# THE HIGH COURT OF JUDICATURE AT MADRAS

| Reserved on | Delivered on |
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| 23~09~2020 | 14~10~2020 |

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

**ORIGINAL PETITION No.891 of 2018 &**

**O.A.No.957 of 2018 & A.No.8143 & 8145 of 2018**

Finnish Fund for Industrial Corporation Ltd.,
Uudenmaankatu 16B,
00120 Helsinki, Finland
Rep. by its Authorised Signaory
Juha-PekkA Tuomipuu ... Petitioner

.Vs.

1. VME Precast Pvt. Ltd.,
   364, Pillaiyar Koil Street,
   Panner Nagar, Mugappair West,
   Chennai – 600 037.

2. VME Properties Pvt. Ltd.,
   364, Pillaiyar Koil Street,
   Panner Nagar, Mugappair West,
   Chennai – 600 037. ... Respondents 1 & 2

3. Alchemist Asset Reconstruction Company Limited,
A-270, First to Second Floor,
Defence Colony, New Delhi – 110 024.
Rep. by its Resolution Manager ... Respondent No.3/Intervenor

[Third respondent impleaded a per Order
dated 03.01.2020 in A.No.5214 of 2019]

**Prayer:** Petitions filed under sections 47 - 49 of the Arbitration and Conciliation Act,. 1996 praying

a. that the Award dated 16.09.2015, be deemed to be a decree of this Court.

b. That this Court pronounce judgment according to the Award dated 16.09.2015, made and published by the Arbitration Institute of Finland Chamber of Commerce and direct the respondents to pay to the petitioner a sum of EUR 372.063.97 and USD 6.332.571.50 [calculated as on 31.08.2018 and detailed at paragraph 25 above] along with further interest as would continue to apply till the date of realisation of the monies [Convertible at the exchange rate as on the date of the award is finally considered as a decree of this Court and all appeals including any special leave petition (if any) filed against order of enforcement] are dismissed.

c. That the respondents be ordered and decreed to pay the petitioner the costs of this petition.



For Petitioner : Mr.Satish Parasaran (SC)
for Mr.P.Giridharan
Mr.S.Santhosh
Mr.Arjun Gupta

For respondents : Mr.P.S.Raman (SC)
for Jayesh B.Dolia
for M/s.Aiyar & Dolia for R1 & R2

Mr.K.Harishankar for R3

**O R D E R**

This original petition has been filed for enforcement of the foreign award dated 16.09.2015 passed by the arbitrator against the first and second respondents.

2. Brief facts leading to filing of this original petition is as follows :

The petitioner being a lender by a loan agreement dated 06.06.2009 with the first respondent, advanced a loan to the tune of US$ 4,000,000.00/-. The above loan advanced is not only on the basis of the loan agreement but also the subsequent three amendments dated 07.07.2009, 26.08.2019 and 15.10.2012 respectively. The second respondent signed the guarantee deed on 27.08.2009 in favour of the petitioner for the sum of Rs.4,214 269.12. After three years of the loan agreement, it appears that the inter creditor agreement dated 29.03.2012 came to be executed between the petitioner herein and the UCO bank. The UCO Bank was now assigned itself to the intervenor namely Alchemist. As the amount has not been paid pursuant to the loan agreement and the guarantee deed executed by

the first and second respondents, the arbitration process commenced at Finland. The sole arbitrator has passed an award dated 16.09.2015 after full contest. Now this application has been filed to enforce the foreign award.

3. In the present application, the intervenor filed an impleading petition. However, this Court by its Order dated 03.01.2020, permitted them to be heard as an intervenor alone without impleading it as the third respondent in the main original petition. However, it is given a right of audience and also held that Alchemist, intervenor cannot take out any interlocutory application and make any other prayer in the main original petition. Similarly, Alchemist have no right to prefer an appeal.

4. In the application filed for enforcement of the foreign award, the main contention of the first respondent in the counter affidavit is that the award is unenforceable since the respondents are not able to present their case as they are not given an opportunity for an oral hearing before the arbitrator. The award has not yet become binding on the parties as appeal is pending before the Supreme Court of Finland. The enforcement of the award would be contrary to the public

policy as no sufficient opportunity was given to the respondents to put forth their case before the arbitrator. Due to change of clauses in the various agreements entered into between the petitioner and the respondents, the place and law for arbitration has been changed to India and Courts in Chennai. In nutshell, it is its contention that due to subsequent execution of various agreements, obligation of the parties shall be borne by the laws of India and not in Finland and the Courts at Chennai, India will alone have jurisdiction. It is his further contention that on the date of the hypothication agreement dated 26.08.2009, the loan agreement contained an arbitration clause and in view of the inconsistency between the provisions of the inter creditor agreement, finance documents, security trustee agreement, the provisions of the Inter Creditor Agreement shall prevail. As per the Inter Creditor Agreement the Courts and Tribunals at Chennai in India shall have exclusive jurisdiction to settle any dispute which may arise out of or in connection with the inter creditor agreement. It is his further contention that the arbitrator has not given sufficient opportunity to present their case. Oral hearing also not been granted. The petitioner has not produced the witness to prove their claim. Hence, the award passed is against the public policy of India. The second respondent executed the guarantee deed indicating that any dispute that may arise

jurisdiction lies in the Finnish Court. Hence, the arbitration conducted by the sole arbitrator is not according to law. Hence, prayed for dismissal of this petition.

5. The second respondent filed a counter submitting that the guarantee deed executed between the parties is governed by the laws in Finland. As per the said agreement, the lender shall have the right to bring any claims based on the Guarantee and any disputes that may arise into Finnish Courts, in the first instance and the District Court of Helsinki for consideration and decision. Further the arbitrator exceeded the jurisdiction vested with the District Court has usurped the power of District Court of Helsinki. Further, the Arbitration Award relied upon the petitioner had not reached finality. Hence, prayed for dismissal of this petition.

6. The learned Senior Counsel Mr.P.S.Raman appearing for the first respondent submitted that the loan agreement and other agreements are executed between the parties and the subsequent agreements executed in connection with the same loan transaction clearly show that Indian Laws are applicable to the

arbitration and the Courts in Chennai will have exclusive jurisdiction. It is his contention that the inter creditor agreement executed by the UCO Bank and the assignor of the intervener makes it very clear that only the tribunal at Chennai in India shall have exclusive jurisdiction in connection with the above agreement dated 29.03.2012. Further, the clauses 1, 2, of the same agreement also indicate that in case of any inconsistency between the provisions of the Inter creditor agreement and the financing documents, the security trustee agreement, the provisions in the inter creditor agreement shall prevail. Similarly, the clauses in the security trustee agreement executed between the first respondent and the petitioner and UCO bank, clearly indicate that all the terms and references used in this agreement and which are defined or construed in the facility agreement but are not defined or construed in this agreement shall have the same meaning and construction given to such terms and references by the inter creditor agreement. Hence, it is his contention that since all the parties have entered into such agreement at a later point of time, only the inter creditor agreement will prevail over. Hence, the governing law of India is applicable and the Courts in Chennai shall have exclusive jurisdiction. The deed of hypothication deals with the similar provision. The learned arbitrator has failed to consider the objection as to the

jurisdiction and the respondent in fact sought time for arguing the preliminary issue and opportunity has not been given by the arbitrator. Having rejected the jurisdiction issue, the Award has been passed within one week and no proper opportunity was given to the respondent. Whereas in the appeal filed as against the award in the District Court, evidence was taken and the personal hearing has not been given as to the jurisdiction. Hence, it is his contention that the parties are denied the principles of natural justice. Personal hearing as to the jurisdiction has not been given. Opportunity to cross examination of the witness has also not been given. If the opportunity was given, before the arbitral tribunal, the nature of the documents executed by the parties would have been produced which would have enlightened the arbitrator to arrive at a right conclusion that Finland Courts have no jurisdiction to entertain the claim. In support of his contentions, he relied on the following judgments :

**Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)** reported in **2019 (15) Supreme Court Cases 131**

**Renusagar Power Co. Ltd., Vs. General Electric Co. with Civil Appeal No.379 of 1992 General Electric Co., Vs. Renusagar**

**Power Co. Ltd.** reported in **1994 Supp (1) Supreme Court Cases 644**

**Automotive Tyre Manufacturers Association Vs. Designated Authority and others** reported in **2011 (2) Supreme Court Cases 258**

**S.N.Prasad, Hittek Industries (Bihar) Limited Vs. Monnet Finance Limited and others** reported in **2011(1) Supreme Court Cases 320**

**Campos Brothers Farms Vs. Matru Bhumi Supply Chain Pvt. Limited and others** reported in **2019 SCC Online Del 8350**

7. Mr.Jayesh Dolia, learned counsel appearing for the second respondent adopting the arguments of the learned Senior Counsel P.S.Raman, appearing for the first respondent submitted that in the loan agreement the second respondent is not a party. The second respondent is a party only in the guarantee deed and in the guarantee deed, the arbitration clause is not provided. It is his further contention that if the guarantee deed indicate that any dispute that may arise within the jurisdiction of the Finland Court, in the first instance, the District Court of

Helsinki. Therefore the arbitration proceedings in Finland is not maintainable in the eye of law. The inter creditor agreement executed between the petitioner and the respondent will give jurisdiction only to the Courts at Chennai in India. The objections has also been taken by the respondent as early as on 24.07.2014 with regard to the jurisdiction before the arbitrator.

8. Mr.Harishankar, learned counsel appearing for the intervenor submitted that he as an assignor of UCO bank, the inter creditor agreement has been entered between the lender and the UCO Bank. The above document indicate that the lender has agreed to execute this agreement for the purpose of co-ordinating the exercise of their rights, powers and remedies in respect of the facilities under the Finance Documents and the security created or to be created under the security documents. The above documents makes it clear that if there is any inconsistency in the earlier agreements, the inter creditor agreement shall prevail over. The exclusive jurisdiction clause in the above agreement indicate that the tribunals in Chennai in India shall resolve the dispute in connection with the above agreement. It is his further contention that the security trustee agreement is also executed between the parties. It also makes clear that all the previous agreements

were superseded and the parties have agreed to the jurisdiction of Courts at Chennai in India. It is his further contention that as per the agreement executed between the lender, namely the petitioner and the UCO bank, before taking any action under facility agreement, notice to be issued to the security trustees. Whereas, notice has been issued to the respondents 1 and 2 alone for investigating security and another security, which is against the provision of contract executed between the parties. In the arbitration proceedings, the third respondent has not been made as a party and in the event, the award is enforced, for security, properties, the right of the intervener will also be affected and they have also security over the properties. Hence, it is his contention that the award cannot be enforced. Though the intervener cannot challenge the award on merits, in view of the contract governing the parties, his right has also to be take note of. Hence, objected in allowing this petition.

9. The learned Senior Counsel Mr.Satish Parasaran appearing for the petitioner submitted that before the action taken against the respondents 1 and 2, arising out of the inter creditor agreement were appraised to assignor of intervener in the year 2014 itself. They have not even shown any objection. Similarly, the

intervenor has come at a later stage, the assignment is also made without any permission as per the contract. SARFAESI proceedings were initiated without informing the lender. The petitioner has given the loan in the year 2009 itself. The loan has not been disputed by the respondents 1 and 2. The payment of the instalments by the respondent 1 and 2 alone is disputed. Not even one rupee has been paid. Hence, it is his contention that the intervenor has no role in opposing this application. Even assuming that there is any breach of contract entered between the UCO Bank and the applicant, the intervenor being the assignee of the UCO bank, their remedy lies under Order XXI CPC, while executing the award, particularly proceedings against the properties or securities. It is his contention that the intervenor has no right to challenge the merits of the award. This has been recorded by this Court by this Court. It is his further contention that arbitration proceedings have no connection to the UCO bank and Section 9 application Orders were passed in the presence of UCO bank. Hence, it is his contention that the loan agreement alone govern the parties and three amendments have been made in respect of the loan agreement.

10. The first loan agreement and the third amendment reaffirm the clauses governing the arbitration at Finland. The dispute relate only to the loan agreement and subsequent contracts cannot be pressed into service to oust the jurisdiction of Finland. The contention of the respondents 1 and 2 is that there was no opportunity given cannot be countenanced for the simple reason that the arbitrator has passed the seven procedural orders and finally passed the award on 16.09.2005. Appeal has also been filed and even in the appeal an opportunity of cross examination of R1 has been provided by the District Court and the District Court ultimately dismissed the appeal and the Supreme Court has also dismissed the appeal on 19.12.2019. Hence, it is his contention that the inter creditor agreement and the security trustee agreement is between the lender, namely UCO Bank and the petitioner. This agreement is to protect the interest of the lender. Whereas, the arbitration relate to the loan transaction and it has not been disputed by the parties. Though the respondents 1 and 2 appears to be two different entities, they being father and son took active part in both the companies. The jurisdiction issue has been tested in the procedural Orders 1 and 2. Further, it is his contention that the conduct of the parties are also recorded by the District Court Finland. No prejudice, whatsoever, has been caused to the respondents 1

and 2 and sufficient opportunity has been given to them. Their allegation of violation of principles of natural justice cannot be pressed into service. Hence, submitted that the award has to be recognised for enforcement. In support of his contentions, he relied on the following judgments :

**Olympus Supestructures Pvt Ltd. Vs. Meena Vijay Khetan and others** reported in **1999 (5) SCC 651**

**M.R.Engineers and Contractors Private Limited Vs. Som Datt Builders Limited** reported in **2009 (7) SCC 696**

**Chloro Controls India Private Limited Vs. Severn Trent Water Purification INC and others** reported in **2013 (1) SCC 61**

**Purple Medical Solutions Private Limited Vs. Miv Therapeutics INC and another** reported in **2015 (15) SCC 622**

**Inox Wind Limited Vs. Thermocables Limited** reported in **2018 (2) SCC 519**

**Vijay Karia and others vs. Prysmian Cavi E Sistemi and others** in **Civil Appeal No.1545 of 2020**

**ARK Shipping Co. Ltd. Vs. CRT Shipmanagement Pvt Ltd.** reported in **2007 SCC Online Bom 663**

**IMC Limited Vs. Board of Trustees of Deenadayal Port Trust** reported in **MANU/GJ/1010/2018**

11. In the light of the above submissions, when the materials are perused, it is not in dispute that the first respondent and the second respondent, as Directors of the companies had executed a loan agreement dated 06.06.2009. Pursuant to the same, there are three amendments made to the loan agreement. The first amendment was made on 07.07.2009. The first amendment stipulates that any dispute under the first amendment shall be settled in accordance with the dispute resolution mechanism under the loan agreement. The second amendment dated 26.08.09 also stipulates the same. The third amendment to the loan agreement dated 15.10.20102 filed in the typeset makes it clear that any dispute shall be settled in accordance with the dispute resolution mechanism under the loan agreement. The second respondent has also signed in the agreement. Clause 2, 11, 10 and 12.1 (m) of the loan agreement, provides that the repayment shall be secured by certain securities including mortgage and hypothication. In furtherance

to the above clauses, a deed of hypothication came into existence by the first respondent. In the above deed of hypothication, clause 1.3 indicate that if there is any inconsistencies between the provisions of the deed and the loan agreement, provisions of this deed shall prevail. Similarly clause 15.8 indicate that this clause shall not be construed so as to limit the right of the lender to take proceedings in one or more jurisdiction. Above clauses makes it clear that the jurisdiction of the Courts at Chennai is non exclusive.

12. It is to be noted that the jurisdiction clause mentioned in hypothecation agreement relate mainly to the security credited by way of hypothication. This hypothication deed itself was a result of the main agreement, i.e., the loan agreement. A reading of the entire hypothication agreement indicate that it does not supersede the loan agreement. This agreement itself has been executed in furtherance of the loan agreement. Therefore, the obligations arising out of the contract, viz., loan agreement continue to remain binding and enforceable. Similarly, on 27.08.2009, a guarantee deed was executed by the second respondent. The guarantee deed also show that the guarantee deed has to be considered according to the laws in Finland and for any disputes has to go before

the Finland Courts. The person signed on behalf of the second respondent has also signed the guarantee deed and loan agreement deeds and amendments.

13. From the above, it is clear that the second respondent guarantor is the parent company of the first respondent. The second respondent appears to have mortgaged certain properties on 01.09.2009 by way of equitable mortgage. In the meanwhile, the inter creditor agreement between the petitioner and the UCO bank came to be executed on 29.03.2012. In the inter creditor agreement some sort of arrangement has been agreed between the petitioner and UCO Bank and the parties agreed to enforce the obligations in respect of the agreement and to enforce the security. They had agreed to have jurisdiction in Courts at Chennai in India. The inter creditor agreement is specifically between two lenders. Similarly, in the security trustee agreement executed between the petitioner and the first respondent and UCO bank, the parties have infact agreed to enforce the right of the lender in respect of the security created over the loan parted by them. In fact, it is only an arrangement between the lenders as to how to proceed with the properties for their loan and it has been executed in furtherance of the loan agreement. Therefore, it cannot be said that in view of such security agreement,

the contractual obligations agreed between the parties in the principal loan agreement was totally erased. The deed of hypothecation has also been entered between the parties, viz., respondents and the UCO bank as security trustee agreement on 29.03.2012. The third amendment of the loan agreement was entered on 15.10.2012 much later to the earlier contract between the lender and the parties. Particularly the loan agreement was amended thrice. The third amendment was on 15.10.2012. The Clause D in the third amendment clearly stipulates that any dispute under the third amendment shall be settled in accordance with the dispute resolution mechanism as agreed under the loan agreement. It is specifically agreed in the third amendment that all other remedies shall remain in force and effect. The amendment shall be governing and considered in accordance with the Finnish Laws and any dispute arise in the agreement essentially shall be settled by the dispute mechanism as provided under the loan agreement and the third amendment agreement.



14. As the loan amount has not been paid, legal notice was issued by the petitioner on 24.03.2014 to both the respondents. Thereafter, on 03.07.2014, notice of termination was issued by the petitioner. Reply was issued by the first

and second respondents on 24.07.2014. In the reply notice, the jurisdiction issue was never raised. Only issue sought to be raised was that without the consent of the UCO bank as per the security trustee agreement, the petitioner cannot proceed further. However, the amount payable is not disputed. In the reply notice sent by the respondents on 26.07.2014, it is stated by the respondents that the petitioner is liable to take action only as per the hypothication deed.

15. From the documents available on record, it is seen that the arbitration has been initiated on the basis of the loan agreement. The loan agreement and third amendment agreement makes it clear that the parties infact have agreed to resolve their dispute through arbitration and submitted to the jurisdiction of Finland. It is to be noted that inter creditor agreement and the security trustee agreement have been created in furtherance to the loan agreement. Those documents have been executed merely to enforce the rights of the lenders namely the petitioner and UCO bank, namely, the lenders to enforce the securities executed by the borrower and the guarantor. Therefore, even if there is any breach in the agreement entered between the petitioner and the UCO Bank, the jurisdiction clause agreed upon in the inter creditor agreement will arise only in

respect of dispute arise as to enforcement of securities. Therefore, those clauses cannot be imported to the loan agreement as the loan agreement is of the year 2009.

16. Now in the light of the above, it has to be seen whether the contention of the respondents 1 and 2 that the opportunity has not been given and the principles of natural justice is totally violated in the arbitral proceedings has to be seen. Mr.Daniel Hochstrasser has been nominated as the sole arbitrator and sole arbitrator has issued notice to the parties. The objection was taken by the respondents 1 and 2 on the ground of Finland has no jurisdiction, in view of the deed of hypothecation dated 29.03.212 and contended that in those documents, the parties have agreed to the jurisdiction of the Courts in Chennai, India. Hence, sought time for preliminary objection. The respondent also submitted oral arguments along with further documents. The sole arbitrator have informed the respondents by email dated 23.02.2015 indicating that he is inclined not to hold a hearing on the issue of jurisdiction, as neither party relied on witness evidence for its arguments on jurisdiction and invited the parties comments by 27.02.2015. Thereafter, passed an Order in procedural Order No.1 discussing various

provisions of the contract and ultimately rejected the contention of the respondents and dismissed their contention as to jurisdiction. Procedural Order No.3 indicate that the sole arbitrator has posted case for filing claim statement not later than 15.05.2015 and the respondents to file claim statement by 13.06.2015 and hearing date is also fixed. The procedural Order No.5 of the arbitrator indicate that neither parties relied on any evidence or experts for its arguments in the statement of claim or the statement of defence and indicated that the sole arbitrator's decision will therefore essentially be based on legal considerations and documentary evidence.

17. In procedural Order No.6, dated 02.02.2015, the learned arbitrator has recorded as follows :

> "Also by letter of 7 September 2015, respondents request a hearing and sufficient time to prepare the cross-examination of claimant's witnesses and for submitting substantial legal submissions and documents.
>
> According to para 35 of the procedural Order No.1, dated 2 February 2015, to which both parties agreed, for each witness to be

presented by a party, a written and signed witness statement must be submitted to the Sole Arbitrator together with the written briefs on the merits. As has already been noted in Procedural Order No.5 of 2 September 2015, none of the parties have submitted any witness statements in their submissions, i.e., Claimant in its statement of claim dated 13 may 2015 and respondents in their statement of defence dated 13 July 2015.

Moreover, neither Claimant in its Statement of Claim nor respondent in their statement of defense rely on any witnesses of facts. Respondents' reference to cross-examination of Claimant's witnesses on page 9 of their statement of defense is therefore not pertinent, because in fact Claimant has not relied on any witnesses in its statement of claim, but bases its claims solely on documentary evidence.

Therefore, respondents' request for a hearing cannot be granted. By failing to introduce witness testimony in their statement of defense, respondents have waived their right to rely on witness testimony, and a hearing is not necessary.

The parties are now invited to submit their Statement of Costs (if any)by 14 September 2015."

Therefore, the above Order makes it very clear that the respondents could have produced the documents or examined any witness before the arbitrator. Having taken such a defence and no documents or evidence produced to substantiate their defence, therefore, it cannot be said the sufficient opportunity has not been given.

18. Be that as it may. It appears that in the appeal filed before the District Court, oral evidence is also given. The District Court after hearing the parties and considering the jurisdiction clause, dismissed the appeal and confirmed the Order of the arbitrator. Appeal filed against the same is also dismissed by the Supreme Court of India. Now the matter has reached its finality.



19. In the judgment in **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)** reported in **2019 (15) Supreme Court Cases 131** it has been held has follows :

"51. Sections 18, 24(3), and 26 are important pointers to what is contained in the ground of challenge mentioned in Section 34(2)(a)(iii).

Under Section 18, each party is to be given a full opportunity to present its case. Under Section 24(3), all statements, documents, or other information supplied by one party to the arbitral tribunal shall be communicated to the other party, and any expert report or document on which the arbitral tribunal relies in making its decision shall be communicated to the parties. Section 26 is an important pointer to the fact that when an expert's report is relied upon by an arbitral tribunal, the said report, and all documents, goods, or other property in the possession of the expert, with which he was provided in order to prepare his report, must first be made available to any party who requests for these things. Secondly, once the report is arrived at, if requested, parties have to be given an opportunity to put

questions to him and to present their own expert witnesses in order to testify on the points at issue.

55. Gary Born states:

"German courts have adopted similar reasoning, holding that the right to be heard entails two related sets of rights: (a) a party is entitled to present its position on disputed issues of fact and law, to be informed about the position of the other parties and to a decision based on evidence or materials known to the parties [See, e.g., Judgment of 5 July 2011, 34 SCH 09/11, II(5)(c)(bb) (Oberlandesgericht Munchen)]; and (b) a party is entitled to a decision by the arbitral tribunal that takes its position into account insofar as relevant [See, e.g., Judgment of 5 October 2009, 34 Sch 12/09 (Oberlandesgericht Munchen)]. Other authorities provide comparable formulations of the content of the right to be heard [See, e.g., Slaney v. Int'l Amateur Athletic Foundation, F.3d at p.592]

20. In **Renusagar Power Co. Ltd., Vs. GeneralElectric Co. with Civil Appeal No.379 of 1992 General Electric Co., Vs. Renusagar Power Co. Ltd.** reported in **1994 Supp (1) Supreme Court Cases 644** it is been held as follows :

> 32. With regard to enforcement of foreign judgments, the position at common law is that a foreign judgment which is final and conclusive cannot be impeached for any error either of fact or of law and is impeachable on limited grounds, namely, the court of the foreign country did not, in the circumstances of case, have jurisdiction to give that judgment in the view of English law; the judgment is vitiated by fraud on part of the party in whose favour the judgment is given or fraud on the part of the court which pronounced the judgment; the enforcement or recognition of the judgment would be contrary to public policy; the proceedings in which the judgment was obtained were opposed to natural justice. (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 42 to 46, pp. 464 to 476; Cheshire & North, Private International Law, 12th Edn., pp. 368 to 392.)

33. Similarly in the matter of enforcement of foreign arbitral awards at common law a foreign award is enforceable if the award is in accordance with the agreement to arbitrate which is valid by its proper law and the award is valid and final according to the arbitration law governing the proceedings. The award would not be recognised or enforced if, under the submission agreement and the law applicable thereto, the arbitrators have no justification to make it, or it was obtained by fraud or its recognition or enforcement would be contrary to public policy or the proceedings in which it was obtained were opposed to natural justice (See: Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 62-64, pp. 558 & 559 and 571 & 572; Cheshire & North, Private International Law, 12th Edn., pp. 446-447). The English courts would not refuse to recognise or enforce a foreign award merely because the arbitrators (in its view) applied the wrong law to the dispute or misapplied the right law. (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. II, p. 565.)

21. In **Automotive Tyre Manufacturers Association Vs. Designated Authority and others** reported in **2011 (2) Supreme Court Cases 258**, the Apex Court has held as follows :

> 77. It is trite that rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. In A.K. Kraipak (supra), it was observed that the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice.

22. In the above judgments, it has has been held that sufficient opportunity has to be given to the parties to present their case. As discussed above, the procedural Orders of the arbitrator clearly indicate that the parties have been given sufficient opportunities and infact, the District Judge also had given opportunity to the parties and witness has also been examined. What was sought to be relied

upon the subsequent contract, the respondents 1 and 2 could have produced witness on their side. But they have not chosen to do so. Therefore, they cannot contend that sufficient opportunity was not given to raise their defence. The District Court also examined the witness and discussed the jurisdiction issue and dismissed the appeal. Further, there is no dispute raised with regard to the claim and receipt of the loan amount. Once the arbitrator has decided the jurisdiction issue on merits considering the documents, it cannot be said that no opportunity has been given to the parties.

23. The only ground challenged for enforcement of the arbitral award is that the arbitral tribunal has no jurisdiction to pass the award. As discussed above, the agreement is a loan agreement and in the loan agreement, the parties have specifically agreed to the jurisdiction of the Finland to resolve their dispute through arbitrator. In such view of the matter, it cannot be said that merely because some security agreement has been executed by the lender to enforce security in respect of their obligations and rights, the clause governing the dispute in the above agreement cannot be imported to principal agreement of loan. The arbitration is mainly based on the loan agreement wherein the first respondent is

the borrower and the second respondent herein is a guarantor, who have also agreed to the jurisdiction of the law in Finland.

24. In **S.N.Prasad, Hittek Industries (Bihar) Limited Vs. Monnet Finance Limited and others** reported in **2011(1) Supreme Court Cases 320**, the Supreme Court has held as follows :

> "21. The first respondent contended that the appellant having agreed to be a guarantor for the repayment of the loan, can not avoid arbitration by contending that he was not a signatory to the loan agreement containing the arbitration clause. It was submitted that the liability of the principal debtor and guarantors was joint and several and therefore there could be only one proceeding against all of them; and that if the contention of the appellant was accepted, it would necessitate two proceedings in regard to the same loan transaction and same cause of action, that is an arbitration proceedings against the borrower and one of its guarantors (respondents 2 and 3) and a separate suit against the other guarantor (appellant). It was further submitted that multiple proceedings may lead to divergent findings

and results, leading to an anomalous situation.

22. It was also submitted that the letter dated 27.10.1995 guaranteeing the loan of Rs.75 lakhs was written by the appellant, as a Director of the borrower company; and that as the appellant had already given a guarantee letter dated 27.10.1995, he was not required to execute the tripartite loan agreements containing the arbitration clause; that the appellant was aware of the terms of the loan and was further aware that loan agreements with arbitration clause had to be executed; and that therefore it should be deemed that the appellant had agreed to abide by the terms contained in the loan agreements, including the arbitration clause. We find no merit in these contentions.

23. When the appellant gave the guarantee letter dated 27.10.1995, he could not be imputed with the knowledge that the loan agreements which were to be executed in future (on 28.10.1995 and 6.11.1995) would contain an arbitration clause. Further, the appellant did not state in his letter dated 27.10.1995 that he would be bound by the terms of loan agreement/s that may be executed by the

borrower. Therefore the question of appellant impliedly agreeing to the arbitration clause does not arise."

25. In **Campos Brothers Farms Vs. Matru Bhumi Supply Chain Pvt. Limited and others** reported in **2019 SCC Online Del 8350**, the Apex Court has held as follows :

"40. In Inox Wind Ltd. (supra), the Supreme Court has considered the difference in a general reference to an earlier contract and a general reference to a standard form contract and held that while a general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form contract would be enough for incorporation of the arbitration clause.

OMP (EFA.) (Comm.) No.1/2017 Page 14 In the present case, the reference was to a standard Contract of a body which is applicable to the trade in question. Therefore, applying the ratio of the judgment of the Supreme Court in Inox Wind Ltd. (supra), it cannot be said that there was no Arbitration Agreement in existence

between the parties, and on this ground the enforcement of the Award cannot be refused.

41. In Duro Felguera (Supra), the Supreme Court held that Section 7(5) of the Act requires a conscious acceptance of the arbitration Clause from another document as a part of their Contract, before such Arbitration Clause could be read as a part of the Contract between the parties. It was further held that the question whether or not the Arbitration Clause contained in another document is incorporated in the Contract, is always a question of construction of document in reference to intention of the parties. The terms of a Contract may have to be ascertained by reference to more than one document. The Court, however, on facts found that Original Package No. 4 tender document had been referred in the MoU therein only to have more clarity in technical and execution related matters and Arbitration Clause contained therein was not intended to be incorporated in the MoU. The finding of the Court, therefore, was on facts of the said case.

> In exercise of powers under Section 48 of the Act, this Court cannot consider the submissions made by the respondent nos. 1 and 2 in their e-mail dated 13.06.2016 on merit as if it is a Court of Original Jurisdiction and find out whether such submission of the respondent nos. 1 and 2 had any merit or not. Once it is found that the Arbitrator has ignored the submissions of a party in totality, whatever be the merit of the submissions, in my opinion, such Award cannot be enforced being in violation of the Principles of Natural Justice and contrary to the public policy of India as stated in sub-Section 2(b) read with Explanation 1(iii) of Section 48 of the Act."

In the above judgment, the apex Court has held that ignoring the submission in totality whatever merits of the submission such were cannot be following the principles of natural justice. But, whereas, in this case, taking note of the fact that the arbitrator has not arrived the issue such issue passed circumstances hled that the award could not be enforced.

26. In the judgment in **Vijay Karia & others Vs. Prysmian Cavi E Sistemi SRL & ORS** in **Civil Appeal No.1545 of 2020,** it has been held as follows :

> "53. When the grounds for resisting enforcement of a foreign award under Section 48 are seen, they may be classified into three groups – grounds which affect the jurisdiction of the arbitration proceedings; grounds which affect party interest alone; and grounds which go to the public policy of India, as explained by Explanation 1 to Section 48(2). Where a ground to resist enforcement is made out, by which the very jurisdiction of the tribunal is questioned - such as the arbitration agreement itself not being valid under the law to which the parties have subjected it, or where the subject matter of difference is not capable of settlement by arbitration under the law of India, it is obvious that there can be no discretion in these matters. Enforcement of a foreign award made without jurisdiction cannot possibly be weighed in the scales for a discretion to be exercised to enforce such award if the scales are tilted in its favour.

54. On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone, for example, that a party has been unable to present its case before the arbitrator, and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a Court may well enforce a foreign award, even if such ground is made out. When it comes to the "public policy of India" ground, again, there would be no discretion in enforcing an award which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. It can thus be seen that the expression "may" in Section 48 can, depending upon the context, mean "shall" or as connoting that a residual discretion remains in the Court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion is limited to the circumstances pointed out hereinabove, in which case a balancing act may be performed by the Court enforcing a foreign award.

57. This Court's judgment in Sohan Lal Gupta v. Asha Devi Gupta (2003) 7 SCC 492, lays down the ingredients of a fair hearing as follows:

"23. For constituting a reasonable opportunity, the following conditions are required to be observed:

1. Each party must have notice that the hearing is to take place.

2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.

3. Each party must have the opportunity to be present throughout the hearing.

4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.

5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.

6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument."

27. In the application filed under section 9 of the Arbitration and Conciliation Act, filed before this Court, this Court has granted injunction by Order dated 27.04.2015 and in the application also this Court has recorded that the respondents 1 and 2 have not disputed the claim amount. The only contention of the respondents is that they are challenging the jurisdiction aspect. It is also decided by the sole arbitrator and the same has been confirmed by the District Court in Finland. No dispute whatsoever raised as against the borrowed amount under the loan agreement and the parties namely, the first respondent clearly admitted for reference for arbitration as per Finland laws and the guarantor, namely, the second herein executed guarantee deed and has submitted to the jurisdiction of the Finland Laws and the entire dispute has been resolved by the arbitrator pursuant to the loan agreement, viz., the principal agreement dated 06.06.2009 and the third amendment to the loan came into existence on 15.10.2012. As already discussed, merely because some inter creditor agreement

entered between the lendors namely intervenor assignee UCO bank and the petitioner and security trustee agreement executed between the lenders and the first respondent in respect of the properties secured towards loan, it cannot be said that those agreements superseded the original contract. The main challenge for the enforcement of the foreign award is that the principles of natural justice is violated. It is to be noted that merely because the arbitrator did not accept the contentions of the respondents 1 and 2, it cannot be said that there is no opportunity is given. As already stated, even assuming that the petitioner has not produced any witness, the respondents, who have taken a stand that the subsequent contract does not provide jurisdiction in Finland Courts or law, the respondents have not volunteered to produce witness on their side to substantiate their contention.

28. Be that as it may. The procedural Orders of the arbitrator clearly indicate that full opportunity has been given in every stage of the proceedings. The District Court, where the appeal has been filed, has given opportunity to the parties to examine witness. Therefore, it cannot be said that opportunity has not been given. It is also to be noted that the claim amount has not been disputed and

borrowal of the amount has also not been disputed. The guarantee deed and the loan agreement been signed by the father and son vice versa., as though they are different entities. In the judgment in **Inox Wind Limited Vs. Thermocables Limited** reported in **2018 (2) Supreme Court Cases 519,** it has been held as follows :

> 14. In Habas's case (supra), Justice Christopher Clarke followed the ratio in the case of 'the Athena' (supra) and held that in single contract cases (categories 1 and 2), a general reference would be sufficient for incorporation of an arbitration clause from a standard form of contract. In cases falling under categories 3 and 4 mentioned above which are two contract cases, it was held that a stricter rule has to be followed by insisting on a specific reference to the arbitration clause from an earlier contract. Reliance placed on the judgment of Sir John Megaw in Aughton v MF Kent Services [1991] 31 Con L.R. 60 was repelled in the following terms:
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> "53 I do not regard myself as bound by the decisions of the Court of Appeal in Aughton v Kent and The Ethniki to reach a

different conclusion. Both were two-contract cases. Further the judgments of Sir John Megaw and Lord Justice Ralph Gibson are, in part in conflict so as to preclude either of them being binding authority even in a two contract case. The agreement of Evans LJ with Sir John Megaw's " analysis of the authorities with regard to arbitration clauses and specifically with regard to the incorporation of charterparty arbitration clauses into bills of lading " was obiter."

29. The claim amount has not been disputed and the borrowal of the loan has not been disputed. Based on the default in repayment of the loan, the proceedings has been initiated as per the agreement. In such view of the matter, as long as the respondents 1 and 2 show prejudice due to the alleged violation of principles of natural justice. Mere complaining that opportunity for oral evidence has not been provided by the arbitrator, particularly with regard to the jurisdiction issue, it cannot be said that the award is not enforceable. Hence, the contention of the respondents 1 and 2 cannot be countenanced. As far as the contention of the intervenor is concerned the apprehension of the intervenor that since the inter

creditor agreement has been entered between the parties, any dispute arise between the parties, the parties have agreed to the jurisdiction of the Courts in Chennai in India and such apprehension has no legs to stand for the simple reason that the inter creditor agreement has been executed by the applicant and the intervenor herein and subsequent to the same, security trustee agreement has also been executed to enforce security and to protect the right of the lender. Only when the dispute arise in respect of the enforcement of the security as against each other in pursuant to the agreement, in such situation, the clause governing the jurisdiction apply to the lenders, particularly when the dispute arise out of the contract namely security trustee agreement. Though there are some clauses in security trustee agreement, that cannot be germane of consideration in this matter, it is submitted that the intervenor has already initiated proceedings under the SARFAESI Act as per the security trustee agreement. Only when actual dispute arise between co lenders as per inter creditor agreement or security trustee agreement, clause governing arbitration between the parties can be pressed into service and not before that. Therefore, when the award has been passed on the basis of the loan agreement, the intervenor has no right to object for its enforcement. It is for the intervenor to enforce the security as per the rights created in the agreements and

the intervenor has no right in this matter to object the foreign award. Accordingly, this Court hold that the award dated 16.09.2015 is enforceable and the applicant is at liberty to file an execution petition to realise the award amount as per law as a decree of Civil Court.

30. Accordingly, this Original Petition is allowed. Consequently, the connected applications are closed.

14.10.2020

vrc

**N. SATHISH KUMAR, J.**
vrc



Order in:
**ORIGINAL PETITION No.891 of 2018**

**14.10.2020**