;*
> *(C) refused to hear evidence material to the controversy; or*
> *(D)conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or*
> *(4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.*
> ***(b) A party must make an application under this section not later than the 90th day after the date of delivery of a copy of the award to the applicant. A party must make an application under Subsection (a)(1) not later than the 90th day after the date the grounds for the application are known or should have been known.***
> *(c) If the application to vacate is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.*
> *Added by Acts 1997, 75th Leg., ch. 165, Sec. 5.01, eff. Sept. 1, 1997."*

63. As such, the respondent was required to challenge the award in

terms of the above said provisions within the period of limitation provided under clause (b) of sub-section (4). However, it is apparent from the record and pleadings of the respondent that no such challenge has been raised by it against the impugned award. The Hon'ble Apex Court in case of ***Vedanta Ltd. (supra)*** has held in para 89, 118 and 127 as under :

> *"89. The courts having jurisdiction to annul or suspend a New York Convention award are the courts of the State where the award was made, or is determined to have been made i.e. at the seat of arbitration. The seat of the arbitration is a legal concept i.e. the juridical home of the arbitration. The legal "seat" must not be confused with a geographically convenient venue chosen to conduct some of the hearings in the arbitration. The courts at the seat of arbitration are referred to as the courts which exercise "supervisory" or "primary" jurisdiction over the award. The "laws under which the award was made" used in Article V (1)(e) of the New York Convention, is mirrored in Section 48(1)(e) of the Indian Arbitration Act, which refers to the country of the seat of the arbitration, and not the State whose laws govern the substantive contract.*
> *118. The merits of the arbitral award are not open to review by the enforcement court, which lies within the domain of the seat courts. Accordingly, errors of judgment, are not a sufficient ground for refusing enforcement of a foreign award.*
> *127. The Appellants are aggrieved by the interpretation taken by the tribunal with respect to Article 15.5 (c) of the PSC and its other sub-clauses. The interpretation of the terms of the PSC lies within the domain of the tribunal. It is not open for the Appellants to impeach the award on merits before the enforcement court. The enforcement court cannot re-assess or re-appreciate the evidence led in the arbitration. Section 48 does not provide a de facto appeal on the merits of the award. The enforcement court exercising jurisdiction under Section 48, cannot refuse enforcement by taking a different interpretation of the terms of the contract."*

64. Further, in the case of ***Shri Lal Mahal Ltd. Vs. Progetto Grano SpA, (2014) 2 SCC 433*** the Hon'ble Apex Court in para 45 has held as under :

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

65. As such, this Court cannot have a second look on the foreign award by appreciating the dispute on merits. Thus, this objection is also rejected.

(vii) Arbitrability of Fraud

66. The respondent has also raised an objection against the enforcement of the foreign award as contained in Annexure A on the ground that in the notice of invocation of arbitration dated 28.10.2019, the claimant had made an alternative claim of fraud. Respondent submits that vide its letter dated 26.02.2020, an objection was raised that the act of fraud vitiates the arbitration proceedings and the same cannot be proceeded by an arbitrator. This contention of the respondent was considered by the Arbitrator in para 20 and 22 of the Procedural Order No. 3 and the same was overruled by holding that it was clarified by the Biotech's counsel that it was not arguing that arbitration agreement itself was void however, it was subsequent allegations of fraud. The Arbitrator ruled that the Texas Law supports the approach of the Arbitrator that it can rule even on the allegations of fraud considering the wordings agreed by the parties that the arbitration agreement encompasses allegations of fraudulent behavior. In the present case, the issue as raised by the claimant before the Arbitrator was non-payment of consideration for supply of goods. Thus, what was claimed is damages for non-payment. The Hon'ble Apex Court in the case of ***Booze Allen (supra)*** considered this aspect and while distinguishing that rights in *personam* are arbitrable but rights in *rem* are not, held that in certain cases even in existence of allegation of fraud, issue can be arbitrable. This

position was repeated by the Hon’ble Apex Court subsequently in the case of ***A.Ayyasamy vs. A.Paramsivam & Ors., (2016) 10 SCC 386*** holding that mere allegation of fraud simplicitor are arbitrable.

67. In the considered view of this Court, the dispute involved in the present case would squarely be covered by the judgment of the Apex Court as rendered in the case of ***Vidya Drolia (supra)*** wherein it is held that allegations of fraud are arbitrable only if they relate to a civil dispute and the fraud does not completely invalidate the arbitration clause. As such, the presence of an allegation of fraud would not vitiate the entire proceedings of arbitration in the considered view of this Court.

(viii) Maintainability of arbitration on account of pendency of civil suit

68. Another objection raised by the respondent is that in view of pendency Civil Suit No. 393B/2019, arbitration was not maintainable. In the considered view of this Court, this objection is also not available to the respondent in view of clear provisions of Section 48(1)(e) of the Act of 1996 as it is the country in which or under the law of which the award was made where challenge to the award is to be made. As already recorded above, there is no challenge to the award sought to be enforced in the country where it has been made. Thus, even this objection is not found tenable.

69. In view of the law as laid down by the Hon'ble Apex Court as referred herein above, the case laws as relied by the learned counsel for the respondent of jurisdictional High Courts are not of any help for it and the judgments of the Hon'ble Apex Court already referred above, which in fact

supports the case of the petitioner.

70. In view of the analysis in the foregoing paragraphs, the objections as raised by the respondent against the enforceability of the award are hereby overruled. It is held that the award 'Annexure-A' is enforceable. As regards the judgment in the case of ***Alimenta S.A. (supra)***, in view of the analysis made hereinabove, this Court does not find that the award in question is against the fundamental policy of India, it in no way can be termed to be against the interest of this country or even if tested on the anvil of justice and morality or any patent illegality, it passes that test also. In the considered view of this Court, ample opportunity of hearing was given to the respondent and there is nothing which would go to the root of the matter making it unenforceable.

List this case for further consideration immediately after six weeks.

(PAVAN KUMAR DWIVEDI)
JUDGE

vidya