Imax Corporation vs E-City Entertainment (I) Pvt. Limited ... on 24 October, 2024

Author: Bharati Dangre

Bench: Bharati Dangre

2024:BHC-OS:18537

1/168

MANDIRA MILIND SALGAONKAR

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IN THE HIGH COURT OF JUDICATURE A
ORDINARY ORIGINAL CIVIL JUR
IN ITS COMMERCIAL
COMM. ARBITRATION PETITION NO.4
WITH
CHAMBER SUMMONS NO.100
WITH
CHAMBER SUMMONS NO.99 O
WITH
CHAMBER SUMMONS NO.101

IMAX Corporation
Versus
E-City Entertainment (I) P
Limited & Ors.

...
Mr.Aspi Chinoy, Senior Advocate with Mr.S
Mr.Rahul Mahajan, Mr.Amit Surve and Ms.Si
i/b Fortitude Law Associates for the Peti
Mr.Prateek Seksaria, Senior Advocate with
Ms.Pooja Tidke, Ms.Krushi N. Barfiwala, M
Mr.Nishant Chothani, Mr.Rohit Agarwal and
i/b Parinam Law Associates for the Respon
Mr.Navroze Seervai, Senior Advocate with
Mr.Saket Mone and Mr.Devansh Shah i/b Vid
the Respondent Nos.2 and 3.
Mr.Sharan Jagtiani, Senior Advocate with
Mr.Akshay Doctor, Ms.Apurva Manwani, Mr.S
and Mr.Devansh Shah i/b Vidhii Partners f
No.4....

CORAM: BHARATI D

RESERVED ON : 07th MAY, 2024
PRONOUNCED ON : 24th OCTOBER,

JUDGMENT:

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1. The Petitioner- IMAX Corporation (for short "IMAX") , a Canadian Corporation, claiming to be the world's leading entertainment technology company, specializing in motion picture technology and large format motion picture presentations, having its registered office at 2525 Speakman Drive, Mississauga, Ontario, Canada, holding three Awards in its favour, pursuant to the arbitration proceedings, being concluded between it and E-City Entertainment (I) Pvt. Ltd. (Respondent No.1) before the International Court of Arbitration of the International Chamber of Commerce in London, has approached this Court, by filing the present Arbitration Petition, invoking Section 47, 48 and 49 of the Arbitration and Conciliation Act, 1996 (for short "the Act of 1996"), seeking a declaration that the three Arbitral Awards in its favour, are enforceable under the provisions of Part II of the Act.

IMAX also seek directions to enforce and execute the Arbitral Awards as decrees in its favour and against all the Respondents.

A direction is also sought against the Respondents to deposit the decretal amount of sum of U.S. $ 11,309,496.06 plus interest at the rate of U.S. $ 2,512.60 per day from 01/10/2007 till payment and realization, with liberty to IMAX to withdraw the same.

Pending the enforcement and/or execution of the Arbitral Award, directions are sought against the Respondents to disclose on oath forthwith or within such time as this Court 3/168 CARBP-414-18.odt deems fit, the details of the movable and immovable properties owned by the Respondents as well as the particulars about the shares, debentures, bonds, securities etc. alongwith the debts due and payable by any third party as well as the details of bank accounts, stock in trade, cash in hand etc.

2. IMAX has filed the present proceedings in the backdrop that it is almost more than a decade, E-City has been attempting to avoid confirmation of Arbitral Awards in India, though the Awards have already received confirmation in Canada and its primary concern is, the interim period, is in fact adding an advantage to the Respondent Nos.2 to 4, who are alleged to have fraudulently stripped assets from E-city Entertainment, in an attempt to prevent IMAX from recovering the amount due to it under the Awards and the premise on which the Petition rest is, there is no valid reason not to recognize the three Awards in its favour. It is a stand adopted that, since the grounds to challenge a foreign Arbitration Award under Section 48 of the Act of 1996 are limited and none of the factor could evade the recognition and enforcement of the Awards in India, as they have been

already declared to be fair and proper, after full court hearing in the Superior Court of Ontario, Canada, which has confirmed them, through a valid Judgment.

It is the claim of IMAX that the agreed interest was part of the final Award and the amount owed to IMAX is now in excess of US $ 20,860,000.00.

3. I have heard the learned counsel Mr. Aspi Chinoy for IMAX Corporation, who has placed before me the list of dates 4/168 CARBP-414-18.odt and events in the backdrop of which he want the issues raised in the Petition filed under Section 47, 48 and 49 of the Act of 1996, to be looked into, for grant of reliefs, as prayed therein.

Respondent No.1- E-City Entertainment Pvt. Ltd. is represented by the learned Senior Counsel Mr. Prateek Seksaria , whereas, Respondent Nos.2 and 3 are represented by Mr. Navroz Seervai, the learned Senior Counsel, who has raised a preliminary objection about maintainability of the Petition qua Respondent Nos.2 and 3, who, according to him, are neither the parties to the Arbitration Agreement or to the Award and I will he dealing with it in due course of my analysis of the counter arguments.

Respondent No.4, E-City Investments and Holdings, is represented by learned senior counsel Mr. Sharan Jagtiani.

4. I have collated the background facts from the arguments advanced on behalf of the respective counsels and as set out in the Arbitration Petition as well as the Affidavits filed on behalf of the Respondents and I deem it appropriate to cull out the sequence of events before I proceed to appreciate the rival contentions advanced and I have tried to be brief in compiling the necessary facts.

At the incipience, I must introduce the parties to the Petition.

IMAX, a Canadian Corporation, was incorporated as a Federal Company on 11/09/1967 with its Executive Offices, located in New York City, which stake a claim that it is one of the world's leading entertainment companies, engaged in the business of large format projection and sound systems , with 5/168 CARBP-414-18.odt its specilization in motion picture technology. The business of the IMAX include the sale or lease of large format projection and sound systems to other companies in various parts of the world.

IMAX Limited was incorporated as an Ontario Corporation, a sole shareholder of IMAX Corporation on 14/12/1998.

Respondent No.1-E-City Entertainment is a Company incorporated in India under the Companies Act, 1956, having its registered offence in the address mentioned in the title clause, in Mumbai. Respondent Nos.2 to 4 in the proceedings are the Essel Group Companies having their respective offices and place of business as indicated in the title clause and it is the specific contention of IMAX that the Respondents are the Companies within the Essel Group, which is a conglomerate, which

owns and controls many companies and assets, including the E-City Entertainment. It is alleged that the conglomerate referring its companies as "our companies"

> organizes them into 8 categories viz. Media, Technology, Entertainment, Packaging, Infrastructure, Education, Precious Metals and Healthy Lifestyles and Wellness.
>
> The Essel Group controls media companies under the brand name of "ZEE" through ZEE TV as well as other group companies including E-City Entertainment.
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> Respondent No.1-E-City Entertainment Pvt. Ltd. is alleged to be a Company of the Essel Group, whose shares are held and controlled by one Dr.Subhash Chandra, Promoter of the Group alongwith his brothers and the family members.
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> 6/168 CARBP-414-18.odt
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> 5. With the introduction of the Parties, I shall now refer to the subject Agreement, entered in form of "Master Agreement"

on 28/09/2000 for lease of 6 (six) IMAX® systems by IMAX and the Final Letter Agreement reflecting the arrangement worked out, to open and develop upto 20 IMAX® systems, as it set out the commitments, the lease terms and also comprises a clause for confidentiality.

The initial commitment contemplated E-City-the Respondent No.1 to order, receive delivery of the systems and make payments in respect of the up-front portions of the initial rent and open IMAX® Theaters containing the systems in the schedule set out in the Agreement with the specifications stipulated therein with an understanding that the specific site of each theater shall be proposed by E-City for approval of IMAX and in addition to the initial roll out of the six (6) systems set out in the Agreement, E-City shall confirm its further commitment for Fourteen (14) additional IMAX® systems by 30/01/2004.

The Agreement stipulated that E-City and IMAX shall enter into a Lease Agreement, setting out the terms and conditions upon which E-City shall lease the Systems, which Agreement shall be based substantially on the terms of IMAX's standard lease agreement and the Parties agreed to negotiate in good faith to conclude the negotiations with respect to such Lease Agreement on or before 30/11/2000.

The Final Letter Agreement contemplated that each Lease Agreement between IMAX and E-City shall be for a term of twenty (20) years (the "Initial Term"), with one renewal term of ten (10) years (the "Renewal Term"), with a 7/168 CARBP-414-18.odt contemplation of renewal of the term at E-City's option for one (1) Thirty-five (35) year, on the same terms and conditions as contained in the Lease Agreement, except the payment of initial rent, which will not be required.

I will be referring to the relevant clauses of this Agreement, as I deal with the contest, as the bone of contention between the Parties has its genesis in it.

On 22/11/2000, agreement was entered between E-City and IMAX for sale of 3D GT projection system. Further, E-City also entered a maintenance, installation and trade-mark agreement with IMAX Theater Services Ltd., a subsidiary of IMAX Ltd., the term of which was for twenty (20) years.

On 20/12/2000, letter was issued by IMAX to E-City acknowledging and agreeing to the obligations with respect of system one, pursuant to the LOI are deferred for a period commencing on date thereof and ending on 01/01/2002.

6. It is the specific case of the Petitioner that after the Final Letter Agreement in form of Master Agreement was signed between the Parties, the Promoter of Essel Group went to New York to renegotiate the Master Agreement, but abruptly E-City Entertainment informed IMAX that it no longer intended to perform its obligations under the Master Agreement and an Email from the Assistant of Dr. Chandra informed IMAX that Essel Group unilaterally decided to breach the Agreement by communicating as below :-

> "With time passing by and certain external forces taking toll, investment priorities for the Essel Group underwent a massive restructuring process and unfortunately, IMAX theatre investments was something that we could not prioritize, especially in light of its uncertainty for return on investment.
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> 8/168 CARBP-414-18.odt [A]t this point in time, E-City is not in a position to make investments in IMAX theatres in India as priorities lie in building multiplex theatres, which is a part of the larger strategy of the Essel Group of getting into film products, distribution and then exhibition through E- City, thereby tapping all areas in the entire value chain related to films in the Indian market."

In the wake of aforesaid breach, IMAX invoked the dispute resolution provision of the Master Agreement, which provided for all disputes to be decided by arbitration, as per the International Chamber of Commerce rules. The arbitration was held in London before a distinguished panel of Arbitrators : Arthur Marriott, Q.C. of the then International Law Firm of Dewey Leboeuf, Professor Errol Mendes of the University of Toronto, Canada and M.L. Bhakta of the Mumbai Law Firm of Kanga & Company.

Both parties participated in the Arbitration process through their counsel and filed pleadings and evidence and series of hearings were held in London before the Arbitral Tribunal.

7. The aforesaid Arbitration proceedings resulted into three Awards :

> (a) On 09/02/2006, the Arbitral Tribunal issued a partial Award (final as to liability-the "Liability Award") stating that the Master Agreement in fact gave rise to legally binding obligations and that E-City Entertainment had breached its obligation to lease all of the six (6) systems required under the Master Agreement. The Liability Award ordered an assessment of damages suffered by IMAX.

(b) On 24/08/2007, the Arbitral Tribunal issued an Award on the damages phase of the arbitration (the "Quantum 9/168 CARBP-414-18.odt Award") holding that E-City Entertainment was required to pay IMAX a sum of U.S. $ 9,406,148.31 (approximately INR 62,22,21,478.86) plus interest at 2% in excess of the prime rate in Canada on that amount, as provided for in the Respondent's contract.

(c) After further briefing on the issue of costs and interest, a Final Arbitral Award was declared on 27/03/2008 (the "Final Award") holding that Respondent, E-City Entertainment is liable to pay to the Petitioner IMAX (i) U.S. $ 1,118,558.54 (approximately INR 7,39,86,305.03) by way of interest up to and including 30/09/2007, (ii) U.S. $ 2,512.60 (approximately INR 1,66,215.69) per day from 01/10/2007 until payment of the Award amounting to U.S. $ 9,406,148.31 (approximately INR 62,22,21,478.86) (iii) costs by way of attorney's fees, export fees and related expenses in the sum of U.S. $ 84,789.21 (approximately INR 56,08,854.62) (iv) U.S. $ 400,000 (approximately INR 2,64,53,245.69) fixed by the ICC as the costs of the arbitration to the Respondent. The total amount payable by Respondent No.1 E-City Entertainment is U.S. $ 11,309,496.06 plus interest at the rate of U.S. $ 2,512.60 per say from 01/10/2007. As of 31/03/2018, the total amount payable by E-city Entertainment is U.S. $ 20,864,913.86.

8. In the sequence of events, it is noted that E-City Entertainment, on 23/07/2008 filed Arbitration Petition (L) No.525/2008 under Section 34 of the Act of 1996, raising a challenge to all the three Awards before this Court under Part I of the Act of 1996. It also took out an Application seeking 10/168 CARBP-414-18.odt condonation of delay of 20 days and sought permission to institute the proceedings for setting aside of the Awards.

On 10/06/2013, the Notice of Motion was allowed and the learned Single Judge of this Court, concluded that Part I of the Act of 1996 is applicable to the case and it is permissible to challenge the Foreign Award, by invoking Section 34 of the Act of 1996 and hence all the provisions of Part I of the Act are applicable and the Petition under Section 34, is maintainable in India.

9. IMAX challenged this interim order dated 10/06/2023 before the Apex Court by filing Civil Appeal No.3885/2017, when the finding rendered by the learned Single Judge came to be reversed, thereby dismissing the Petition filed by E-City Entertainment under Section 34 of the Act of 1996. The Apex Court recorded its finding as below :

"31. The significant determinant in each case is the agreement of the parties as to the place of arbitration and where in fact the arbitration took place. If in pursuance of the arbitration agreement, the arbitration took place outside India, there is a clear exclusion of Part-I of the Arbitration Act. In the present case, the parties expressly agreed that the arbitration will be conducted according to the ICC Rules of Arbitration and left the place of arbitration to be chosen by the ICC. The ICC in fact, chose London as the seat of arbitration after consulting the parties. The arbitration was held in London without demur from any of the parties. All the awards i.e. the two

partial final awards, and the third final award, were made in London and communicated to the parties. We find that this is a clear case of the exclusion of Part-I vide Eitzen Bulk A/S (supra), and the decisions referred to an followed therein.

32. The respondent contends before us that Part-I of the award was applicable, however they themselves stated the place of arbitration to be London.

It is pertinent to reproduce the relevant portion in the respondent's application before the ICC while objecting to the authority of the law firms representing the appellant. It stated :-

"The seat of this arbitration is London."

11/168 CARBP-414-18.odt Therefore, the two reasons for Part-I not being applicable are as follows :-

(i) Parties agreed that the seat may be outside India as may be fixed by the ICC; and

(ii) It was admitted that the seat of arbitration was London and the award was made there.

Therefore, there is no doubt that Part-I has no application because the parties chose and agreed to the arbitration being conducted outside India and the arbitration was in fact held outside India."

10. E-City Entertainment/Respondent No.1 on 27/11/2014 instituted Suit No.300/2015 and filed Notice of Motion No.1112/2016 against IMAX, inter alia, seeking damages and permanent injunction from taking action to enforce the Arbitral Award in New York Court.

On 02/02/2015 this Court rejected the Application for grant of ad-interim relief in the Notice of Motion against which E-City filed an Appeal before the Division Bench bearing No.169/2017, but since the Apex Court had allowed the Appeal of IMAX and held that Part I of the Act do not apply to foreign arbitrations and dismissed E-City's Arbitration Petition (L) No.525/2008, on 06/04/2017, E-City withdrew its Appeal and also withdrew its Suit No.300/2015 alongwith the pending Notice of Motion.

With these background facts, IMAX has filed Arbitration Petition under Section 47, 48, 49 of the Act of 1996, seeking enforcement of the three Awards in its favour under the provisions of Part II of the Act of 1996 and also praying for its execution in form of decrees.

I shall now briefly refer to the arguments advanced on behalf of the respective counsel for the contesting parties.

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COUNTER ARGUMENTS ADVANCED ON BEHALF OF THE

RESPECTIVE PARTIES.

ARGUMENTS ADVANCED ON BEHALF OF IMAX CORPORATION

11. Learned senior Counsel Mr.Aspi Chinoy has specifically impressed on the fact that the Arbitral Awards have already been confirmed by the Canadian Court and the resulting Canadian Judgment has been accepted as a New York Judgment, as he would submit that on 24/06/2011 IMAX had instituted proceedings in Superior Court of Ontario (Canadian Court) seeking recognition of the Awards and declaring them to be enforceable as Ontario Judgment under the applicable laws of Canada. According to him, the request was opposed by E-City Entertainment by marking its appearance before the Canadian Court and upon an extensive briefing, pre-trial discovery and a Court hearing before superior Court in Toranto, Canada, on 02/12/2011, the Canadian Court declared its decision confirming the Arbitration Awards and converting them into Canadian Judgment in favour of IMAX. It is pertinently pointed out, that while doing so the Court rejected E-City Entertainment's arguments that the Awards were not proper and enforceable. The Canadian Judgment was then recognized and converted into a valid United States Judgment by an order of the New York Supreme Court on 09/10/2015 with the following conclusion :-

> "Ordered that IMAX Corporation's petition, seeking an order pursuant to CPLR $ 5225 (b) directing respondents The Essel Group, Subhash Chandra, Atul Goel, Amit Goenka, Laxmi Goel, ZEE TV USA, Inc., Asia TV USA Ltd., and Natural Wellness USA, Inc. to deliver sufficient funds to satisfy the judgment, or directing respondents to deliver their personal property to the Sheriff of the county of New York to satisfy the judgment, and directing respondents to render an accounting of their corporate assets is denied.
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> This constitutes the decision, order and judgment of the court."
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> 13/168 CARBP-414-18.odt
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> 12. Mr.Chinoy while pressing the relief in the present Petition for recognition and enforcement of the Arbitral Award has justified the impleadment of Respondent Nos.2, 3 and 4 by advancing his submission, that Respondent No.1, in the midst of arbitration, began to divest the assets of E-City Entertainment in an unlawful manner, with a design to prevent IMAX from recovering the expected damages to be awarded and he would accuse E-City Entertainment of acting in breach of the provisions of Section 391 to 394 of the Companies Act, 1956, by failing to give the Petitioner notice of the demerger process, which could have enabled the Petitioner to appear before the Court and raise an objection, but this opportunity was denied to IMAX.
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> I will be dealing with this point and the response of Mr. Seervai to the said submissions at the appropriate stage.

13. It is also the argument of Mr. Chinoy that it is now a well settled position of law, that in case of a foreign award, the award holder is entitled to apply for recognition of the Award and seek its enforcement/execution as a decree by filing a common petition. He would place reliance upon the decision of the Apex Court in case of Government of India Vs.Vedanta Limited & Ors.1 and in particular, the relevant observation to the effect that the proceedings seeking recognition and enforcement of a foreign award has different stages; in first stage the Court would decide about enforceability of the Award having regard to the requirement of Section 47 and 48 of the Act of 1996, but once it is so decided, it would proceed to take further effective steps for execution of the Award and if the 1 (2020) 10 SCC 1 14/168 CARBP-414-18.odt desired object and purpose can be served in the same proceedings, there is no need to take two separate proceedings, as it would result in multiplicity of the proceedings.

Relying upon the said decision, it is the submission of Mr. Chinoy that recognition of Award is required to be first decided as against E-City Corporation i.e. Respondent no.1 and once the Court decides that it is enforceable, it shall be deemed to be a decree of the Court against Respondent No.1 and the Court shall take effective steps for its execution.

At this juncture, Mr.Chinoy clarify that Respondent Nos.2 to 4 are not joined in the Petition as Judgment-Debtors under Award, but they are impleaded as Respondents for execution/effective enforcement of the Award/Decree against Respondent No.1, who is accused of transferring the assets and properties in favour of Respondent Nos.2 and 3 in a systematic manner, so as to divest E-City Entertainment of its assets during the continuation of the Arbitration proceedings, by using the device of the Scheme of demerger. He has, therefore, urged that this is a fit case where corporate veil of Respondent Nos.2 and 3 shall be lifted and execution be permitted against them, as they are holding the improperly divested properties of Respondent No.1.

He would place reliance upon the decision of Division Bench of this court in case of Bhatia Industries & Infrastructure Limited Vs. Asian Natural Resources (India) Ltd. & Vitol S.A.2 to buttress his submission that the doctrine of piercing corporate veil is also applicable in execution 2 2016 SCC OnLine Bom 10695 15/168 CARBP-414-18.odt proceedings, when the Court from the material on record arrive at a conclusion that the Judgment-Debtor is trying to defeat the execution of the Award passed against him and he would submit that the the frontiers of the doctrine of lifting of corporate veil are unlimited and it must be applied depending upon the realities of the situation, as it aim at doing justice to the parties and the horizon of this doctrine is definitely expanding in the modern scenario.

14. Mr. Chinoy would rely upon the pleadings in the Petition, in an attempt to demonstrate that the Respondents had in a clandestine manner with a clear intention of defrauding Petitioners claim on the arbitral awards, divested assets E-City

Entertainment in favour of E-City Real Estate Pvt. Ltd. and E- City Project Construction Pvt. Ltd., by approaching the court under Section 391 to 394 of the Companies Act 1956, to demerge the valuable assets in favour of the two entities.

In the Petition, the sequence of events reflecting the scheme of arrangement between the E-City Entertainment and the Respondents nos.2 and 3 is specifically pleaded as a deliberate attempt of the Respondents to transfer a substantial portion of E-City Entertainment's assets by preventing IMAX from receiving notice of this transfer, so that it could not object to the fraudulent demerger.

Mr. Chinoy has specifically stressed on the timelines, by submitting that the Petitioner is now facing a scenario, as E- City Entertainment and Essel Group, have improperly tried to avoid compensating the Petitioner IMAX from the Arbitral Awards and the assets of E-City Entertainment were 16/168 CARBP-414-18.odt fraudulently stripped, when it became clear in the arbitration proceedings, that IMAX would receive damages. It is also alleged that the E-City Entertainment being a group company belonging to Essel Group is under common control and management of its promoters who control all the companies and have been successful in fraudulently siphoning the assets and funds from E-City Entertainment to defeat satisfaction of the Arbitral Awards.

According to Mr.Chinoy the group of companies should be treated as one concern, especially when a parent Company owns all the shares of the subsidiaries and exercise control over it and in the present case, the Respondent/E-City Real Estate and E-City Project Construction are the companies owned by the Essel Group Promoters and each of them should be treated as an alter ego of E-City Entertainment and shall receive a treatment as "single entity'.

The Demerger process from E-City Entertainment to E- City Real Estate and E-City Projects Construction, without giving notice to IMAX as the largest contingent creditor was a sham, according to Mr.Chinoy, as it was done with a fraudulent intention to place the assets of E- City Entertainment beyond the reach of IMAX.

According to the learned senior counsel, the sole reason for carrying out the purported corporate restructuring was to enable the management and/or beneficial owners of the E-City Entertainment to recommence their business after the insolvency of the E-City Entertainment and, according to him, IMAX was the largest creditor of E-City Entertainment and it has been put in a position, of it being unable to satisfy the 17/168 CARBP-414-18.odt Arbitral Awards. The demerged companies, E-City Real Estate and E-City Projects Construction including E-City Investments which is the ultimate holding company of the demerged companies are presently owning the assets of E-City Entertainment and are running the business undertakings which were previously part of E-City Entertainment, having left the creditor, the E-City Entertainment without any recourse, is his contention.

15. Mr. Chinoy has specifically invited my attention to the pleadings in the Petition to the following effect :-

> "63. The majority of the assets of the E-City Entertainment were transferred to the E-City Real Estate under Scheme 1 and to the E-City Projects Construction under Scheme 2. As a consequence of same, very less of the assets remained vested in E-City Entertainment. As against the highly depleted assets, E-City Entertainment had on its books of accounts a huge contingent liability which E-City Entertainment knew would become an actual Award. Indeed, the actual damages Award was rendered by the Arbitration Panel while the Scheme 2 demerger was pending, but the Demerger Petition was never amended to inform this Hon'ble Court. As shown by the facts discussed above, all of the Respondents and Directors of all the Respondents conspired against the Petitioner by draining E-City Entertainment's assets. Given the award of damages which the Arbitral Tribunal has awarded, as a result of the sham demerger Petitioner it will not be able to recover the full amount awarded from E-City Entertainment. Further, all the Respondents have conspired together to fraudulently transfer the assets of E-City Entertainment in favor of E-City Real Estate and E-City Projects Construction. E-City Real Estate and E-City Projects Construction are an alter-ego of E-City Entertainment and therefore should be treated as a "single entity"

due to the common control and management of all the Respondents. In view of the same, the corporate veil should be lifted and all of the Respondent companies should be treated as one concern and the Petitioner should be enabled to claim on that basis. In order to safeguard the interest of IMAX, it is requested to pass order and/or a declaration that the three Arbitral Awards - the Liability Award dated 09.02.2016, the Quantum Award dated 24.08.2007 and the Final Award dated 27.03.2008 are enforceable under the provisions of the Part II of the Arbitration Act and directions to be issued to enforce and execute the said Arbitral 18/168 CARBP-414-18.odt Awards as a decree in favor of the Petitioner and against all the Respondents."

Mr.Chinoy, on behalf of the Petitioner, has thus justified the recognition and enforcement of the three foreign awards as deemed decrees against Respondent No.1, under which an amount in excess of US $ 25.80 million is payable to the Petitioner.

SUBMISSIONS ADVANCED ON BEHALF OF RESPONDENT NO.1-E- CITY ENTERTAINMENT

16. The learned senior counsel Mr.Prateek Seksaria representing E-City Entertainment, Respondent No.1, has raised three prominent points in opposing the relief sought in the Petition and for countering the submission advanced by Mr.Chinoy and his submissions can be disintegrated as below :-

> a] The Petition is ex-facie barred by the Law of Limitation under Article 137 of Schedule 1 of the Limitation Act, 1973.

b] Section 47-49 of the Act of 1996, contemplate a two stage process viz. u/s 47 a Party applying for enforcement is required to produce evidence at the time of making application, whereas, Section 49 stipulate a legal fiction, where if the Court is satisfied that a foreign Award is enforceable, the Award is deemed to be a Decree of the Court, whereas, Section 48 deal with recognition of a Foreign Award. Therefore, Section 47-49 do not contemplate execution proceedings under Order XXI of the Code of Civil Procedure ("CPC" for short), which is not relatable to Section 47-49. In the present case, the Petitioner has admittedly filed a separate Application seeking execution under Order 21 Rule 11 of the CPC, being numbered as Commercial Execution Application No.49/2017 only against Respondent No.1 on 29/03/2017 and it is pending till 19/168 CARBP-414-18.odt date, being conscious that leave under Order 21 Rule 22 of the CPC is necessary before proceeding to execute the foreign Award, with the legal fiction of it being executable as Decree of the Court. In the Execution Application, a specific order is passed to the effect that the Execution Application and Chamber Summons filed by the Judgment Debtors will have to await the outcome of Arbitration Petition No.414 of 2018.

c] The transaction contemplated under the Master Agreement is violative of RBI Notification dated 03/05/2000 under the Foreign Exchange Management Act, 1999 ("FEMA"), the Foreign Exchange Management (Current Accounts Transaction) Rules, 2000 and is violative of public policy of India and, therefore, the Awards are unenforceable under Section 48 (2) of the Act of 1996.

d] In absence of an appropriate notice being given to Respondent No.1 of the appointment of the the Arbitral Tribunal as also the Arbitral proceedings, the recognition and enforcement of the Award should be refused under Section 48(1)(b) of the Act of 1996 and also under Section 48(1)(d) of the Act as the composition of the Arbitral Authority and the procedure followed by the Arbitral Tribunal was contrary to and not in accordance with the Agreement of the parties i.e. Rules of Arbitration of the International Chamber of Commerce (applicable with effect from 01/01/1998).

e] The suppression and false statement made by the Petitioner that the Petitioner was unaware of the demerger scheme when it approached the Court in Ontario for recognition of the Foreign Award.

17. In support of his submission that the Petition is barred under Article 137 of Schedule 1 of the Limitation Act, 20/168 CARBP-414-18.odt Mr.Seksaria has urged, that the Declaratory Award was passed by the ICC Tribunal on 09/02/2006 and the partial Final Award on jurisdiction and quantum is dated 24/08/2007, whereas the Final Award is passed on 27/03/2008.

By submitting that in Para 37 of the Petition it is asserted that the Award must be challenged within 28 days of its declaration and hence, according to him, the foundational fact as stated in the Petition for determining the starting point of the limitation is not in dispute.

According to him, E-City filed a Petition challenging the Award under Section 34 of the Act of 1996, after the prescribed period and a Notice of Motion was filed seeking condonation of delay, with an emphasis being laid on the fact that filing of Petition under Section 34 does not amount to stay of the Award, either prior to 2015 amendment in the Arbitration Act, or thereafter.

By virtue of Article 137 of the Schedule to the Limitation Act, 1963, the period of limitation for seeking recognition and enforcement of the Award under the Act had lapsed on 27/03/2011, as according to Mr.Seksaria, the limitation in terms of the Judgment of the Supreme Court, is 3 years.

18. By inviting our attention to the sequence of events, when this Court condoned the delay in the Notice of Motion filed by E-City, in a Petition filed under Section 34, a Special Leave Petition was filed by IMAX before the Apex Court, challenging the order dated 10/06/2013 and though the Apex Court stayed the proceedings under Section 34 of the Act, and it is on 21/168 CARBP-414-18.odt 10/03/2017, the proceedings filed by E-City under Section 34 were held to be not maintainable.

In these background facts, this Petition being filed on 02/04/2018 for execution, according to Mr. Seksaria, is filed beyond the period of limitation.

According to Mr.Seksaria, the learned single Judge of this Court, while deciding the preliminary issue of limitation on 13/11/2019 had declared that the period of limitation available was 12 years, but it is his submission that the order passed by the learned Single Judge is wiped from its existence and in any case does not operate as res judicata or issue estoppel. Since mere filing of Petition under Section 34 did not operate as automatic say of an Arbitration Award, Mr. Seksaria would submit that E-City Entertainment filed Special Leave Petition against order dated 13.11.2019 before the Supreme Court, which granted interim order staying the Judgment dated 13/11/2019, on 10/01/2020.

However, subsequently the three-Judge Bench of the Apex Court in case of Vedanta Ltd. (supra), took note of the order of the learned Single Judge dated 13/11/2019 in the case of IMAX Corporation Vs. E-City Entertainment (L) Pvt. Ltd. and concluded that the Foreign Award was a Decree and, therefore, Article 136 of the Limitation Act is applicable for its enforcement. As a consequence of this decision, the Special Leave Petition filed by E-City was dismissed by the Apex Court and even the Review Petition was dismissed on 18/10/2022.

19. In this factual background, it is the submission of Mr.Seksaria that the issue of limitation is a pure question of 22/168 CARBP-414-18.odt law and hence it do not operate as res judicata or an issue estoppel since it is founded on principle of public policy. He would place reliance upon the decision of Apex Court in the case of Pundlik Jalam Patil (Dead) by LRs Vs. Executive Engineer, Jalgaon, Medium Project & Anr .3 as well as decision in the case of Manindra Land & Building Corporation Ltd. Vs. Bhutnath Banerjee & Ors.4. It is his specific contention that the issue of limitation goes to the root of the matter and if an Application is barred by Law of Limitation, the Court do not have any authority or jurisdiction to entertain such an Application and since the issue of limitation is an issue affecting jurisdiction, an erroneous decision of the court would not operate as res judicata, at a subsequent stage between the parties, because it is considered to be conclusive,

as it will assume status of a special rule of law.

In support of his contention that no erroneous decision on a pure question of law which has been expressly overruled, and set at naught by the Supreme Court can be argued, as being binding inter party , he would place reliance upon the decision in case of Mathura Prasasd Bajoo Jaiswal & Ors. Vs. Dossibai N.B. Jeejeebhoy5, and in the case of Canara Bank Vs. N.G.Subbaraya Setty & Anr.6.

It is also the contention of Mr. Seksaria that the Court in any case has an inherent power, coupled with the duty to recall an erroneous order and or to rectify such an error and though in the realm of law, the Courts and Statutes lean in favour of finality of the decision, exceptions; both statutory and 3 (2008) 17 SCC 448 4 AIR 1964 SC 1336 5 (1970) 1 SCC 613 6 (2018) 16 SCC 228 23/168 CARBP-414-18.odt judicially, have been carved out to correct mistakes when there is no statutory provision, or rules framed in that regard.

The learned counsel would recall the decision of the Apex Court in case of S.Nagaraj & Ors. Vs. State of Karnataka & Ors.7, to support his submission that the fundamental principle is, that justice is above law and the Court is not precluded from recalling its own order even suo motu or rectifying the error, if it is satisfied that it is necessary to do so.

In any case, according to Mr. Seksaria, justice must prevail and no principle of law shall create fetter upon the Court when squarely the matter in dispute, is dependent upon interpretation of the provision of law concerning the power to grant relief and to possess proper jurisdiction.

According to him, the issue of limitation will have to be decided in accordance with the law laid down by the Supreme Court in Vedanta Limited(supra) and the only inevitable conclusion is, that the Petition is hopelessly barred by Law of Limitation.

In addition, it is also the submission of Mr. Seksaria that the Petition is hopelessly barred in view of the law laid down in Hindustan Construction Company Ltd. & Anr. Vs. Union of India & Ors.8 and Vedanta Limited (supra) and it is a matter of public policy, for the interest of the State, not to entertain the proceedings barred by Law of Limitation ipso facto and ipso jure and it would fall within the realm of public policy of India within Section 48(2) of the Act.

7 1993 Supp.(4) SCC 595
8 (2020) 17 SCC 324

20. Focusing on his second objection, Mr.Seksaria would submit that since the Petitioner had admittedly filed separate application seeking execution only against Respondent No.1, which is pending, the present Petition to the extent that it seek reliefs which are in the nature of execution, are untenable under Section 47-49 of the Act of 1996 as it is his contention that in the said Application , the Respondent has a right to raise all such objections, which are permissible to be raised under the Code of Civil Procedure and this right cannot be taken away just by filing a Petition under Section 47-49 from restricting it to the grounds under Section 48 or by the mere recognition of an Award or by legal fiction, 'Being deemed to be Decree of this Court'.

Reliance is placed upon the decision of the Bombay High Court in case of TOEPFER International Asia Pvt. Ltd. Vs. Thapar Ispat Limited9 Urging that though an Execution Application is not continuation of a Suit, but is separate and independent of a Suit, it is argued that the procedure contemplated under Section 47-49 of the Act 1996 cannot be used as Execution Proceedings. According to E-City, the Petitioner is seeking attachment of properties by the present Application to which an objection under Order 21 Rule 58 can be raised and it would be tried as if it was an independent Suit and in any case, no prejudice is caused to the Petitioner if it is relegated to the execution being availed in the previously filed proceedings, if the Court recognize the Award and permit enforcement.

9 2000(2)Mh.L.J. 331

21. While advancing his submission about the Master Agreement being violative of RBI Notification, Foreign Exchange Management Act, 1999 as well as the Foreign Exchange Management Rules, 2000, Mr.Seksaria has elaborated that the Agreement contemplated entering into an execution of Lease Agreements post negotiations in good faith on or before 30/11/2000, as it was in the background of Final Letter Agreement/Master Agreement being entered between IMAX and E-City to open and develop Twenty (20) theatres in India with E-city's initial commitment to lease six (6) IMAX systems from IMAX.

Further, according to the learned senior counsel , clause 14 of the Agreement, expressly stipulated that the transaction is contingent upon approval from RBI and as it contemplated payment of the non refundable deposit of USD 300,000 towards initial rent, the nontransferable trademark license fee, consultancy fees etc. and each of the remittances entailed prior approval of RBI/Government of India on account of the then applicable RBI Notification dated 03/05/2000 under FEMA and Rules of 2000.

Mr.Seksaria has taken me through the list of events and has canvassed that though E-City sought approval from RBI about the remittances required to be made for lease of capital equipment and other sums, it never received the requisite approval and unless and until permission was accorded by Reserve Bank of India, the proposed transaction was not a lawful contract and did not amount to an Agreement within the meaning of Section 10 read with Section 23 of the Contract Act, 1872.

26/168 CARBP-414-18.odt When IMAX issued a notice of termination of exclusivity to Respondent No.1 and asserted that they were at liberty to pursue sale and/or lease of IMAX systems, and notice of default was issued by it, and in the statement of defence, E- City adopted a specific stand that the terms of the Agreement contemplated that it was contingent upon E-City receiving RBI approval.

In the liability Award passed by ICC in favour of IMAX, E-city's submission on RBI approval was noted by the Tribunal and in its declaratory Award it specifically noted that there was no hint or suggestion in the letters that it was other than a deal done, but according to Mr.Seksaria, the Tribunal rendered a finding against it, however, in Statement of Defence in the post liability phase also E-City reiterated its stand that it was obliged under Foreign Investment Laws to obtain approval of RBI as per Clause 14 of the Agreement and no such approval was received, despite request and a specific stand was adopted that the execution and/or implementation of any Lease Agreement would have been illegal and unenforceable under the law of the place of performance, viz. India and, therefore, unenforceable as a matter of Singapore Law being the law applicable.

22. My attention is also invited to the evidence that has come before the Tribunal though it is the grievance of Mr. Seksaria that the partial Final Award on jurisdiction and quantum passed by the ICC, Tribunal on 24/08/2007 did not take into consideration the material issue raised i.e. without RBI approval the Agreement was unenforceable and illegal in India.

27/168 CARBP-414-18.odt The stand of the E-city is very specific, being the Agreement to be void, since it is prohibited under FEMA and thus the Awards in favour of the Petitioner and against E-City are unenforceable under Section 48(2) of the Act of 1996, being violative of public policy of India.

23. I have been taken through the provisions of FEMA, its object being to protect Indian economy from loss of foreign exchange and in not permitting foreign exchange to be repatriated outside India, in until certain mandatory conditions are satisfied and it is in the scheme of the statute, it is submitted that unless permission was accorded by RBI, the subject Agreement did not constitute lawful contract under the Indian Contract Act, 1872, as despite applying for permissions, such permissions were never granted.

Mr. Seksaria has invited my attention to the following decisions in support of his contention, that such a transaction is against the fundamental policy of India :-

(i) National Agricultural Co-Operative Marketing Federation of India Vs. Alimenta S.A.10

(ii) Asha John Divianathan Vs. Vikram Malhotra & Ors.11

24. In addition, Mr. Seksaria has also stressed upon another leg of public policy being "fair hearing" and it is his contention that a party, in an adversery system is required to challenge in cross-examination the evidence of any witness of opposing party, if he wishes to submit to the court that evidence should not be accepted on that point, which is a matter of fairness and 10 (2020) 19 SCC 260 11 (2021) 19 SCC 629 28/168 CARBP-414-18.odt this ensure that the witness is given an opportunity to explain his or her evidence if is to be so impugned.

Reliance is placed upon the observations of the Supreme Court of England in TUI UK Ltd. vs. GRIFFITHS12 dated 29.11.2023 and it is submitted, that in the facts of the present case there is a denial of justice and fair hearing since the Arbitral Tribunal has conducted the arbitration process irrationally by ignoring and not determining the central issue, which goes to the root of the matter, i.e. the mandatory prior RBI approval and it is submitted that the Tribunal has completely missed the issue by not rendering any finding on the issue of enforceability of the Agreement and the prohibition in law, as it required mandatory RBI approval.

Submitting that the Arbitral Tribunal was not alive to the necessity of deciding the issue whether the Agreement was prohibited by law and has presumed and opined in the quantum award by recording the following in Para 56 :-

> "Accordingly, the Tribunal finds that there is no evidence that there would have been difficulty with the RBI giving the necessary permission."

One more Judgment on which reliance is placed is by the Division Bench of Calcutta High Court in AEG Carapiet vs. A.Y. Derderian 13, in order to support the contention that if no cross-examination is allowed, then the case is accepted as it leads to miscarriage of justice, first by springing surprise upon the party, when it has furnished the evidence of its witness and when it has no further chance to meet the new case made, which was never put up and secondly because such subsequent testimony has no chance of being tested and corroborated.

12 (2023) UK SC 48
13 AIR 1961 Calcutta 359

29/168 CARBP-414-18.odt

SUBMISSIONS ADVANCED ON BEHALF OF RESPONDENT NOS.2 AND 3

25. Mr.Seervai, the learned senior counsel representing Respondent Nos.2 and 3, has assertively raised a preliminary objection about the impleadment of Respondent No.2, E-City Real Estates Private Limited and Respondent No.3, E-City Projects Construction Pvt. Ltd., on the ground that they are neither party to the contract nor they were party to the arbitration proceedings and finally on the ground that they are not even party to the award.

In the wake of the scheme of Part II of the Arbitration and Conciliation Act, 1996 and, in particular, Sections 44 and 45 and Sections 47 and 48, it is his specific submission that the proceedings for recognition and enforcement of Award cannot lie against Respondent Nos.2 and 3. Emphasising upon the cardinal principle underlying the aforesaid provisions, it is his contention that the award is against Respondent No.1 and a bare look at Section 48, which has set out the conditions for enforcement of foreign awards, the emphasis is on the words, "party against whom it is invoked" and the enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court a proof of circumstances set out in the provision and in the wake of the argument advanced by the learned senior counsel Mr.Chinoy, Mr.Seervai has described the impleadment of Respondent Nos.2 and 3 as nothing but misuse of the proceedings, as Respondent Nos.2 and 3 are no less than a stranger, as they were not party to arbitration proceedings nor there exists an Award against them.

30/168 CARBP-414-18.odt Since the Award is only against Respondent No.1-E-City Entertainment (I) Pvt. Ltd., its enforcement and recognition shall only be restricted to the party to the award, is his emphatic assertion.

Mr.Seervai has placed reliance upon the relevant observations of the Apex Court in the case of Gemini Bay Transcription Private Limited & Anr. Vs. Integrated Sales Service Limited & Anr.14, concluding that a non-signatory's objection cannot possibly fit into Section 48(1)(a) when read alongwith Section 44 of the Act of 1996, as Section 48(1)(a) refers only to the "parties" to the agreement, referred to in Section 44(a) and thus, according to him, to include non- parties to the agreement by introducing the word "person" would run contrary to the express language used by the statute.

Relying upon this decision, Mr.Seervai has submitted that Chamber Summons was taken out for deletion of Respondent Nos.2 and 3.

26. One another point on which Mr.Seervai has focused his attention, in contesting the claim in the Petition is, as regards the attack on the demerger orders, which according to him, are passed by the court of competent jurisdiction and it is his contention that the Petitioner is attempting to raise a collateral challenge to the order of demerger passed by the competent Court and this is not a permissible course of action, since IMAX has sought to assail the demerger orders, by submitting that it is not required to challenge the said orders 14 (2022) 1 Supreme Court Cases 753 31/168 CARBP-414-18.odt to sustain a tracing action in respect of assets of E-City Entertainment, that have been alleged to be transferred to the Respondent Nos.2 and 3.

According to the learned senior counsel, in absence of a direct challenge to the demerger orders, it is not open to IMAX to chase the assets that stood transferred to the Respondents with the imprimatur of the Company Court and that too on some unsubstantiated ground that the demerger was fraudulent. It is also clarified that in the wake of the demerger orders, the assets that stood transferred to the Respondents also carried with it respective liabilities and this submission is the heart of his case.

Despite conceding to the fact that the Company Court is a Court of competent jurisdiction, still inviting this Court to unravel the demerger process and effectively invalidate the orders on the ground of alleged fraud, which is also hanging in air, according to Mr.Seervai, the Petition alongwith the grounds set out, is untenable. It is also his submission that though the pleadings in the Petition are based on Group Company Doctrine, but during the course of argument, the said stand is given up, in the wake of the prevailing situation.

Mr.Seervai would place reliance upon the decision of the Madras High Court in the case of Union of India & Ors. Vs. Ponni Sugars (Erode) Limited15 and, according to him, when a similar position emerged before the Madras High Court, it has categorically held that, in absence of any challenge to the scheme sanctioned by the competent Company Court, the appellants cannot take a stand in the appeal that the scheme of 15 (2015) 5 MLJ 434 32/168 CARBP-414-18.odt arrangement arrived at between the companies is only to avoid the repayment of loans. Laying his emphasis on the argument that a decision rendered by the competent court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so, it would result in confusion and chaos and the finality of the proceedings would cease to have any meaning, he would draw benefit from the decision in Inderjit Singh Grewal Vs. State of Punjab & Anr.16.

27. Being extremely critical about the stand adopted by IMAX, that demerger is a "sham" and by referring it as "conspiracy", he would respond by submitting that these words are not to be used as magic mantras or catch-all phrase, to defeat or nullify the effect of a legal situation and in absence of sufficiency of grounds, it is not open for IMAX to claim that the demerger orders are nullity in order to visit liability from the Respondents. Further, according to him, an order sanctioning scheme of arrangement operates as judgment in rem, which is good against the whole world and not only bind the parties to the arrangement, but also to the third parties and strangers. By drawing the principle laid down in In re Europlast India Ltd.17, which has pronounced that the scheme of arrangement "represents a contract sanctified by a Courts' approval between the company and the creditors and/or members of the company....sanction of the Court operates as judgment in rem", Mr.Seervai described the argument advanced on behalf of the Petitioner to be monstrously egregious, which therefore must meet rejection. It is his 16 (2011) 12 SCC 588 17 2010 Supp BomCR 425 33/168 CARBP-414-18.odt specific contention that if the Petitioner is submitting that it is not seeking recognition in Respondent Nos.2 and 3, since no role is attributed to them, but despite this, they are foisted with the consequences.

Placing reliance upon paragraphs 42 to 50 of the Petition, where the chronology of events is set out for depicting the deliberate attempt of the Respondents, to have in a clandestine manner transferred a substantial portion of E-City Entertainment assets and further to prevent IMAX from receiving notice of this transfer, so that it could have objected to this fraudulent de-merge, it is the argument of Mr.Seervai that what is argued before the Court is contrary to what is pleaded. By inviting the attention of the Court to the pleadings in paragraphs 58 and 59, by referring the Respondents as a "Group of Companies" and pleading that it should be treated as one concern, since the Respondents, E-City Real Estate and E- City Projects Construction are companies controlled by the Essel Group Promoters and were used to transfer assets from E-City Entertainment to defeat IMAX's liability, under the arbitral awards, with a specific pleading that they should be treated as an alter-ego of

E-City Entertainment, he would place reliance upon the decision of the Apex Court in the case of Cox and Kings Limited Vs. SAP India Private Limited & Anr. 18. Probably realizing this position, according to Mr.Seervai, Mr.Chinoy has now orally argued before the Court that it is chasing Respondent Nos.2 and 3 only, since it finds the assets of E-City Entertainment in the hands of E-City Real Estates and E-City Projects Construction.

18 (2024) 4 SCC 1

28. In the course of his arguments, Mr.Seervai has taken us through several pronouncements from the Apex Court and the High Courts in support of his submission that IMAX's allegations of fraud are without merits and it is not open for it to now allege that the order of demerger of the competent Court shall be ignored and overreached, since if there was any fraud, it was open to IMAX to challenge the demerger orders and having not done so, by way of collateral proceedings, the attack is now mounted. In addition to the aforesaid argument, Mr.Seervai has also raised a point that the Petition is barred by limitation and has referred to the earlier order passed by this Court, when the issue of limitation was agitated by E-City Entertainment and the proceedings were disposed off by order dated 13/11/2019 by the learned Single Judge, by recording a finding that the enforcement/execution proceedings were within limitation on account of the application of Article 136 of the Schedule to the Limitation Act, 1963 and this order was assailed before the Apex Court, when the challenge was not entertained and the review thereof was also dismissed on 16/08/2023.

It is specifically urged by Mr.Seervai that in the present proceedings, IMAX has failed to assert as to when the cause of action arose for it against the Respondents and when it derived knowledge of the said cause of action, since the pleadings in the Petition are completely silent on this aspect and, therefore, it is not open for the Court to decide such an important issue in absence of pleadings, as it would defeat the purpose of the Limitation Act, 1963. It is his specific contention that the fact of demerger was known to IMAX as far 35/168 CARBP-414-18.odt back as June 2011 and, therefore, this ought to have been reckoned as starting point for limitation insofar as the group companies are concerned, but institution of the present proceedings in April 2018, which is beyond the period of three years of limitation, the proceedings must fail.

SUBMISSIONS ADVANCED ON BEHALF OF RESPONDENT NO.4.

29. Mr.Sharan Jagtiani, learned senior counsel, representing Respondent No.4, a company incorporated on 29/09/2000 with its primary objective being to invest, hold and acquire shares and other securities in other companies, with Respondent Nos.1 to 3 being some of such companies, has also opposed the Petition, with reliefs sought therein.

According to Mr.Jagtiani, when the arbitration proceedings commenced between the Petitioner and Respondent No.1 alone, on 16/06/2004, the Petitioner never sought impleadment of Respondent No.4. In the scheme of arrangement approved by the Bombay High Court, being "Scheme 1" when Respondent No.2 was de-merged from Respondent No.1 and "Scheme 2", when Respondent No.3 was de-merged from Respondent No.1, Respondent No.4 was a shareholder in Respondent No.1 and it became a shareholder in the resultant entities i.e. Respondent Nos.2 and 3.

Mr.Jagtiani has placed before the Court the shareholding pattern of Respondent No.1 pursuant to the demerger, which reflect that Respondent No.2 possessed 62.875% of shareholding, whereas Respondent No.4 had 37.121% shareholding in Respondent No.1, whereas one Amit Goenka had the shareholding of 0.004%.

36/168 CARBP-414-18.odt

30. It is the specific stand of Respondent No.4 that is not a party to the arbitral proceedings and its impleadment in the Petition is only founded on the claim of IMAX in paragraph 41 of the Petition.

In addition, in paragraph 55, with reference to E-City Investments, it is the pleaded case of the Petitioner that Respondent No.4-E-City Investments is the ultimate holding company of all the three companies viz. E-City Entertainment, E-City Real Estates and E-City Projects Construction and Respondent No.4, E-City Investments is in turn controlled and owned by the promoters of the Essel Group, Mr.Laxmi Goel, Mr.Atul Goel, Dr.Chandra, Mr.Arpit Goel, Mr.Ankit Goel and Mr.Charu Goel.

He has reproduced a table showing the group companies and their holding, which I reproduce :-

> : List of Related Parties of Respondent No.4, E-City Investments :
>
> Name of the Related Party Relationship R1- E-City Entertainment Company Private Associate Company Limited R2-E-City Real Estate Private Limited Subsidiary Company R3- E-City Projects Construction Private Subsidiary Company Limited : Shareholding Pattern of Respondent No.4 E-City Investments:
>
> Name of Shareholder No. of Shares % of holding Essel Group Promoter Mr.Atul Goel 1,546,623 19 Essel Group Promoter Mr.Laxmi Goel 26,15,637 32.13 Essel Group Promoter Mr.Arpit Goel 11,14,351 13.69 Essel Group Promoter Mr.Charu Goel 1,546,623 19 Essel Group Promoter Mr.Ankit Goel 13,16,885 16.18 37/168 CARBP-414-18.odt

31. My attention is also invited to some more pleadings, which I will be reproducing when the rival contentions are dealt with. However, at present, I must record the submission of Mr.Jagtiani, who has invited my attention to Chamber Summons No.100 of 2019, seeking deletion of Respondent No.4, which received a reply from the Petitioner, reiterating that all the Respondents are part of Essel Group of Companies and they have conspired to fraudulently transfer the assets of

Respondent No.1 to Respondent Nos. 2 to 4 during the pendency of the arbitration proceedings and all the Respondents should be treated as single entities.

Mr.Jagtiani has joined hands with Mr.Seervai in submitting that under Part II of the Arbitration and Conciliation Act, 1996, foreign awards are only binding upon the parties to the arbitration proceedings and he has taken me through the whole scheme of Part II and the position that emerges therefrom, specifically by reading of Section 46, which categorically stipulate that the foreign award would be binding for all purposes on the persons as between whom it was made and Section 49, which casts an obligation upon the Court to satisfy itself that the foreign award under consideration before it, is enforceable under Chapter II and this would necessarily contemplate that the Court would have to satisfy itself that exception to the enforcement, as set out in Section 48(1) of the Arbitration Act are not attracted to the foreign award, since otherwise the Court would be bound to refuse enforcement.

Mr.Jagtiani find a clear indicator of the legislative intent, to recognise the foreign award as binding only on the parties 38/168 CARBP-414-18.odt between whom it is made, by comparing the language of Section 46 (Part II) and Section 35(Part I) of the Act of 1996 and he would submit that whilst the finality ascribed to the foreign award under Section 46 is only between the parties to the arbitration proceeding, the finality ascribed to awards under Part I is significantly wider, as the awards made thereunder are held to be final and binding on not only the parties to the arbitration proceedings, but also on the parties claiming under them.

Mr.Jagtiani would also place reliance upon the decision of the Apex Court in the case of Gemini Bay Transcription Private Limited (supra), where the issue of enforceability of the foreign award against the parties, though non-signatories to the arbitration agreement but parties to the arbitration proceedings were analysed threadbare and he has drawn my attention to the relevant paragraphs of the said law report, with special emphasis on paragraphs 43 and 50.

A decision of the learned Single Judge (Coram : R. I. Chagla, J.) in the case of Mitsui OSK Lines Ltd. (Japan) Vs. Orient Ship Agency Pvt. Ltd. & Anr. 19 is also relied upon, where an execution application, seeking execution of foreign award was sought to be amended, in order to implead third parties to the execution proceedings, though they were not party to the arbitration proceedings and the basis to implead them being, that monies were purportedly siphoned off in favour of these third parties, who were the related entities.

This Court, according to Mr.Jagtiani, dismissed the Chamber Summons, by concluding that the Respondents 19 2020 SCC Onlline Bom 217 39/168 CARBP-414-18.odt sought to be added, not being parties to the foreign arbitration proceedings and/or foreign award, the Chamber Summons appeared to evade the provision, as they were not parties as envisaged under Section 48 of the said Act, as the foreign award was enforceable only against the Judgment Debtor, who was the party to the arbitration agreement and against whom the award was passed and the foreign award cannot be enforced against the additional Respondents, who are neither parties to the arbitration agreement nor to the award.

32. The learned senior counsel representing Respondent No.4 has also relied upon the most fundamental principle of company law, being that the company is an independent legal entity distinct from its shareholders and any claim against the company must be made against the company itself and not the shareholders, whose liability is restricted to the value of shares in the company and, therefore, the shareholder cannot be made made liable for company's debts, subject to certain limited exceptions.

The principle, according to Mr.Jagtiani, about the fundamental distinction between the shareholder of a company and the company itself, which was expounded in Salomon Vs. Salomon & Co. Ltd. 20 is firmly embedded in Indian jurisprudence and as time and again being paraphrased through various decisions and reliance is placed upon the observations in the case of Tata Engineering and Locomotive Co. Ltd. & Ors. Vs. State of Bihar & Ors.21 20 [1987] AC 22 21 AIR 1965 SC 40 40/168 CARBP-414-18.odt

33. Necessity of piercing the corporate veil and making those behind the veil i.e. shareholders liable for the debts of the company, according to Mr.Jagtiani, must meet a very high threshold and the standard to be met for permitting piercing the corporate veil as laid down in Balwant Rai Saluja & Anr. Vs. Air India Limited & Ors.22 is once again relied upon by Mr.Jagtiani. In addition, he has also placed reliance upon the decisions of the Apex Court in Indowind Energy Ltd. Vs. Wescare (India) Limited & Anr.23 and Vodafone International Holdings BV Vs. Union of India & Ors. 24, where the parameters of piercing the corporate veil are set out.

Even Mr.Jagtiani has reiterated the argument that fraud is not the magic mantra to vitiate any transaction, as fraud must be pleaded in detail, with material particulars being divulged as Order VI Rule 4 of the Code of Civil Procedure, 1098 requires a party to give material particulars in cases, where misrepresentation, fraud is alleged and in fact, several courts from time to time have held that the threshold for meeting a case of fraud is extremely high, as in any proceedings, not only the plea of fraud is required to be specifically pleaded, but also proved.

The principle laid down in Bishnudeo Narain & Anr.. Vs. Seogeni Rai & Anr.25, followed the decision in the case of Union of India Vs. Chaturbhai M. Patel & Co. 26, is invoked by Mr.Jagtiani.

22 (2014) 9 SCC 407 23 (2010) 5 SCC 306 24 (2012) 6 SCC 613 25 AIR 1951 SC 280 26 (1976) 1 SCC 747 41/168 CARBP-414-18.odt

34. Referring to the observations of the Apex Court in the case of Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc. & Ors.27, when the Hon'ble Supreme Court pronounced upon an issue as to whether a party could invoke arbitration in respect of an arbitration agreement to which it was not a signatory; and if it can do so, the parameters within which such invocation would be invalid, Mr.Jagtiani has clarified that Chloro Controls India Pvt. Ltd. was rendered in the context of an expressed statutory provision in Part II to extend the arbitration agreements to non-signatories, namely, Section 45 of the Act. According to him, the Apex Court permitted impleadment of the party at the pre-arbitration stage. However, it was reiterated that ordinarily an arbitration agreement takes place between the persons, who are the parties to the arbitration

agreement and the substantive contract underlining the agreement. However, only in certain circumstances, a non-signatory should be subjected to arbitration, without prior consent, but it would be an exceptional case. However, by the subsequent decision in the case of Cox and Kings Ltd. (supra), it was clarified that principle of piercing the corporate veil cannot be the sole basis for impleading a non-signatory under the Group of Companies Doctrine and it would require more, such as the common intention of the parties to participate in the transaction.

In any case, if the high burden to subject a non-signatory to arbitration has been met, the consequence would be that the non-signatory participates in the arbitration and has the opportunity to present its case.

27 (2013) 1 SCC 641

35. By inviting my attention to the position of law emerging from the various authoritative pronouncements, Mr.Jagtiani has submitted that Respondent No.1 was incorporated in the year 1999 and the Master Agreement was entered with the Petitioner on 28/09/2000, with a limited object to be achieved and it was essentially a holding company, holding the shares of various entities. On the date on which the Master Agreement was entered into, Respondent No.4 was not even in existence and, therefore, it is not a signatory thereto. Until the Enforcement Petition was filed, it was not made a party to any of the proceedings instituted by the Petitioner, including its application for recognition of Awards, which was filed before the Supreme Court of Justice Ontario, Canada as well as the application for enforcement filed before the Supreme Court of the State of New York and also the Execution Application No.49 of 2017, but it is for the first time, Respondent No.4 is impleaded in the proceedings on the pretext that Respondent No.4 hold shares in Respondent Nos.1 to 3 and the overlapping identity of the Directors of Respondent No.1 and Respondent No.4 by holding it responsible for the alleged fraudulent act of moving assets from the Respondent No.1 to Respondent Nos.2 and 3, by way of scheme of demerger and by piercing the corporate veil of Respondent No.1 and Respondent No.4, an attempt is made to make it liable for debts of Respondent No.1.

By inviting my attention to the pleadings in the Petition pertaining to the purported fraud attributed to Respondent No.4, Mr.Jagtiani has submitted that the case of the Petitioner merely rest on bare statement that there was fraud and there is reference to the commonality of the shareholding and 43/168 CARBP-414-18.odt Directorship and, therefore, Respondent No.4 should be made liable. But, since the Petitioner has failed to discharge the burden of establishing fraud, against the shareholders of Respondent No.4's promoters, which is more essential in post- award proceedings, the Court shall not oblige it by piercing the veil only on the basis of stray, bare and unsubstantiated averments. It is therefore pleaded by Mr.Jagtiani that the Chamber Summons filed by Respondent

No.4 should be allowed and its name be struck off from the Petition.

POINTS FALLING FOR CONSIDERATION IN THE WAKE OF THE RIVAL CONTENTIONS ADVANCED :-

36. From the rival contentions advanced for the contesting parties through the respective counsel, I can infer the genesis of the dispute, since IMAX in its statement of case in arbitration, alleged breach of agreement dated 28/9/2000 and sought recovery against Respondent, E-City Entertainment (L) Pvt Ltd ("E-City") alleging its breach.

The Master Agreement, a detail 11 page agreement set forth a comprehensive plan under which E-City was awarded exclusivity to become IMAX's primary business partner of the large and lucrative Indian Market. In return, E-City committed to lease at least six theatre systems from IMAX at agreed upon prices and dates with a possibility of leasing 14 additional IMAX systems. E-City for a period of time abided by its commitment, but faced the accusation that it took advantage of its exclusivity rights. However, in 2003, when it informed IMAX that it no longer wanted to pursue the Master Agreement, for internal financial reasons and it was scaling back on the development of the family fund centres throughout 44/168 CARBP-414-18.odt India in which it had intended to place IMAX systems, IMAX was aggrieved and alleged default of all of their initial payment obligations under the terms of the Master Agreement, which contemplated E-City to have finished making payments for initial rent for all six systems to IMAX by 15, December 2004, but failed to do so.

IMAX has specifically pleaded "Notably, this letter noted that although certain terms of the Master Agreement were modified all other terms and conditions contained in the Master Agreement remain in full force and effect, clearly indicating that both parties viewed the Master Agreement as creating valid and enforceable obligations."

A reference is also made to the agreement entered into on 20/12/2000 between IMAX and Electronic Media Limited (EML) being a Purchase Agreement and a Maintenance Agreement for IMAX Theatre Systems and it alleged that IMAX and EML, parts of the same group as E-City, had agreed that the agreement would be terminated once IMAX and E- City executed similar agreements, which were never entered into.

A claim was made in damages in US Dollars expressed to be "simply the amount that would have been paid to IMAX by E-City, had E-City fully performed its obligations under the contract", and the breakdown of the net owed was set out in paragraph No.36 of the Statement of Claim.

IMAX supported its claim with the following pleading :-

> "36Accordingly, had E-City fully performed its rental obligations under the Master Agreement, IMAX would have realised at least $21,222,920 in revenue over the 20 year term of the leases called for under the Master Agreement, obligations which would, by now, have 45/168 CARBP-414-18.odt been largely performed. E-city should be directed to make payment of this amount to IMAX in order to make IMAX

> fully whole for its breach of its obligations. In contract, IMAX fully performed and complied with its exclusivity obligations."

An Award of damages was sought in this amount, together with contractually agreed interest at the prime commercial rate of interest in Canada plus 2% per annum from the date of the Award."

37. E-City, which was the only Respondent before the Arbitral Tribunal, in its Statement of Defence, defended its stand by pleading as below :-

> "(a) not a legally binding contract as it was not formed with any intention to create binding legal relations and was therefore not enforceable in law or equity by the Claimant against the respondent;
>
> (b) was an illusory contract that did not give rise to any enforceable legal obligations; and/or
>
> (c) was void for uncertainty."

It further took a specific stand that even if the letter dated 28/11/2000 gave rise to legally binding obligations, the agreement was vitiated by misrepresentation and performance of such agreement has been terminated by abandonment or acquiescence by both the parties.

E-City while admitting that an agreement was entered into on 22/11/2000 in respect of one IMAX system, specifically adopted a stand that the execution of purchase and maintenance agreement was not done in response to an obligation purportedly contained in the LOI, as alleged in the statement of case and saved by the claimant's letter dated 20/12/2000 and countersigned by the respondent, the purchase and maintenance agreements were terminated.

In addition, it was the pleaded case of the Respondent in its statement of defence that EML is not a subsidiary, holding company and/or related company to the respondent, and all 46/168 CARBP-414-18.odt and any further negotiations post the executions of the LOI where negotiations relating to the implementation of the terms of LOI and not pursuant to any binding legal obligation.

In addition, E-City specifically pleaded about the necessity of approval and permission to be obtained from RBI which was never received.

38. The case of the Respondent in the Statement of Defence in relation to clause No.3 of the LOI is to the effect that the said clause was merely preface to the future negotiations and it therefore, did not create and legal binding relations between the parties.

E-City, in its Statement of Defence, also placed on record the correspondence exchanged with the Control Department of the Reserve Bank of India of Bombay, seeking approval to make the necessary remittances, which resulted in the Bank writing to the General Manager of Exchange Control Department of the RBI, requesting permission to accede to E- City's request for remittance

of US$ 3,00,000 towards first tranche in token of the acceptance in view of the arrangement proposed to be entered with the overseas party.

39. The contest between the parties before the International Court of Arbitration, Chamber of Commerce resulted into the first award captioned "Partial final award on jurisdiction and quantum" which flagged the issue of jurisdiction raised by the respondent E-City and the claim for damages made by the claimant on which oral submissions and evidence was presented before the Tribunal.

47/168 CARBP-414-18.odt The objection to the jurisdiction of the Tribunal was raised by way of reservation of possible rights of the respondents, by submitting that there was a merger between IMAX Limited (claimant in the arbitration) and IMAX Corporation on 1/1/2001 and the question was raised about the maintainability of the arbitration at the instance of IMAX Limited, since the issue arose as to which Company had incurred the losses claimed and it may have impact on the validity of award on liability.

The above jurisdictional issue was concluded by accepting the opinion of Mr.Farley Q.C, with reference to the Canada Business Corporation Act and in particular, Section 186 thereof, and the Tribunal accepted the view that having regard to the substantive law on continuance and amalgamation, the Ontario Courts would regard the amendment of the title of action as a matter of form, not substance, and the Court would allow amendments to pleadings at any stage of an action, unless prejudice would result that would not be dealt with cost or adjournment. By concluding that in the interest of justice, the case required the name of the claimant to be changed from 'IMAX Limited' to 'IMAX Corporation', to reflect that position under the Canadian Law, the Tribunal declined to accept the narrow view of Section 186, which was advanced on behalf of the respondent and preferred the evidence of Mr.Farley Q.C as to the status of IMAX Limited upon merger to the effect that it be regarded as the same Company as IMAX Corporation.

40. As far as the second issue about damages is concerned, the claim of IMAX focused principally on the revenue, which it 48/168 CARBP-414-18.odt could have earned from the six agreements, was accepted as the basis and by deciding its claim for interest along with the mitigation of damages raised by E-City, the Tribunal awarded a sum of US$ 9,406,148.31 as calculated in the award to be paid by the respondent to the claimant IMAX Corporation. It was also directed that the claimant shall pay the interest on the said sum at the Canadian Based US Dollar rate plus 2% and the parties shall endeavour to agree the dates from which the interest should run. In addition, the cost of an incidental to be assessed by the Tribunal, upto the date of final partial award, was also directed to be paid.

This award was made in London, the juridical seat of arbitration on 24/8/2003.

41. This was followed by the final award dated 27/3/2008, with the following directions:-

> "(i) that the respondent do pay to the Claimant the sum of US$ 1,118,558.54 by way of interest upto and including 30th September, 2007;

(ii) that the respondent do pay to the Claimant interest at a rate of US$ 2,512.60 per day from 1st October, 2007 until payment of the Award of US$ 9,406,148.31

(iii) that the respondent do pay to the Claimant costs by way of attorneys' fees, expert fees and related expenses in the sum of US$ 384,789.21.

(iv) that the respondent do pay to the claimant the said sum of US$ 400,000 fixed by the ICC as the costs of the arbitration."

42. IMAX Corporation filed application under Rule 14.05 of the Rules of Civil Procedure and Article 35 of the Schedule to the International Commercial Arbitration Act before the Ontario Superior Court of Justice and by order dated 29/11/2011, the Court in Ontario recognized the final award of 27/3/2008 and the partial final award of ICC on jurisdiction 49/168 CARBP-414-18.odt and quantum of 24/8/2007 in the matter of IMAX Limited Vs. E-City Entertainment (L) Pvt. Ltd and declared it to be an enforceable judgment of the Court with full force in effect.

Pursuant thereto, IMAX Corporation sought to domesticate the judgment which it obtained against E-City Entertainment Pvt Ltd from the Superior Court of Justice, Ontario Canada, Essel Group, Subhash Chandra, Atul Goel, Amit Goenka, Laxmi Goel, Zee TV USA, Asia TV USA Ltd and Natural Wellness USA, INC. (collectively, the respondents).

In addition, IMAX sought a turnover order directing the respondents to deliver sufficient funds to justify the judgment or to deliver their personal property to the Sheriff of the country of New York to satisfy the judgment pursuant to the CPLR 5225(b). The Supreme Court of State of New York, County of New York by its decision dated 9/10/2015, however, denied the prayer of IMAX, to the effect that the judgment be recognized against the respondents by treating them as alter- ego or as a single personality as E-City. Recording that IMAX have failed to show that the respondents have one and the same entity as E-City, its request for an order to domesticate the Canadian judgment was denied.

Reference to the relevant observations would be considered at the relevant time when this issue about alter ego is considered by me.

43. E-City, the Respondent No.1 has contested the petition on four counts:-

"(a) The present Petition has been filed beyond the limitation period.

(b) In the scheme of Part II of the Arbitration and Conciliation

Act, Sections 47 to 49 do not contemplate exectuion proceedings under Order XXI of the Code of Civil Procedure, 1908 and the Petitioner has already filed a separate application for execution only against Respondent No.1, which is pending.

The present Petition, which seek relief in the nature of execution, is untenable.

c) The present Petition is in essence a Petition challenging the demerger scheme which is not permissible;

(d) The invocation of Arbitration was invalid under the laws of Singapore i.e. Seat of Arbitration.

(e) Enforcement of the said Foreign Award would be contrary to the public policy of India as per Section 48(2)(b) of the Arbitration and Conciliation Act, 1996."

44. In the wake of the pleadings in the proceedings including the rejoinder filed by the petitioner as well as the affidavit in reply filed by Respondent Nos.2 and 3 and on hearing the respective counsel, the following legal issues/points fall for consideration before me.

(A) In case of the foreign awards, whether the award holder (IMAX Corporation) is entitled to apply for recognition and enforcement of the Award as deemed decrees and thereafter seek its execution, by filing a common petition. (B) The scope of review under Section 48 of the Arbitration and Conciliation Act, 1996, and whether it is permissible to undertake the review on the merits of the Award. (C) Whether the petition filed by E-City Corporation for enforcement, recognition and execution is filed beyond the prescribed period of limitation as contemplated under the Limitation Act, 1963?

(D) Whether the enforcement of the foreign awards shall be refused on the ground that it is contrary to the public policy of India, as the transaction envisaged in the LOI could not have been legally executed and performed under the Indian law, without obtaining prior approval of Reserve Bank of India? (E) Whether it is permissible for the Petitioner to raise a challenge to the demerger scheme as a collateral challenge, particularly when the scheme of demerger was approved by a competent Company Court?

(F) The necessity and validity for impleadment of Respondent Nos.2 to 4 in the present Petition, seeking enforcement and execution of the foreign awards?

(G) Whether the invocation of arbitration by IMAX Limited, which has merged into IMAX Corporation, was invalid? I shall deal with the above issues sequentially.

ANALYSIS OF THE COUNTER SUBMISSIONS ADVANCED WITH REFERENCE TO THE ISSUES THAT FALL FOR CONSIDERATION :-

> ISSUE NO. A Whether a common petition filed by the Petitioner seeking recognition/enforcement and execution can be entertained.

45. Mr.Chinoy, by relying upon the decision of the Apex Court in the case of Vendanta Limited (supra), has justified the maintainability of the petition which seek recognition and enforcement of the three awards passed in its favour and has submitted that once the enforceability of the award is tested on the parameters of Section 47 and 48 of the Act of 1996, the Court would proceed to take further effective steps for execution of the award.

This submission is strongly contested by Mr.Seksaria who has opposed the petition on the ground that is not entitled to seek the relief of execution by filing a combined petition, as it has already filed a separate Execution Application under Order 21 Rule 11 of CPC (CEXA 49/2017) even prior to the filing of the present petition which is pending and this Court has kept it in abeyance, by recording that both the Execution Application as well as the Chamber Summons, will have to abate the outcome of the Arbitration Petition.

46. Part II of the Arbitration and Conciliation Act, 1996 provides for enforcement of foreign awards, which is assigned a definite meaning.

52/168 CARBP-414-18.odt Section 46 clearly contemplate that any foreign award which would be enforceable under the Chapter shall be treated as binding for all purposes on the persons as between whom it is made.

Section 47 contemplate the evidence to be produced before the Court by a party applying for enforcement of a foreign award and it may be in the following form:-

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

Section 48 in Chapter 1 under the caption 'New York Convention Awards" set out the conditions for enforcement of foreign awards and is couched in a negative language by prescribing as to when enforcement of foreign awards may be refused, at the request of the party against whom it is invoked, by contemplating proofs to be furnished by that party, as set out therein. Only upon such proof being tendered, the enforcement of the foreign award may be refused.

Section 49 further create a deeming scenario, by providing that when the Court is satisfied that the foreign award is enforceable, it shall be deemed to be a decree of that Court.

47. The Scheme of Section 47 to 49 of Part II of the Act of 1996, envisage two step process i.e. recognition and enforcement and execution, and Section 49 creating a legal 53/168 CARBP-414-18.odt fiction, by providing that the award shall be a decree, when it is held to be enforceable.

In TOEPFER (supra), the learned Single Judge of the Bombay High Court in paragraph nos.18 and 19, has thrown light upon the deeming fiction, when he recorded thus :-

> "18. Hence, I find that all objections raised to the validity of the Award have no force. I am satisfied that the award is perfectly in accordance with the provisions of GAFTA Rules and is fit one to be enforced as a Foreign Award under Chapter II of the Arbitration and Conciliation Act, 1996.
>
> 19. By prayer (a) in the petition, it is prayed that this Court be pleased to enforce the award dated 30th September, 1997 Exh. O to the petition. In my view, such a prayer cannot be granted under the provisions of the Act 1996. In my opinion, Section 49 of the Act merely empowers the Court to declare that the Foreign Award is enforceable under the provisions of Chapter II of the Act. The moment such a declaration is granted, an award shall be deemed to be a decree of the Court. Once its deemed to be a decree of the Court, it is open to the parties to seek its execution in accordance with the provisions of the Civil Procedure Code."

48. In Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd. 28, the Apex Court has held that a proceeding seeking recognition and enforcement of a foreign award has different stages; in the first stage, the Court would decide about the enforceability of the award on having regard to the requirements of Section 47 and 48 of the Act of 1996. Once the enforceability is decided, then necessary steps would be required to be taken for execution of the award and it is relevant to reproduce the observation of the Apex Court to the following effect :-

> "31. Prior to the enforcement of the Act, the Law of Arbitration in this country was substantially contained in three enactments namely (1) The Arbitration Act, 1940, (2) The Arbitration (Protocol and Convention) Act, 1937 and (3) The Foreign Awards (Recognition and Enforcement) Act, 1961. A party holding a foreign award was required to take recourse to these enactments. Preamble of the Act makes it abundantly clear that it 28 (2001) 6 SCC 356 54/168 CARBP-414-18.odt aims at to consolidate and amend Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The object of the Act is to minimize supervisory role of court and to give speedy justice. In this view, the stage of approaching court for making award a rule of court as required in Arbitration Act, 1940 is dispensed with in the present Act. If the argument of the respondent is accepted, one of the objects of the Act will be frustrated and defeated. Under the old Act, after making award and prior to execution, there was a procedure for filing and making an award a rule of court i.e. a decree. Since the object of the act is to provide speedy and alternative solution of the dispute, the same procedure cannot be insisted under the new Act when it is advisedly eliminated. If separate proceedings are to be taken, one for deciding the enforceability of a foreign award and the other thereafter for execution, it would only contribute to protracting the litigation and adding to the sufferings of a litigant in terms of money, time and energy. Avoiding such difficulties is one of the objects of the Act as can be gathered

from the scheme of the Act and particularly looking to the provisions contained in Sections 46 to 49 in relation to enforcement of foreign award. In para 40 of the Thyssen judgment already extracted above, it is stated that as a matter of fact, there is not much difference between the provisions of the 1961 Act and the Act in the matter of enforcement of foreign award. The only difference as found is that while under the Foreign Award Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus, in our view, a party holding foreign award can apply for enforcement of it but the court before taking further effective steps for the execution of the award has to proceed in accordance with Sections 47 to 49. In one proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from objectives contained in para 4 of the Statement of Objects and Reasons, Sections 47 to 49 and Scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the court. The submission that the execution petition could not be permitted to convert as an application under Section 47 is technical and is of no consequence in the view we have taken. In our opinion, for enforcement of foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make rule of the court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the court enforcing a foreign award can deal with the entire matter. Even otherwise, this procedure does not prejudice a party in the light of what is stated in para 40 of the Thyssen judgment.

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49. The applicability of Sections 47 to 49 in regard to the foreign award was once again tested in Vedanta Limited (supra) when the scheme of 1996 Act for enforcement of New York Convention Awards was focused upon and it is held that under the Act of 1996, there is no requirement for the foreign award to be filed before the Seat Court and obtain a decree thereon, after which it becomes enforceable as a foreign decree. Recording that the requirement under the Geneva Convention 1927, being referred to as "Double exequatur" was done away with the New York Convention and under the Act of 1996, a party may apply for recognition and enforcement of a foreign award, without obtaining leave from the Court of the seat in which, or under the laws of which the award was made.

Discussing the scheme of the Act of 1996 and from Section 44 to 47, the Apex Court observed thus :-

"83.2 Section 44 of the 1996 Act provides that a New York Convention award would be enforceable, if the award is with respect to a commercial dispute, covered by a written agreement in a State with which the Government of India has a reciprocal relationship, as notified in the Official Gazette.

83.3 Section 46 provides that a foreign award which is enforceable under Chapter 1 of Part II of the 1996 Act, shall be treated as final and binding on the parties, and can be relied upon by way of defence, set off, or otherwise, in any legal proceeding in India.

83.4 Section 47 sets out the procedure for filing the petition for enforcement / execution of a foreign award. This section replicates Article IV (1) of the New York Convention which requires the applicant to file the authenticated copy of the original award, or a certified copy thereof, along with the original agreement referred to in Article II, or a certified copy thereof, at the time of filing the petition.

83.10 Section 48 replicates Article V of the New York Convention, and sets out the limited conditions on which the enforcement of a foreign award may be refused. Sub-sections (1) and (2) of Sections 48 contain seven grounds for refusal to enforce a foreign award. Sub-section (1) contains five grounds which may be raised by the losing party for refusal of enforcement of the 56/168 CARBP-414-18.odt foreign award, while sub-section (2) contains two grounds which the court may ex officio invoke to refuse enforcement of the award,31 i.e. non-arbitrability of the subject-matter of the dispute under the laws of India; and second, the award is in conflict with the public policy of India.

83.11 The enforcement Court cannot set aside a foreign award, even if the conditions under Section 48 are made out. The power to set aside a foreign award vests only with the court at the seat of arbitration, since the supervisory or primary jurisdiction is exercised by the curial courts at the seat of arbitration. The enforcement court may "refuse" enforcement of a foreign award, if the conditions contained in Section 48 are made out. This would be evident from the language of the Section itself, which provides that enforcement of a foreign award may be "refused" only if the applicant furnishes proof of any of the conditions contained in Section 48 of the Act.

83.13 The grounds for refusing enforcement of foreign awards contained in Section 48 are exhaustive, which is evident from the language of the Section, which provides that enforcement may be refused "only if" the applicant furnishes proof of any of the conditions contained in that provision.

83.14 The enforcement court is not to correct the errors in the award under Section 48, or undertake a review on the merits of the award, but is conferred with the limited power to "refuse"

enforcement, if the grounds are made out.

83.15 If the Court is satisfied that the application under Section 48 is without merit, and the foreign award is found to be enforceable, then under Section 49, the award shall be deemed to be a decree of "that Court". The limited purpose of the legal fiction is for the purpose of the enforcement of the foreign award. The concerned High Court would then enforce the award by taking recourse to the provisions of Order XXII of the CPC."

50. Though Mr.Seksaria would lay his emphasis on the observation in paragraph no.83.11, in my view, the said observation cannot be read in isolation, but reading of the whole of para 83 with its different parts, it is evidently clear that the enforcement Court may refuse enforcement of a foreign award, if a person against whom it is invoked, is able to offer proof and make out a case under clauses (a) to (e) of the said provision, amounting to the conditions perforcing the Court to refuse the enforcement of the award. A Court may 57/168 CARBP-414-18.odt also refuse enforcement by retaining a residual discretion to overrule the objections, only if it finds that overall justice has been done between the parties and may direct enforcement of the award, but by going through the scheme contemplated in Chapter I of Part II, it is sufficiently clear that in the first stage, the Court would decide about the sustainability and enforceability of the Award and only when the Court is satisfied that the foreign award is enforceable under this Chapter, a deeming fiction kicks in, and the award shall be deemed to be a decree of that Court. The second stage evidently is executing the said decree and this would be definitely done as per the manner prescribed in the Code of Civil Procedure.

51. In the wake of the decision in the case of Vedanta Limited (supra), where it is clearly pronounced that there is no need to take two separate proceedings i.e. one for deciding the enforceability (recognition) of the award as a deemed decree and then separate proceeding for execution of the deemed decree thereafter, and it is open for the award holder to apply for recognition and execution of a foreign award by common petition.

In stage 1, the Court would decide the enforceability of the award as a deemed decree, on satisfying the requirement of Section 47 and 48. Once the Court decides that a foreign award is enforceable as a decree of that Court, it shall proceed to take effective steps for its execution as a deemed decree and then would take recourse to the provision of Order 21 of the Code of Civil Procedure.

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52. The reliefs sought in the present Petition has been bifurcated, as prayer clause (a), seek a declaration that the awards in favour of the petitioner are enforceable under part II of the Act of 1996 and a direction is sought to enforce and execute the awards as decree in its favour and against all the Respondents. Prayer clauses (c) and (d) are the reliefs sought under Order XXI of the Code and needless to state that while these reliefs are to be considered, it is open for the judgment debtors to raise the possible objections permissible, while executing the decree. In any case, the Execution Application which is filed will be decided subsequent to the declaration in the petition in terms of prayer clause (a) thereof, as prayers

(b), (c) and (d) will be a part of the execution stage.

In the wake of the above, Issue No.A is answered by holding that a common petition seeking enforcement and execution as a deemed decree is maintainable in the wake of the law laid down in case of Vedanta Limited (supra) and the issue is answered in favour of the Petitioner, by holding that a common petition can be entertained for enforcement and execution of the three awards.

ISSUE NO.B The scope of review under Section 48 of the Arbitration and Conciliation Act, 1996, and whether it is permissible to undertake the review on the merits of the Award.

53. The scope of Section 48 Chapter II of the Arbitration and Conciliation Act, 1996 relating to enforcement of certain foreign awards, in Chapter I pertain to the New York Convention awards. Upon the evidence produced by a party 59/168 CARBP-414-18.odt seeking enforcement of a foreign award, in form of the original award or copy thereof, duly authenticated in the manner required by the law of the country in which it is made or the original agreement for arbitration or a duly certified copy thereof and such evidence, as may be necessary, to prove that the award is a foreign award, the Court before which the evidence is produced, may enforce the award. But, it may refuse the enforcement, if the party furnishes to the Court the proof about the existence of the circumstances stipulated in Section 48(1)(a) to (e).

Similarly enforcement of an arbitral award may also be refused in terms of Section 48(2) if the Court finds that the subject matter of the difference is not capable of settlement by arbitration under the law of India or the enforcement of the award would be contrary to the public policy of India.

54. Section 44 of the Act of 1996 has set out the necessary ingredients for an award to be "a foreign award" and it contemplate the following :-

> (a) It must be an arbitral award on differences between the persons arising out of legal relationship;
>
> (b) The difference may in contract or outside the contract;
>
> (c) The legal relationship so spoken of ought to be considered "commercial" under the law in India;
>
> (d) The award must be made on or after 11/10/1960;
>
> (e) The award must be a New York Convention award i.e. it must be in pursuance of an agreement in writing to 60/168 CARBP-414-18.odt which the New York Convention applies and be in one of such territories;
>
> (f) It must be made in one of such territories which the Central Government by notification declares to be territories to which the New York Convention applies.

Though the term "legal relationship" is not defined in the Act, it is intended to be convey a relationship, which gave rise to legal obligations and duties. The expression "commercial" is

construed to be broadly having regard to the manifold activities which are integral part of international trade.

55. Section 47 of the Act contemplates the evidence to be produced by a party seeking enforcement of a foreign award and the requirement stipulated under sub-section (1) are procedural in nature, introduced in the statute with an object that the Court from whom the enforcement is sought, must be satisfied that the award produced before it for enforcement, is a foreign award, as defined and that it is enforceable against persons, who are bound by the award.

56. Coming to the most significant provision in the scheme, in form of Section 48, which contemplate that when the enforcement of foreign award is resisted by a party against whom it is made, the burden is on the party to prove that its case falls within the sub-clauses of sub-section (1) or sub- section (2) of Section 48 of the Act of 1996.

In Gemini Bay Transcription Private Limited (supra), it is observed by the Apex Court that the New York Convention, 61/168 CARBP-414-18.odt which the Act of 1996 has adopted, has a pro-enforcement bias and unless a party is able to show that its case comes falls within sub-sections (1) and (2) of Section 48, the foreign award must be enforced. The grounds contained in Section 48 are watertight and a reading of the said provision would make it manifestly clear that only if the party against whom the enforcement is invoked furnishes to the Court the necessary proof in form of grounds set out in clauses (a) to (e), the award shall not be enforced.

Reading of Section 48 make it evidently clear that no ground outside Section 48 can be looked at and as held in Gemini Bay Transcription Private Limited (supra), the grounds are not to be construed expansively, but narrowly.

The relevant observations of the Apex Court in Gemini Bay Transcription Private Limited (supra), deserve a reproduction :-

> "41. ..... Thus, in Ssangyong Engg. & Construction Co. Ltd. v. NHAI, ["Ssangyong"], it was held: (SCC pp. 172-74, para 45) "45. After referring to the New York Convention, this Court delineated the scope of enquiry of grounds under Sections 34/48 (equivalent to the grounds under Section 7 of the Foreign Awards Act, which was considered by the Court), and held : (Renusagar case, SCC pp.671-72 & 681-82, paras 34-37 & 65-66) "34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (a) to (e) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the court was satisfied in respect of matters mentioned in clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are, in substance, similar to those adopted by the English courts at common law. (See Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. I, p. 578.) It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York

Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the 62/168 CARBP-414-18.odt New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (a) to (e) of Clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) and (b) of Clause (2) of Article V. None of the grounds set out in sub-clauses (a) to (e) of Clause (1) and sub-clauses (a) and

(b) of Clause (2) of Article V postulates a challenge to the award on merits.

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

"It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration." (p. 269)

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

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

57. The "pro-enforcement bias" of the New York Convention, which has found its way in Section 48 has cast the burden on the party/parties objecting to the enforcement instead of party seeking enforcement and it is only when the proof is tendered to the effect, that the parties to the agreement being under some incapacity, or the agreement being invalid under the law 63/168 CARBP-414-18.odt to which the parties have subjected it, the enforcement can be refused.

58. The question as to whether a non-parties to the agreement can raise such an objection is also well settled in Gemini Bay Transcription Private Limited (supra). By a bare look at Section 47, which speaks of an arbitral award on differences between "persons" and specifically, since Section 48(1)(a) refers only to the "parties" to the agreement referred to in Section 44(a), it is concluded that to include non-parties to the agreement, by introducing the word "person" would run contrary to the express language of Section 48(1)(a).

It is with this intention that the legislature has conferred the right to object to the enforcement of an award at the instance of the party against whom it is invoked and, since, the grounds on which the objection can be raised, are clearly stipulated by the legislature, and speak of incapacity of parties and the agreement to be invalid under the law to which the parties have subjected it, an attempt to bring non-parties within this ground has been described to be trying to fit a square peg in a round hole.

59. The scope of Section 48 of the Act is also exhaustively dealt with in case of Vijay Karia & Ors. Vs. Prysmian Cavi E Sistemi SRL & Ors.29, with specific reference to one of the ground stipulated therein being the enforcement of the award to be contrary to the public policy in India and as to what would mean by "public policy" and though I would be referring 29 (2020) 11 SCC 1 64/168 CARBP-414-18.odt to the relevant observations to that effect, when I deal with the contention of Mr.Seksaria that the agreement was unenforceable, being not in accordance with the public policy in India, for the present, the relevant observations as regards the scope of Section 48 from the decision, deserve a reproduction :-

> "50. The US cases show that given the "pro-enforcement bias"

of the New York Convention, which has been adopted in Section 48 of the Arbitration Act, 1996-the burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement and not the other way around in the guise of public policy of the country involved, foreign awards cannot be set aside by second guessing the arbitrator's interpretation of the agreement of the parties; the challenge procedure in the primary jurisdiction gives more leeway to courts to interfere with an award than the narrow restrictive grounds contained in the New York Convention when a foreign award's enforcement is resisted."

It is thus well settled, that Section 48, is hedged with pro- enforcement bias and unless the Respondent No.1 is able to show that its case falls within Section 48(1) or 48(2), the foreign award must be enforced.

ISSUE NO.C The Arbitration Petition is filed beyond the period of limitation in the wake of the decision of the Apex Court in the case of Government of India Vs. Vedanta Limited (supra).

60. Respondent No.1 has resisted the recognition of the awards on the ground that the Petition, has been filed after five years and, hence, is barred by the law of limitation.

It is an undisputed fact that E-City Entertainment (I) Pvt. Ltd. raised challenge to the foreign awards, by filing Arbitration Petition under Section 34 of the Act of 1996, which 65/168 CARBP-414-18.odt on 31/07/2013, came to be admitted, holding that it is maintainable. On IMAX assailing it before the Apex Court, on 19/11/2013, ex-pate ad-interim order was granted staying further proceedings of the Arbitration Petition.

During this period, IMAX did not file any application for enforcement of the foreign award, but it chose to pursue the execution proceedings before the Court in Canada and USA.

Commercial Execution Application No.49 of 2017 was filed to enforce the foreign award in which Respondent No.1 has raised objections to its enforceability, by filing Chamber Summons No.288 of 2017.

The present Petition, by invoking Sections 47, 48 and 49 of the Act of 1996, is filed by IMAX, not only against E-City Entertainment (I) Pvt. Ltd. but also other three Respondents on 28/03/2018.

The bone of contention between the contenders is, whether the Petition is within the limitation prescribed.

61. On the present Petition being filed, the Respondents raised a preliminary objection of it is being barred by limitation and on 13/11/2019, the objection was held to be not sustainable, by holding that Petition filed by IMAX is within the prescribed period of limitation.

A careful reading of the order dated 13/11/2019 passed by the learned Single Judge of this Court (Coram :

> G.S.Kulkarni, J.) would disclose that the learned Judge has taken into consideration the wholesole background facts, including the Petition filed by E-City Entertainment (I) Pvt.
>
> 66/168 CARBP-414-18.odt Ltd. under Section 34 of the Act of 1996, calling in question the awards, coupled with the application for condonation of delay, when an objection was raised about the maintainability of the Petition.
>
> The Apex Court finally decided the Petition on 10/03/2017, inter alia, holding that the High Court had no jurisdiction to entertain the Petition under Section 34, as the challenge was to the foreign awards and, this step resulted in institution of the present petition, by invoking Sections 47, 48 and 49 of the Act of 1996 on 02/04/2018, seeking enforcement and execution of the awards in question.
>
> Respondent No.1 invoked the provision of Article 137 under the Schedule to the Limitation Act, while it raised an objection about it being time barred.

Referring to Article 137, a residuary clause, which was captioned as, "any other application for which no period of limitation is provided elsewhere in this division", the period of limitation start running when the right to apply accrues, the limitation prescribed being of three years. Reference was also made to Article 136, with the description as, " for the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court", which prescribe the period of limitation as twelve years.

On considering the rival contentions advanced, with E- City specifically raising an objection that there is no application for condonation of delay filed by the Petitioner, the contention was recorded to the effect that even assuming that this Court was wrongly approached under Section 34 67/168 CARBP-414-18.odt proceedings in the year 2008, ultimately the issue was decided by the Apex Court on 10/03/2017, holding that the proceeding filed by Respondent No.1 under Section 34 were not maintainable and the pendency of these proceedings in no manner could have saved the limitation prescribed under Article 137. The contention that seeking enforcement of an award is governed by substantive provision contained in form of Sections 47 to 49 of the Arbitration and Conciliation Act and the party holding a foreign award cannot sleep over its enforcement/decreetal right arising under the award and cannot seek its enforcement merely because there are some proceedings filed by the award debtor, assailing the awards before a Court, which was not competent to entertain such proceedings.

Per contra, the Petitioner contended that the Respondents objection about applicability of Article 137 of the Limitation Act is not correct, since the foreign award itself is required to be accepted as a decree and the proceedings filed by the Petitioner under Sections 47 and 48 of the Act of 1996, are to be considered as proceedings for enforcement and execution of foreign awards.

It was, therefore, contended that the case of the Petitioner would be governed by Article 136 of the Limitation Act and not by Article 137, as the former provided for execution of any decree or order of any Civil Court and prescribed the period of limitation of twelve years from the time, when the decree or order becomes enforceable.

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62. In this background, the short question which fell for consideration, as to whether the Petition was filed within the prescribed limitation, came to be decided and while the learned Single Judge clearly accepted that the enforcement and execution can form part of the same proceedings and, therefore, found it appropriate to invoke Article 136 under the Limitation Act and concluded thus :-

> "26. It is thus beyond a pale of doubt that enforcement and execution can form part of the same proceedings. If this be so then certainly Article 136 under the Limitation Act becomes relevant. If the argument of non applicability of Article 136 as urged on behalf of the respondent is accepted, it would be contrary to the principle of law as laid down by the Supreme Court in Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd. (supra) apart from deeply damaging the decreetal interest of the award creditors apart from being contrary to the object of Section 47 to 49 of the Arbitration Act.
>
> 27. In fact the above legal position now stands reinforced as seen from a recent decision of the Supreme Court in M/S.Shriram EPC Ltd. Vs. Rioglass Solar SA, the Supreme Court taking note of the decisions in Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd. (supra) and Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd. (supra) has held that the observations of the Supreme Court in Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd. (supra) that "the only difference as found is that while under the Foreign Awards Act a decree follows, under the new Act the foreign award is already stamped as the decree." to mean that the expression "stamped"

means "regarded" This means that the foreign award is to be regarded as a decree. The following observations of the Supreme Court in paragraph 19 read thus:-

> "One sentence in Fuerst Day Lawson (supra) reads, "[T]he only difference as found is that while under the Foreign Awards Act a decree follows, under the new Act the foreign award is already stamped as the decree." This sentence does not lead to the conclusion, following the judgment in Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd., (1999) 9 SCC 334, that under the 1996 Act, a foreign award is considered to be stamped already. All that this sentence means is that the foreign award is to be regarded as a decree. The expression "stamped" means "regarded". This judgment also does not carry us much further."

(emphasis supplied)

63. Even the Petition was tested by applying the provision of Article 137 and an inference was drawn in the wake of the 69/168 CARBP-414-18.odt documentary evidence with its chronology that the Petition is not barred by law of limitation, by recording as under :-

> "28. Now coming to the contention as urged on behalf of the respondents, the main thrust of the respondents' argument is the decision of the learned Single Judge of this Court in Noy Vallesina Engineering Spa v/s. Jindal Drugs Limited (supra). In my opinion considering the facts of the present case and as noted above, that the Supreme Court on 10 March 2017 set aside the order passed by this Court holding that the Section 34 petition filed by the respondents was not maintainable and the present proceedings being filed on 2 April 2018, even by applicability of the provisions of Article 137 of the Limitation Act, the petition is not barred by limitation. In any case, applying the principle of law as laid down in Fuerst Day Lawson Ltd. Vs.

> Jindal Exports Ltd. (supra) and M/S.Shriram EPC Ltd. Vs. Rioglass Solar SA (supra), the Court cannot overlook the prayers as made by the petitioner which are in the nature of a combined petition namely for enforcement and for execution of the award. As observed above a broader view is required to be taken to advance the object and intention of the provisions of the Arbitration Act and not a hard technical approach as urged by the respondents that the petition be held as time barred, by applying Article 137 of the Limitation Act in the absence of a delay condonation application and the delay being condoned. This contention of the respondents militates against from what the Supreme Court has now further clarified in M/S.Shriram EPC Ltd. Vs. Rioglass Solar SA (supra)that when it was observed in Furest Day Lawson Ltd. Vs. Jindal Exports Ltd (supra) that the Foreign award is already stamped as a decree, it means that "the foreign award is to be regarded as a decree." In view of this clear position in law there is no manner of doubt and more particularly as seen the prayers as made in the petition that this petition cannot be held to be time barred, as contended on behalf of the respondents."

64. The order dated 13/11/2019 to the above effect was challenged by IMAX and during its pendency, a three-Judge Bench of the Supreme Court in Vedanta Limited (supra), by taking note of this order passed by the learned Single Judge on 13/11/2019, reached a conclusion that a foreign award was a decree and, therefore, Article 136 of the Limitation Act is applicable for its enforcement.

70/168 CARBP-414-18.odt The issue of limitation for filing an enforcement/ execution application of foreign award under Section 47 of the Act of 1996, was deliberated upon, in the wake of the divergent views being taken by different High Courts with respect to the period of limitation.

In making reference to the various decisions, the decision of the learned Single Judge of Bombay High Court in Noy Vallesina Engg. Spa Vs. Jindal Drugs Ltd. 30, Imax Corporation Vs. E-City Entertainment (India) (P) Ltd. as well as the decisions of the Madras High Court and the Delhi High Court were taken note of.

As regards the view taken in Imax (supra), it was noted that another Single Judge of the Bombay High Court, followed the Judgment in Fuerst Day Lawson Ltd. and held that since the foreign award is already stamped as a decree, the award holder may apply for enforcement, after steps are taken for execution of award under Sections 47 and 48 of the Act of 1996, as in one proceedings, there may be different stages, the first stage being the Court would require to decide on the enforceability of the award, having regard to the requirement of the provision and, thereafter, proceed to take steps for its execution and, therefore, Article 136 would be applicable for enforcement of a foreign award.

65. Their Lordships of the Apex Court, in the wake of the conflicting pronouncements, noted that the Indian Arbitration Act, 1996 does not specify any period of limitation for filing application for enforcement/execution of foreign award, 30 2006 SCC OnLine Bom 545 71/168 CARBP-414-18.odt though Section 43 provide that the Limitation Act, 1963 shall apply to arbitrations, as it applies to proceedings in Court.

It is recorded that Limitation Act, 1963 does not contain any specific provision for enforcement of a foreign award and Articles 136 and 137 fall within the third division of the Schedule, and Article 136 provides that the period of limitation for the execution of any decree or order of a "civil court" is twelve years from the date when the decree or order becomes enforceable.

Article 137 was referred to as residuary provision, prescribing the limitation of three years from the point of time, when the right to apply accrues.

66. In light of the said scheme, further observations of the Apex Court in paragraph 69 deserve a reproduction :-

> "69. Section 36 of the Arbitration Act, 1996 creates a statutory fiction for the limited purpose of enforcement of a "domestic award" as a decree of the court, even though it is otherwise an award in an arbitral proceeding. By this deeming fiction, a domestic award is deemed to be a decree of the court, even though it is as such not a decree passed by a civil court. The Arbitral Tribunal cannot be considered to be a "court", and the arbitral proceedings are not civil proceedings. The deeming fiction is restricted to treat the award as a decree of the court for the purposes of execution, even though it is, as a matter of fact, only an award in arbitral proceeding. In Paramjeet Singh Patheja V. ICDS Ltd., this Court in the context of a domestic award, held that the fiction is not intended to make an award a decree for all purposes, or under all statutes, whether State or Central. It is a legal fiction which must be limited to the purpose for which it was created. Paras 39 and 42 of the judgment in Paramjeet Singh Patheja read as : (SCC pp.345-46) "39. Section 15 of the Arbitration Act, 1899 provides for "enforcing"

the award as if it were a decree. Thus a final award, without actually being followed by a decree (as was later provided by Section 17 of the Arbitration Act of 1940), could be enforced i.e. executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realising the money awarded. However, the award remained an award and did not become a decree either as defined in CPC and much less so far the purposes of 72/168 CARBP-414-18.odt an entirely different statute such as the Insolvency Act are concerned.

** ** **

42. The words "as if" demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes,whether State or Central."

(emphasis supplied)

67. Further observations leading to a conclusion in paragraph 76 to the effect that the period of limitation for filing a petition for enforcement of a foreign award under Sections 47 and 49 would be governed by Article 137 of the Limitation Act, 1963, is supported by the following reasoning :-

> "72. Foreign awards are not decrees of an Indian civil court. By a legal fiction, Section 49 provides that a foreign award, after it is granted recognition and enforcement under Section 48, would be deemed to be a decree of "that court" for the limited purpose of enforcement. The phrase "that court" refers to the court which has adjudicated upon the petition filed under Sections 47 and 49 for enforcement of the foreign award. In our view, Article 136 of the Limitation Act would not be applicable for the enforcement/execution of a foreign awards, since it is not a decree of a civil court in India.
>
> 73. The enforcement of a foreign award as a deemed decree of the High Court concerned [as per the amended Explanation to Section 47 by Act 3 of 2016 confers exclusive jurisdiction on the High Court for execution of foreign awards] would be covered by the residuary provision i.e. Article 137 of the Limitation Act. A three-Judge Bench of this Court in Kerala SEB V. T.P.Kunhaliumma held that the phrase "any other application" in Article 137 cannot be interpreted on the principle of ejusdem generis to be applications under the Civil Procedure Code. The phrase "any other application"

used in Article 137 would include petitions within the word "applications", filed under any special enactment. This would be evident from the definition of "application" under Section 2(b) of the Limitation Act, which includes a petition. Article 137 stands in isolation from all other Articles in Part I of the Third Division of the Limitation Act, 1963.

74. The exclusion of an application filed under any of the provisions of Order 21 CPC from the purview of Section 5 of the Limitation Act, was brought in by the present Limitation Act, 1963. Under the previous Limitation Act, 1908 there were varying 73/168 CARBP-414-18.odt periods of limitation prescribed by Articles 182 and 183 of the said Act, as well as Section 48 of CPC, 1908. Article 182 provided that the period of limitation for execution of a decree or order of any civil court was 3 years, and in case where a certified copy of the decree or order was registered, the period of limitation was 6 years. Article 183 provided that the period of limitation to enforce a decree or order of a High Court was 6 years. Section 48 CPC (which has since been repealed by Section 28 of the Limitation Act of 1963) provided that the period of limitation for execution a decree was 12 years.

75. The Law Commission in its 3rd Report dated 21-7-1956 noted that different time-limits were prescribed for filing an application for execution of decrees or orders of civil courts. It was recommended that the time-limit should be absolute, and there should be no scope for any further extension of time by acknowledgments. There was no justification for making a distinction between decrees or orders passed by the High Court in exercise of original civil jurisdiction, and other decrees. The maximum period of limitation for the execution of a decree or order of any civil court was fixed at twelve years in the new Limitation Act, 1963 from the date when the decree or order became enforceable. In this background, the present Limitation Act, 1963 excludes any application filed under Order 21 from the purview of Section 5 of the Act, with the object that execution of decrees should be proceeded with as expeditiously as possible. The period of limitation for execution of the decree of a civil court is now uniformly fixed at the maximum period of 12 years for decrees of

civil courts."

68. Another tenacious justification offered in support of the conclusion drawn is worded as below :-

> "77. The application under Sections 47 and 49 for enforcement of the foreign award, is a substantive petition filed under the Arbitration Act, 1996. It is a well-settled position that the Arbitration Act is a self-contained code. The application under Section 47 is not an application filed under any of the provisions of Order 21 CPC, 1908. The application is filed before the appropriate High Court for enforcement, which would take recourse to the provisions of Order 21 CPC only for the purposes of execution of the foreign award as a deemed decree. The bar contained in Section 5, which excludes an application filed under any of the provisions of Order 21 CPC, would not be applicable to a substantive petition filed under the Arbitration Act, 1996. Consequently, a party may file an application under Section 5 for condonation of delay, if required in the facts and circumstances of the case."
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> 74/168 CARBP-414-18.odt
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> 69. The conundrum as regards the limitation period to be made applicable to the enforcement petition under Sections 47 and 49 has been put to rest by holding that the period of limitation prescribed by Article 136 of the Limitation Act shall be made applicable, but on sufficient grounds being shown to condone the delay in filing the enforcement/execution application, the delay is allowed to be condoned.
>
> Admittedly, the present Petition is not supported by any such application for condonation of delay.
>
> 70. Dealing with the objection that the Petition having been filed after five years, is barred by law of limitation, Mr.Chinoy has urged that once a point of limitation as a preliminary issue in the very same proceedings is decided by an order of this Court on 13/11/2019, holding that the Petition was within limitation, it is not open to E-City to once again raise the same contention. In any case, Mr.Chinoy has urged that the learned Single Judge has accepted the principal submission of the Petitioner that the limitation would be governed by Article 136 and he also accepted the alternative submission on behalf of IMAX that even Article 137 is applied, which has prescribed three years as period of limitation, from the point of time, when the right to apply accrues, it was still within limitation, by recording that as per the law laid down by the Supreme Court in Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited & Anr. 31, the filing of Petition under Section 34 by E-City, operated as a stay on the enforcement of the award and it was only on 10/03/2017, when the Hon'ble Supreme Court dismissed the Section 34 Petition, 31 (2009) 17 SCC 796 75/168 CARBP-414-18.odt the enforcement and execution proceedings could have been entertained on behalf of IMAX.

> E-City preferred Special Leave Petition before the Apex Court against the Judgment dated 13/11/2019, which was dismissed on 18/10/2022, which was subsequent to the decision of the Apex Court in the case of Vedanta Limited (supra) against which a review petition was filed, but even the same was dismissed on 16/08/2023. Therefore, according to Mr.Chinoy, issue of limitation stands concluded by the Judgment dated 13/11/2019 and it is not open for E-City to re-

open the said issue.

71. It is trite position of law that issue of limitation is a pure question of law and would partake as an issue of jurisdiction and, therefore, may not operate as res judicata or an issue of estoppel.

The law of limitation is based on the maximum Interest Reipublicae Ut Sit Finis Litium. It is a general principle of general welfare that end should be put to a litigation and the principle is founded on the public policy. Section 3 of the Limitation Act makes it imperative for the Court to dismiss any application, filed beyond the period of limitation, although the point of limitation may be raised as one of the defence. It is only when sufficient cause is shown, the period of limitation is permitted to be extended, as contemplated under Section 5 of the Limitation Act.

Statutes of limitation are sometimes described as "statutes of peace", as laws of limitation, founded on public 76/168 CARBP-414-18.odt policy, contemplate that an unlimited and perpetual threat of limitation creates insecurity and uncertainty; and some kind of limitation is essential for public order. The object of fixing time limit for litigation is based on public policy, fixing a lifespan for legal remedy, to be availed for the purpose of general welfare, intended to see that the parties do not resort to dilatory tactics, but avail the legal remedies available, within the prescribed time frame.

It is well settled principle that the law aids those who are vigilant in invoking the remedies available to them within the prescribe time-lines and not to those, who sleep over their rights.

It is, therefore, when a sufficient cause is shown, the Court may be persuaded to accept the explanation offered and deem it appropriate to condone the delay and entertain the cause, despite it being lodged before the Court beyond the period prescribed for limitation.

72. Another angle to the law of limitation is also to be kept in mind, being on expiration of period of limitation prescribed for instituting the proceedings or making an Appeal, a right accrues in favour of other party, on account of the lapse of time and this right shall not be lightheartedly disturbed. The proof of sufficient cause is a condition precedent for exercise of power vested in the Court under Section 5 of the Limitation Act and the significant consideration would be the diligence of the party and its bona fide.

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73. The bar of limitation, as set out in Section 3 of the Limitation Act, 1963, goes to the root of the matter and irrespective of whether the objection has been raised or not, the Court is cast with an

independent duty to look into the aspect of limitation. In Noharlal Verma Vs. District Co- Operative Central Bank Limited, Jagdalpur32, the said principle has been succinctly set out in the following words :-

> "32. Now, limitation goes to the root of the matter. If a suit,appeal or application is barred by limitation, a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide iton merits.
>
> 33. Sub-section (1) of Section 3 of the Limitation Act, 1963 reads as under :-
>
> "3. Bar of limitation.-(1) Subject to the provisions contained in Sections 4 to24 (inclusive), every suit instituted, appeal preferred, an application made after the prescribed period shall be dismissed although limitation has not been set up as a defence."

(emphasis supplied) Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation."

74. The issue of limitation goes to the root of a matter and if it is the duty of a court of law to ensure that the proceedings are filed within the prescribed period of limitation, and a Court or an adjudicating authority may not exercise its jurisdiction, if the proceedings are not filed within limitation and shall refrain itself from deciding it on merit, unless the delay is condoned and the proceedings are brought within the period of limitation, it also becomes an issue of jurisdiction.

32 (2008) 14 SCC 445

The question affecting the jurisdiction, therefore, will required to be determined as a jurisdictional issue and the Court would be called upon to decide the said issue, not only by keeping in loophole the rights of the parties, but also the backdrop of the public policy contained in statutory prohibition.

75. Whether a decision on question of law operates as res judicata was the subject matter of the determination before the Apex Court as early in 1970 in Mathura Prasasd Bajoo Jaiswal & Ors.

(supra), in relation to Section 11 of the Code of Civil Procedure, 1908 and what would constitute res judicata, a doctrine belonging to domain of procedure, was deliberated.

The pertinent observations in paragraphs 6 and 7 of the decision read thus :-

> "6. The authorities on the question whether a decision on a question of law operates as res judicata disclose widely differing views. In some cases it was decided that a decision on a question of law can never be res judicata in a subsequent proceedings between the same Parties : Parthasardhi Ayyangar v. Chinnakrishna Ayyangar; Chamanlal v. Bapubhai; and Kanta Devi v. Kalawati. On the other hand Aikman, J., in Chandi Prasad v. Maharaja Mahendra Singh , held that a decision on a question of law is always res judicata. But as observed by Rankin, C.J., in Tarini Charan Bhattacharjee v. Kedar Nath Haldar :
>
> "Question of law are of all kinds and cannot be dealt with a though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration."

We may analyse the illustrative cases relating to questions of law, decisions on which may be deemed res judicata in subsequent proceedings.....

7. Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties :

> Tarini Charan Bhattacharjee's case (supra). It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different."
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> 79/168 CARBP-414-18.odt
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> 76. Holding that the question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit, the observations of Rankin, C.J. in Tarini Charan Bhattacharjee v. Kedar Nath Haldar 33, were reproduced :-
>
> "The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided."

In paragraph 10 of the law report, Justice J.C. Shah concluded that a question relating to jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision

of the Court and if by an erroneous interpretation of the statute, the Court holds that it has no jurisdiction, the question would not operate as res judicata. Similarly, by an erroneous decision, if the Court assumes jurisdiction, which it did not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

77. If a question arising is a mixed question of law and facts and is determined by, in the earlier proceedings between the same parties, it may not be question in subsequent proceedings between the same parties, as it would be hit by the doctrine of res judicata, but, where the decision is on question of law i.e. interpretation of a statute or its applicability, it will be res judicata in subsequent proceedings between the same parties, 33 ILR 56 Cal 723 80/168 CARBP-414-18.odt for "the matter in issue" would be the same. However, when the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court permitting something, which is illegal, by resorting to the rule of res judicata, a party affected by the decision will not be precluded from challenging the validity of that order, by taking recourse to the rule of res judicata, as the rule of procedure cannot supersede the law of the land.

Concluding that the decision of the Civil Judge, Junior Division that he had no jurisdiction to entertain the application for determination of standard rent, in view of the judgment of the Court, was held to be plainly erroneous and the appeals came to be allowed, since the view expressed by the High Court of Bombay in Mrs.Dossibai N.B.Jeejeebhoy Vs. Hingoo Manohar Missar was overruled in Mrs.Dossibai N.B.Jeejeebhoy Vs. Khemchand Gorumal & Ors. and it is for the same reason, the Court held that the earlier decision of the Bombay High Court between the same parties relating to the same land is res judicata and it is in this background, the above exposition of law emanated.

The question relating to limitation thus cannot be deemed to have been determined by an erroneous decision of the Court and such decision shall not operate as res judicata at a subsequent stage between the same parties because if it is considered to be conclusive, it will assume the status of a special rule that is applicable to the Petitioner and the Respondent No.1, relating to the jurisdiction of the Court to entertain the application in derogation of the rule declared by the legislature that Article 137 of the Schedule of the 81/168 CARBP-414-18.odt Limitation Act and Section 3 of the Limitation Act and, particularly, this is what the law laid down by the Apex Court in Vedanta Limited (supra), concluding that the foreign awards are not decrees of the Indian Civil Court and the application for its execution would be an application not covered under any other Article of the Limitation Act, and, hence, would be covered by Article 137 of the Limitation Act, 1963.

In the wake of the decision of the Apex Court to the aforesaid effect in Vedanta Limited (supra), the issue of limitation has to be decided in accordance with the said authoritative pronouncement and applying the same law, the Petition filed by the Petitioner is barred by law of limitation, being filed beyond the prescribed period of three years.

If the Petition filed for the reliefs therein is entertained, by ignoring that it is filed beyond the period of limitation and is not accompanied with an application for condonation of delay, it would amount to creating a special statute of law and would convey that the order dated 13/11/2019, where the

preliminary issue about the maintainability was decided, but which did not receive approval of the Apex Court, which was confronted with this very issue and the conflicting views of different High Courts were put to rest, then such a view would act in derogation to the law declared by the Apex Court and also the rule declared by the legislature, fixing limitation.

78. Though Mr.Chinoy has attempted to submit that the issue of limitation is foreclosed and the order dated 13/11/2019 operates as res judicata and in any event, it is 82/168 CARBP-414-18.odt wiped from existence, when the order of 13/11/2019 is carefully perused, it is evident that the focus of the decision is upon Article 136 of the Schedule to the Limitation Act, 1963, by holding that the Petition is not barred by law of limitation, as the award by a foreign court amounts to a decree and is, therefore, covered under Article 136.

Paragraph 20 of the decision clearly record that, "it is well settled that a foreign award is stamped as a decree and hence, as a decree it can be enforced and be executable in one and the same proceeding. In that event Article 136 of the Limitation Act would surely become applicable prescribing a limitation of twelve years from the date when award becomes enforceable and/or the award directing payment of money as specifically provided, under Article 136."

The observations of the Apex Court in Fuerst Day Lawson Ltd. (supra), were extensively reproduced, to conclude that alongwith application for enforcement, it would be open to a party seeking enforcement of a foreign award to apply for execution in the form prescribed, so that once the Court proceeds to hold that the award is enforceable, it can thereafter proceed to execute the decree without further procedural requirements.

It is in these circumstances, while concluding that enforcement and execution can form part of the same proceedings, Article 136 under the Limitation Act is invoked.

79. The point of limitation is also tested in the order dated 13/11/2019, by pitching it against the applicability of the 83/168 CARBP-414-18.odt provisions of Article 137 and it is concluded that the petition is not barred by limitation, as by filing of the Section 34 petition by the respondents, the order passed by the learned Single Judge, condoning the delay and holding the petition to be maintainable, was set aside by the Apex Court only on 10/03/2017 and, thereafter, the proceedings under Section 47-49 for enforcement under execution filed on 2/04/2018, even by applying Article 137 of the Limitation Act, is not barred by limitation.

The observations in relation to Article 137, on reading of the entire order dated 13/11/2019, are only incidental and non-essential observations as, the objection raised by E-City was specifically premised on the ground that the petition is time barred considering the provisions of Article 137 of the schedule to the Limitation Act, which was a residuary Article prescribing period of limitation to be 3 years. While deriving a conclusion that since the foreign award amounts to a decree and therefore, would be governed by Article 136, the submissions advanced on behalf of the petitioner, by way of an alternative limb that even assuming that the provisions of Article 137 are applicable, the Petition is nevertheless within prescribed limitation was also tested.

While pronouncing upon the aspect of limitation, one find reference to the arbitration petition filed by the Respondent under Section 34 of the Act of 1996, on 27/11/2008, along with an application for condonation of delay, which was condoned on 10/07/2013, which is held to relate back to the date on which the petition was filed.

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80. Reliance is placed on the well settled position of law as set out in Fiza Developers(supra) to the effect that until disposal of the application under Section 34 of the Arbitration Act, there is an implied prohibition on enforcement of the arbitral award as the very filing and pendency of the application under Section 34, in effect operated as stay on the enforcement of the award.

Laying emphasis on the provisions of the Arbitration Act, prior to its amendment by the 2015 Amendment Act (with effect from 23/10/2015), the observations in paragraphs 19 and 20 in Fiza Developers (supra) were reproduced in support of the plea that filing and pendency of an application under Section 34, in effect, operate as a stay to the enforcement of the award.

My attention is invited to the decision of the Apex Court in case of Hindustan Construction Company Ltd. (supra), wherein it is categorically held and declared that there was never an automatic stay on enforcement of an award, upon filing of a petition under Section 34 of the Act, either pre or post to 2015 amendment to the Act, and the decision in case of Fiza Developers (supra) was expressly over ruled by declaring it to be per incuriam including paragraph 20 thereof, which formed the basis of the incidental observations in the order dated 13/11/2019 as regards applicability of the limitation prescribed under Article 137 of the Limitation Act.

It would be appropriate to reproduce relevant observations in Hindustan Construction Company Ltd. (supra), to the following effect:

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32. When this Court speaks of 'the mandatory language of Section 34' of the Arbitration Act, 1996 obviously what is meant is the language of Section 36 of the Arbitration Act, 1996, as noted by National Buildings Construction Corporation Ltd.vs. Lloyds Insulation India Ltd. (2005) 2 SCC 367 (in paragraph 6). In Fiza Developers and Inter-Trade (P) Ltd. v. AMCI (Budia) (P) Ltd., this Court held: [Fiza Developers & Inter-Trade case, SCC p. 801, para

20. Section 36 provides that an award shall be enforced in the same manner as if it were a decree of the court, but only on the expiry of the time for making an application to set aside the arbitral award under Section 34 or such application having been made, only after it has been refused. Thus until the disposal of the application under Section 34 of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award."

33. To state that an award when challenged under Section 34 becomes unexecutable merely by virtue of such challenge being made because of the language of Section 36 is plainly incorrect. As has been pointed out hereinabove, Section 36 was enacted for a different purpose. When read with Section 35, all that Section 36 states is that enforcement of a final award will be under the CPC, and in the same manner as if it were a decree of the court. In fact, this is how Section 36 has been read by a three-Judge Bench in Leela Hotels Ltd. v. Housing & Urban Development Corpn. Ltd. as follows: (SCC p. 313, para 45) "45. Regarding the question as to whether the award of the learned arbitrator tantamounts to a decree or not, the language used in Section 36 of the Arbitration and Conciliation Act, 1996, makes it very clear that such an award has to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the court. The said language leaves no room for doubt as to the manner in which the award of the learned arbitrator was to be accepted."

38. Thus, the reasoning of the judgments in NALCOS, and Fiza Developer Inter-Trade (P) Ltd. being per incuriam in not noticing Sections 9, 35 and the second part of Section 36 of the Arbitration Act, 1996, do not commend themselves to us and do not state the law correctly. The fact that NALCO has been followed in National Buildings Construction Corpn. Ltd. v. Lloyds Insulation (India) Ltd. (supra) does not take us any further, as National Buildings Construction Corpn. Ltd. in following NALCO, a per incuriam judgment, also does not state the law correctly. Thus, it is clear that the automatic stay of an award, as laid down by these decisions, is incorrect. The resultant position is that Section 36 - even as originally enacted- is not meant to do away with Article 36(2) of the UNCITRAL Model Law, but is really meant to do away with the two bites at the cherry doctrine in the context of awards made in India, 86/168 CARBP-414-18.odt and the fact that enforcement of a final award, when read with Section 35, is to be under the CPC, treating the award as if it were a decree of the court.

81. In the wake of the aforesaid, since the judgment in Fiza Developers (supra), which contemplated that in enforcement of the arbitral award, by the very filing and pendency of an application under Section 34, amount to stay on the enforcement, has lost its ground and the order dated 13/11/2019 which is based on Fiza Developers (supra) also cannot sustain.

In the wake of the aforesaid, the said order cannot operate as res judicata between the parties as Hindustan Construction Company Ltd. (Supra) has declared the law that there was never an automatic stay on enforcement of an award, upon filing of a petition under Section 34 of the Act and the incidental observation in relation to Article 137 of the Schedule to the Limitation Act, in the order dated 13/11/2019, has also lost its grounds, though I am of the firm view that the reference to Article 137, and its applicability was only a non- incidental discussion. The observations in the order dated 13/11/2019, in so far as Article 137 of the Schedule of the Limitation Act is concerned being only incidental observations, as the objection raised by the Respondent No.1 and the determination was focused upon the applicability of the Article 136 and therefore, I find substance in the submission of Mr.Seksaria, that the order dated 13/11/2019, cannot operate as res judicata or issue estoppel.

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82. Though limitation is a mixed question of law and facts, it will shed the said character and would get itself converted into a pure question of law when the foundational fact(s) determining the starting point of limitation is specifically pleaded in the plaint. In such a scenario, if the Court concerned is of the opinion that the point of limitation could be framed as preliminary issue and it warrants postponement of settlement of other issues, till its determination, it may frame the same as a preliminary issue and proceed to deal with the Suit only in accordance with the decision on that issue.

83. In Sukhbiri Devi & Ors. Vs. Union of India & Ors. 34, while deciding as to when can a preliminary issue under Order 14 Rule 2 (2) (b) of CPC be formulated, received the answer in the following words:-

> "17. In view of the legal position obtained from the decision in Nusli Neville Wadia's case the following decisions also assume relevance. In the decision in National Insurance Co. Ltd. v. Rattani this Court held that an admission made in the pleadings by a party is admissible in evidence proprio vigore. Equally well settled is the principle of law that an admission made by a party in his pleadings is admissible against him proprio vigore (see the decisions in Ranganayakamma v. K.S. Prakash (Dead) By LRs. and Vimal Chand Ghevarchand Jain v. Ramakant Eknath Jadoo.
>
> 18. In the context of the usage of the expression "admitted facts" in paragraph 52 of the decision in Nusli Neville Wadia's case and the word 'admission' employed the National Insurance CO. Ltd. case a reference to Sections 17, 18 and 58 of the Indian Evidence Act would not be inappropriate. A conjoint reading of the said provision would reveal that 'statements' by a party to proceedings are admissions and facts admitted need not be proved.
>
> 19. We referred to the said provisions and decisions only to stress upon the point that the appellants cannot legally have any dispute or grievance in taking their statements in the plaint capable of determining the starting point of limitation for the purpose of application of Order XIV, Rule 2(2)(b) of the CPC. Though, limitation is a mixed question of law and facts it will shed the said 34 2022 SCC OnLine SC 1322 88/168 CARBP-414-18.odt character and would get confined to one of question of law when the foundational fact(s), determining the starting point of limitation is vividly and specifically made in the plaint averments. In such a circumstance, if the Court concerned is of the opinion that limitation could be framed as a preliminary point and it warrants postponement of settlement of other issues till determination of that issue, it may frame the same as a preliminary issue and may deal with the suit only in accordance with the decision on that issue. It cannot be said that such an approach is impermissible in law and in fact, it is perfectly permissible under Order XIV, Rule 2(2)(b), CPC and legal in such circumstances. In short, in view of the decisions and the provisions, referred above, it is clear that the issue limitation can be framed and determined as a preliminary issue under Order XIV, Rule 2(2)(b), CPC in a case where it can be decided on admitted facts."

84. The order dated 13/11/2019, has conclusively held that Article 136 apply to a foreign award, since it is stamped as a decree, by referring to the decision of the Apex Court in Fuerst Day Lawson Ltd. (supra) and M/s. Compania Naviera 'sodnoc vs. Bharat Refinaries Ltd, with respect to limitation being 12 years and the objection raised by E-City that the petition is barred by limitation, by applying Article 137 was rejected.

In the wake of the above, since the awards, which are sought to be enforced through the present petition are dated 5/04/2006, 24/08/2007 and 27/03/2008, and as per the law laid down in Vedanta Limited (supra) the limitation period to file the petition for enforcement of the foreign award is held to be governed by Article 137 of Schedule to the Limitation Act, the petition filed under Section 48 of the Act of 1996 in March/ April 2018 is hit by the bar of limitation.

Since the period consumed from the day of passing of the last award on 27/03/2008, despite filing of petition under Section 34 of the Act of 1996 in India and since it did not amount to an automatic stay on the enforcement/ execution of 89/168 CARBP-414-18.odt the award, it was open to the petitioner to file the enforcement petition within time period of 3 years from the expiry of 28 days from each of the award, as under the English Arbitration Act, 1996, time period to challenge the award is 28 days, and the time to enforce the award began to run on expiry of 28 days from passing of the awards.

As a sequel to the above, the present petition in my view is barred by limitation and the argument of Mr. Seksaria on behalf of Respondent No.1, and entertaining the petition would also be hit by the public policy of India, being not to entertain the proceedings barred by the law of limitation.

ISSUE NO.D Whether the transaction contemplated under the Master Agreement is violative of public policy of India, making the Awards unenforceable under Section 48(2) of the Arbitration and Conciliation Act, 1996

85. Enforcement of an arbitral award may be refused by a Court, if the Court finds that the enforcement will be contrary to the public policy of India..

The Foreign Awards (Recognition & Enforcement) Act, 1961 which find the term 'Public Policy' in Section 7(1)(b)

(ii) , in absence of workable definition of International Public Policy, has been construed to mean the 'Public Policy' as applied by the Courts in such Foreign Award is sought to be imposed.

In Renusagar (supra), the term 'public policy' applied with reference to the said Act has received following interpretation :-

90/168 CARBP-414-18.odt "46. While observing that "from the very nature of things, the expressions public policy', 'opposed to public policy' or 'contrary to public policy are incapable of precise definition" this Court has laid down: (SCC p. 217, para 92) :

> "Public policy... connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time." (See: Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly.)

47. The need for applying the touchstone of public policy has been thus explained by Sir William Holdsworth:

> "In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them." (History of English Law, Vol. III, p. 55)

48. Since the doctrine of public policy is somewhat open-textured and flexible, Judges in England have shown certain degree of reluctance to invoke it in domestic law. There are two conflicting positions which are referred as the 'narrow view' and the 'broad view. According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this areas. (See: Chitty on Contracts, 26th Edn., Vol. I, a para 1133, pp. 685-686). Similar is the trend of the decision in India. In Gherulal Parakh v. Mahadeodas Maiya" this Court favoured the narrow view when it said:

> "... though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days" (p. 440)

49. In later decisions this Court has, however, leaned towards the broad view. [See: Murlidhar Agarwal v. State of U.P.; Central Inland Water Transport Corpn. v. Brojo Nath Ganguly at p. 373; Rattan Chand Hira Chand v. Askar Nawaz Jung.]

50. In the field of private international law, courts refuse to apply a rule of foreign law or recognise a foreign judgment or a foreign arbitral award if it is found that the same is contrary to the public policy of the country in which it is sought to be invoked or enforced. The English courts follow the following principles:

> "Exceptionally, the English court will not enforce or recognise a right conferred or a duty imposed by a foreign law where, on the facts of the particular case, enforcement or, as the case may be, 91/168 CARBP-414-18.odt recognition, would be contrary to a fundamental policy of English law. The court has, therefore, refused in certain cases to apply foreign law where to do so would in the particular circumstances be contrary to the interests of the United Kingdom or contrary to justice or morality." (See: Halsbury's Laws of England, 4th Edn., Vol. 8, para 418.)"

In the Act of 1996, Explanation 1 appended, offer the following clarification:-

> "Explanation 1. - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-
>
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or
>
> (iii) it is in conflict with the most basic notions of morality or justice."

In addition, Explanation 2 offers further clarity, by asserting as under :-

> Explanation 2. - For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.
>
> 86. Respondent No.1, E-City has adopted a specific stand that the transaction contained in Master Agreement is violative of Reserve Bank of India ("RBI")Notification dated 03/05/2000 under the Foreign Exchange Management Act, 1999 and the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and, hence, it amounts to breach of the public policy of India.

The aforesaid objection is to be tested by a careful reading of the Final Letter Agreement/Master Agreement dated 28/09/2000 entered between IMAX and E-City, which contemplated opening and developing 20 theaters in India, 92/168 CARBP-414-18.odt with E-City's initial commitment to lease six IMAX systems from IMAX. The agreement contemplated entering into an execution of Lease Agreement, post negotiations under good faith on or before 30/11/2000.

Clause 14 of the said agreement acknowledged that the structure of the transaction was contingent upon the approval of the Reserve Bank of India and both the parties agreed for reasonable structuring requested by Reserve Bank of India, as long as it do not negatively impact them in a material fashion. The subject agreement inter alia contemplated payment of the following :-

> "a) That E-city has paid to Imax a non-refundatble deposit of USD 300,000 towards initial rent.
>
> b) Execution of individual lease agreements post negotiations in good faith on or before 30.11.2000. Upon execution of individual lease agreements, Imax Ltd. would give E-city license to use the trademark IMAX and IMAX-3D for the royalty amounts stated therein.

Imax would provide services such as maintenance, digital services, delivery and installation and marketing and programming for amount as fees and charges etc."

87. FEMA, a law relating to foreign exchange, enacted with the objective of facilitating external trade and payments and for permitting the orderly development and maintenance of foreign exchange market in India, assigned a definite meaning to the term 'foreign exchange' in Section 2(n) to mean foreign currency, including deposits, credits and balances payable in any foreign currency as well as drafts, travellers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency, but payable in any foreign currency. It also covers drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.

93/168 CARBP-414-18.odt Chapter II of FEMA, prescribing regulations and management of foreign exchange, impose prohibition on a person to deal in or transfer any foreign exchange or foreign security to any person, making payment to or for the credit of any person resident outside India in any manner; receiving otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner. Similarly, by virtue of Section 4, a person resident in India, is prohibited from acquiring, holding, owning, possessing or transferring any foreign exchange, foreign security or any immovable property situated outside India. Similarly, the Capital Account Transactions, as contemplated in Sections 5 and 6, necessarily contemplate the approval from the RBI/Central Government.

Since the agreement between the parties was contingent upon approval of the RBI, it assumed the character of statutory contract and violation of the stipulation of obtaining the approval/permission, has potential to make the contract void under the Indian Contract Act, 1872. If it is so, it then becomes against the fundamental policy of India and what is urged by Mr.Seksaria, is that enforcement of an award, which fails to recognise the fundamental policy of India must be refused, as any remittance made in contravention of the public policy of India relating to the Export Control Regulation and remittance of foreign exchange, without the approval of RBI/Government of India would impact the enforcement of the Award.

In light of Section 5 of FEMA, which empowers the Central Government, in consultation with RBI and in public 94/168 CARBP-414-18.odt interest to impose reasonable restrictions for Current Account Transactions, the power available has been exercised by RBI on various Current Account Transactions, including the transaction under the agreement and what is relied upon is the RBI Circular dated 24/08/2000 and the FEMA (Current Account Transaction Rules), 2000.

Section 13 of the FEMA has prescribed penalty for contravening any rule, regulation, notification, direction or order issued in exercise of the powers under the Act or if it result in contravention of any condition, subject to which an authorisation is issued by Reserve Bank.

RBI Circular of 24/08/2000, issued under FEMA with reference to the Government of India Notification dated 03/05/2000, notifying the Rules of 2000, which has prohibited certain Current Account Transactions and restrictions being imposed in other transactions, has set out that the

transactions specified in Schedule II of the notification require prior approval of the Government of India, whereas those mentioned in Schedule III require the prior approval of RBI and the authorised dealers were directed to follow the directions contained in the Annexure while dealing with the applications relating to the import of goods and services into India.

The notification clarified that the transactions contained in the Annexure shall be read with the Rules notified by the Government of India on 03/05/2000 and the directions in the Circular have been issued under Section 10(4) and Section 11(1) of the FEMA and contravention of any non-observance of these directions is made subject to the penalties prescribed under FEMA.

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88. The Annexure contemplate distinct situations and Part 'A' contemplate 'Import of Goods' and cover 'Advance Remittance' in point A.11, which permit authorised dealers to allow advance remittance for import of goods, without any ceiling, subject to the following conditions :-

> "(c) if the amount of advance remittance exceeds U.S.$25,000 or its equivalent, a guarantee from an international bank of repute situated outside India or a guarantee of an authorised dealer in India, if such a guarantee is issued against the counter-guarantee of an international bank of repute situated outside India, should be obtained. An unconditional stands by L/C from an international bank of repute situated outside India may also be accepted in lieu of bank guarantee provided it is irrevocable, non-transferable and lists out full particulars of the transactions and there is a clear provision for prompt payment being received in convertible currency in an approved manner. The validity of the guarantee/letter of credit should adequately cover the period for the purpose of enforcing payment;
>
> (d) physical import of goods into India should be made within three months (twelve months in case of capital goods) from the date of remittance and the importer should given an undertaking to furnish documentary evidence of import within fifteen days from the close of the relevant period. Authorised dealers, if satisfied with the request, may allow extension of time for import not exceeding one month (three months in case of capital goods). In cases where the advance remittance has been made against a bank guarantee, the guarantee should be suitably amended, if need be, to cover the extended period for import of goods into India; and
>
> (e) authorised dealer should ensure that in the event of non-import of goods, the amount of advance remittance is repatriated to India or is utilised for any other purposes for which release of exchange is permissible under the Act, Rules or Regulations made thereunder, to the satisfaction of the authorised dealer."

89. In respect of the transaction contemplated in the LOI (Clause 5 of the agreement) relating to deferred payment of USD 19,00,000 to be paid in several installments over 5 years, including installment worth USD 3,80,000 every year E-City perceived that any remittance over a period of 6

months require approval of RBI/Government of India in accordance 96/168 CARBP-414-18.odt with Regulation 5(3) of Reserve Bank Notification dated 03/05/2000.

Clause A.12 of Circular NO.9 dated 24/08/2000, which set the time-limit for Import Payments, provided thus :-

> "A.12 Time Limit for Settlement of Import Payments
>
> (i) In terms of the extant Rules, remittances against imports should be completed not later than six months from the date of shipment. Accordingly, deferred payment arrangements involving payments beyond a period of six months form the date of shipment are treated as external commercial borrowings which require prior approval of the Reserve Bank/Government of India {cf: Regulation 5(3) of Reserve Bank Notification No.FEMA 3/2000-RB dated May 3, 2000}....."

90. The Foreign Exchange Management (Borrowing or lending in foreign exchange) Regulations, 2000 was enacted in exercise of power conferred by RBI under Section 47 of FEMA, for borrowing or lending foreign exchange from or to a person resident in or outside India, though RBI may for sufficient reason, permit a person to do so. The same regulation also prescribed as below :-

> "3. An importer in India may, for import of goods into India, avail of foreign currency credit for a period not exceeding six months extended by the overseas supplier of goods, provided the import is in compliance with the Export Import Policy of the Government of India in force."

Clause 8 of the agreement pertaining to a non-exclusive, non- transferable license to use the IMAX trade mark in accordance with IMAX's standard license terms, even contemplated prior approval of Government of India and also of RBI, in the wake of the following stipulations in the Foreign Exchange Management (Current Account Transaction) Rules, 2000, as Rules 4 and 5,impose the following restrictions :-

97/168 CARBP-414-18.odt "4. Prior approval of Reserve Bank.- No person shall draw foreign exchange for a transaction included in the Schedule II without prior approval of the Government of India.

Provided that this Rules shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

5. Prior approval of Reserve Bank.- Every drawal of foreign exchange for transactions included in schedule III shall be governed as provided therein :

> Provided that this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter."

Schedule III, under Rule 5, in item 8 cover, "remittance for use and/or purchase of trade mark/franchise in India".

The earlier provision of obtaining the approval of Ministry of Industry and Commerce for remittances were payment of royalty exceeded 5% on local sales and 8% on exports and lumpsum payment exceeding US$ 2 million was omitted.

91. In the LOI, IMAX was supposed to provide maintenance services, training assistance (clause 6 of the agreement), digital services, delivery installation (clause 8 of the agreement, marketing and programming (clause 11 of the agreement) and E-City was to remit the following amount for the aforesaid services;

"Maintenance services/Training Assistance/Marketing and Programming In total an amount of USD 2,20,000 payable for the entire project."

92. The aforesaid clauses in the agreement necessarily contemplated provision of consultancy services procured from outside India and, therefore, required approval of RBI, as 98/168 CARBP-414-18.odt remittances of royalty and payment of lumpsum fee under the technical collaboration agreement,not registered with RBI as well as remittances exceeding US$ 100,000 for consultancy services procured from abroad were covered under Rule 5, which required prior approval from RBI for every drawal of foreign exchange transactions covered under Schedule III.

93. FEMA 1999 replacing the Foreign Exchange Regulation Act, (for short 'FERA') is enacted with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. The earlier enactment FERA, which had become incompatible with pro-liberalization policies of the Government of India was substituted by a new regime, in form of a regulatory mechanism that enable the Reserve Bank of India to pass regulations and the Central Government to make Rules, relating to foreign exchange in tune with the foreign trade policy of India. Unlike other Laws where everything is permitted unless specifically prohibited, under FERA of 1973, everything was prohibited unless specifically permitted and noticing that the tone and tenor of the existing legislation was very drastic, it was substituted by the FEMA, which liberalized foreign exchange control and restrictions on foreign investment as the management of foreign exchange becomes necessary and made the transactions for external trade more easier and simpler. The switch to FEMA is clearly marked by the change in the approach on the part of the Government by 'managing' the foreign exchange instead of regulating it and FEMA proceeds on principal that all current 99/168 CARBP-414-18.odt account transactions are permitted unless expressly prohibited and all capital account transactions are prohibited unless expressly permitted.

The object of FEMA is to protect Indian economy from loss of foreign exchange and to not permit the foreign exchange to be repatriated outside India unless certain prior mandatory stipulations are satisfied. Since FEMA intended to maintain financial stability by monitoring and regulating foreign investment and transactions by preventing abrupt capital movements that would destabilise the economy with a dual object of facilitating external trade and payments and also attracting and

management foreign investment alongwith safeguarding the interest of resident Indians, it also created offences for non compliance of its provisions.

The penalty is imposed with an object of ensuring India's economic stability and growth, by adhering to the framework prescribed for external trade, foreign investment and individual remittances. FEMA, thus is not only a legal regime, but it is a commitment to ethical financial practices that enhance India's credibility at global stage.

Since Reserve Bank of India, is the central Authority responsible for its administration , the violations of FEMA is looked at with seriousness and it may lead to fines upto three times the amount involved and in severe cases, the imprisonment.

94. When a statute impose a penalty for contravention of its provisions, any contract entered by contradicting an express declaration in the statute is void, since imposition of penalty 100/168 CARBP-414-18.odt in engaging in a prohibited act is to prevent from something to be done and if a thing is prohibited, doing of that thing is void.

If a Contract is entered to undertake a prohibited act, it would be void ab-initio and would become unenforceable.. If the contract, express or implied, is forbidden by law, definitely no Court shall render assistance to such a Contract. The expression "public policy" concerning the agreement relates to the public policy of the country where award is being enforced. Section 23 of the Contract Act, 1872 deals with what consideration and objects are lawful and what not. If the court regards it as immoral or opposed to public policy, in that event, the consideration or object of agreement is said to be unlawful, and any agreement of which the object or consideration is unlawful, is void.

The Contract Act does not define the expression 'public policy or opposed to public policy'. The principles governing public policy are capable of expansion or modification.

Enforcement of the foreign award would be refused on the ground that it was contrary to public policy if such enforcement would be contrary to (1) fundamental policy of Indian Law, (2) interest of India, and (3) justice or morality.

The expression "public policy of India" in Section 48(2)

(b) has the same import as that of expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act.

95. In the context of challenge to domestic awards, Section 34 of the Arbitration Act differentiates between International Commercial Arbitrations held in India and other arbitrations 101/168 CARBP-414-18.odt in India. So far as the 'The Public Policy of India" ground is concerned, both Sections, 34 and 48 are now placed on the same pedestal, so that in an International Commercial Arbitration conducted in India, the ground of challenge relating to "Public policy in India" would be the same as the ground of resisting enforcement of a foreign Award in India.

In Ssangyong Engg. & Construction Co. Ltd. vs. NHAI ,35 , it is pertinently observed thus :

> "41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders13, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

96. Mr.Chinoy has relied upon the decision of the Apex Court in case of Vijay Karia (supra) which dealt with violation of FEMA rules, where the argument advanced on behalf of the Appellant was the transfer of shares, from the persons resident in India to the Respondent No.1, a person resident outside India, cannot be less than the valuation of such shares as done by a duly certified Chartered Accountant, Merchant Banker or Cost Accountant and, as the sale of such shares at a discount of 10% would violate Rule 21(2)(b)(iii) and the fundamental policy of Indian Law contained in the aforesaid rules would be breached and, therefore, the Award was not capable of being enforced.

35 (2019)15 SCC 131

Referring to the decision of the learned Single Judge of Delhi High Court in case of Cruz City 1 Mauritius Holdings vs. Unitech Ltd.36, the Apex Court arrived at a conclusion that even if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of Reserve Bank of India may be obtained post facto if such violation can be condoned and neither the Award nor the Agreement being enforced by the Award can be held to be having no effect in law, since a rectifiable breach under FEMA can never be held to be violation of fundamental policy of Indian law.

97. Mr.Seksaria has distinguished the said Judgment and observations in Vijay Karia (supra) by submitting that the Reserve Bank of India in reference to the subject Agreement never granted permission and he would submit that Section 47 which was the thrust of the submission, was a case of 'prior approval' and it was in the facts of the case, the following observations came from the Apex Court :-

> "88. This reasoning commends itself to us. First and foremost, FEMA -unlike FERA - refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being the Reserve Bank of India under FERA. It is important to remember that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of the Reserve Bank of India may be obtained post-facto if such violation can be condoned. Neither the award, nor the agreement being enforced by the award, can, therefore, be held to be of no effect in law. This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law. Even assuming that Rule 21 of the Non-Debt Instrument Rules requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award directs that such shares be sold at a sum less than the market value, the Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the 36 2017 SCC OnLine Del 7810 103/168 CARBP-414-18.odt discounted value, or may choose to condone such breach. Further, even if the Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign award on the ground of violation of a FEMA Regulation or Rule would not arise as the award does not become void on that count. The fundamental policy of Indian law, as has been held in Renusagar, must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground."

98. The Single Judge of Delhi High Court in Cruz (supra) while dealing with the issue of foreign award violating the provisions of FEMA, by referring to Renusagar Power Co. Ltd. Vs. General Electric Co.37 has held that "The contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian Law. The expression "fundamental policy of Indian Law" refer to the principles and legislative policy on which the Indian Statute and Laws are founded. The expression "fundamental policy"

> connotes the basic and substratal rationale values and principles which form the bedrock of values in our country.

99. In the light of principle objective of New York Convention, being to ensure enforcement of Awards, notwithstanding that the Awards are not rendered in conformity to the national laws, the Delhi High Court held that that "the objections to enforcement on the ground of public policy must be such that it offend the core values of a member state's national policy which it cannot be expected to compromise".

37 1994 Supp.(1)SCC 644

The Delhi High Court, inter alia, relied on the Judgment of Bombay High Court in POL India Projects Limited vs. Aurelia Reederei Eugen Friederich GmbH Schiffahrtsgesellschaft & Company KG 38, which held that the contention that violation of FEMA was to be treated as equivalent to the earlier violation of FERA was not correct and the conclusion was supported by the following observation :

> "104. With the liberalization of our economy, it was felt that FERA must be repealed and new legislation must be enacted. The Statement of Objects and Reasons of FEMA indicate that FEMA was enacted in view of significant developments that had taken place since 1993: there was substantial increase in the foreign exchange reserves, growth in foreign trade, rationalisation of tariffs, current account convertibility, liberalisation of Indian Investments abroad, increased access to external commercial borrowings by Indian corporates and participation of foreign institutional investors in our stock markets. There was a paradigm shift in the statutory policy. The focus had now shifted from prohibiting transactions to a more permissible environment. The fundamental policy of FEMA no longer proscribes or prohibits Indian entities from expanding their business overseas and accepting risks in relation to transactions carried out outside India. And, as the title of FEMA suggests, the policy now is to manage foreign exchange. Under FEMA, all foreign account transactions are permissible subject to any reasonable restriction which the Government may impose in consultation with the RBI. It is now permissible to not only compound irregularities but also seek ex post facto permission. Thus, the question of declining enforcement of a foreign award on the ground of any regulatory compliance or violation of a provision of FEMA would not be warranted."

The Bombay High Court in case of POL India (supra) had held that even if a permission was required to be taken before execution of Letter of Guarantee , without its compliance, the execution of Letter of Guarantee would not be contrary to fundamental policy of Indian Law and the reasoning adopted was somehow similar when the Court observed thus :

> "108. Having held that a simpliciter violation of any particular provision of FEMA cannot be considered synonymous to offending 38(2015) SCC OnLine Bom 1109 105/168 CARBP-414-18.odt the fundamental policy of Indian law, it would also be apposite to mention that enforcement of a foreign award will invariably involve considerations relating to exchange control. The remittance of foreign exchange in favour of a foreign party seeking enforcement of a foreign award may require permissions from the Reserve Bank of India. There may also be a question whether

> the initial agreement pursuant to which a foreign award has been rendered required any express permission from RBI. However, as indicated earlier, the policy under FEMA is to permit all transactions albeit subject to reasonable restrictions in the interest of conserving and managing foreign exchange. India has not accepted full capital account convertibility as yet. Thus, there are transactions for which permission may not be forthcoming. Whereas certain transactions are permitted under FEMA and regulations made thereunder without any further permissions; other transactions may require express permission from the RBI. However, these considerations can be addressed by ensuring that no funds are remitted outside the country in enforcement of a foreign award, without the necessary permissions from the Reserve Bank of India. This would adequately address the issue of public interest and the concerns relating to foreign exchange management, which FEMA seeks to address.
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> 109 .....
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> 110. The contention that enforcement of the Award against Unitech must be refused on the ground that it violates any one or the other provision of FEMA, cannot be accepted; but, any remittance of the money recovered from Unitech in enforcement of the Award would necessarily require compliance of regulatory provisions and/or permissions."

100. The fundamental policy of Indian Law is a concept narrower than the policy of Indian Law, which means that a mere violation of law is not enough to make an award vulnerable.

The Explanation (1) appended to Section 48 itself provides guidance by clarifying that the Award is in conflict with public policy in India if it is in contravention with the fundamental policy of Indian Law or is in conflict with the basic notions of morality or justice.

101. One of the constituents of public policy of India is the expression "fundamental policy of Indian law" . Akin to the

explanation (2) of Section 34(2) of the Act of 1996, Section 48 (2) offers a clarification that whether there is contravention with the fundamental policy of Indian Law, it shall not entail a review on merits of the dispute.

In Renusagar Power Co. Ltd. (supra), it was held that violation of Foreign Exchange Regulation Act , 1973, being a statute enacted to safeguard the national economic interest, shall be contrary to the public policy of India and the fundamental policy of Indian law.

A decade later in ONGC Vs. Saw Pipes Ltd.39, after examining the grounds on which the Award can be set aside under Section 34 of the Act, the Apex Court held that in addition to the narrower meaning given to the term "public policy" in Renusagar (supra) , the Award can be set aside, if it was

patently illegal.

Although the Apex Court in ONGC Vs. Saw Pipes Ltd. (supra) sought to expand the scope of enquiry to set aside an Award in purely domestic arbitrations by giving a wider interpretation to term 'public policy', it had the effect of being extended to apply equally to Award arising out of International Commercial Arbitration as well as foreign awards, given the language, employed in the statute.

102. To overcome this effect , the Law Commission of India, in the year 2014 recommended insertion of Section 34 (2A) to deal with purely domestic Awards which were permitted to be set aside if the Court find that such Award is vitiated by 'patent illegality appearing on the face of the Award'.

39 (2003) 5 SCC 705

The Law Commission further recommended restriction of the scope of 'public policy' to bring the definition in line with the one propounded in Renusagar (supra) .

Before the recommendations could be implemented, the term 'fundamental policy of Indian law' was construed widely by the Apex Court in ONGC Vs. Western GECO International Ltd.40, to include Wednesbury principle of reasonableness when the Apex Court without exhaustively enumerating the purport of the expression 'fundamental policy of Indian law' referred to the three drastic principles which would be understood to be a part and parcel of fundamental policy of Indian law, which included, adopting a judicial approach, following principles of natural justice and absence of perversity or irregularity tested on the touchstone of Wednesbury principles of reasonableness.

The Apex Court, thus incorporated the Wednesbury principle of reasonableness as a part of fundamental policy of Indian Law .

103. In Associate Builders Vs. DDA41 the Apex Court further fortified this concept of fundamental policy of Indian Law to include - violation of FERA and disregard to the orders of the superior Courts and the three juristic principles as expounded in Western GECO, the principles not being exhaustive, but capable of further expansion. Since the Law commission was of the view that the clarification was needed to ensure that the term 'fundamental policy of Indian law" is narrowly construed and if such clarification is not provided all 40 (2014) 9 SCC 263 41 (2015) 3 SCC 49 108/168 CARBP-414-18.odt amendments suggested by it, in relation to the term "public policy" and "fundamental policy of Indian Law" will be rendered negatory which would permit review of an Arbitral Award on merits, and would be opening for challenges on this ground, the suggestion made by the Law Commission were adopted and the Act was amended with effect from 23/10/2015.

In Ssangyong Engg. & Construction Co. Ltd. (supra) the Apex Court embarked on the journey of tracing amendments in the backdrop of the statement of object of the 2015 Amendment and it was held that that the expression 'fundamental policy of Indian Law', would be relegated to Renusagar (supra) understanding i.e. violation of provisions of FERA and disregard to the Judgments of of superior of Court.

It was further clarified that the meaning of the term would no longer sustain, because under the guise of interfering with an Award on the ground that the Arbitrator did not adopt a judicial approach, the Court's intervention would be touching the merits of the Award, which was impermissible post the 2015 amendment.

104. The Delhi High Court in Cruz (supra) elaborated the expression " fundamental policy" by declaring that the objections on the ground of public policy must be such that it offend the core values of Indian National Policy, and those cannot be expected to be compromised.

On the facts of the case it was held that simplicitor violation of any provision of FEMA , unlike violation of FERA, shall not be considered synonymous to offending the policy of Indian Law.

109/168 CARBP-414-18.odt

105. This decision of Delhi High Court received approval from the Apex Court in Vijay Karia (supra) by adding that, "fundamental policy refers to the core values of India's public policy as a Nation, which may find expression not only in statute, but also time honored, hallowed principles, which are followed by the Courts".

106. In Vijay Karia (supra), the Apex Court reaffirmed the principle that for violation of fundamental policy of Indian Law, there shall be a breach of legal principle of legislation that is so basic to Indian Law that the same cannot be compromised and mere violation of any enactment shall not be a breach of fundamental policy of Indian Law and while expounding this proposition, the Apex Court created a narrow opening to include not only legislation/ enactments that can be said to be integral part of the policy of India, but also time honored hallowed principles which are consistently followed by the Courts in India.

The time honored hallowed principles forming core value of national policy, may cover an Award which is passed in disregard to the orders passed by the superior Court or passing an Award on the basis of the void contract or upholding the transaction rendered void by a Statute, as these may be some of the illustrations of the legal principles, which are incapable of being compromised, and in any case, the list may not be exhaustive.

107. A contingent contract, which was capable of being performed in case the Government give the requisite 110/168 CARBP-414-18.odt authorisation and which was in contemplation at the time of entering into the contract, and when an arbitration award was passed, without such permission being granted by the Government, in National Agricultural Co-Operative Marketing Federation of India (supra), the award was held to be ex-facie illegal and in contravention of the fundamental law,

since no export without permission of the Government was permissible and without the consent of the Government, the quota could not have been forwarded. In this background, the export without permission was in violation of the law and it was conclusively held that enforcement of such award would be violative of the public policy of India.

The Appellant NAFED and Respondent-Alimenta had entered into contract for supply of 5000 metric tonnes of Indian HPS groundnuts, but on account of cyclone, only 1900 metric tonnes was shipped and addendum was executed to the agreement, whereby the period of shipment of the commodity was changed to November-December 1980 for the balance quantity. Clause 14 of the agreement provided that in case of prohibition of export by executive order or by law, the agreement would be treated as cancelled. NAFED had the permission from the Government of India to enter into export for three years i.e. between 1997 - 1980, but no permission under the Export Control Order to carry forward the exports for the season 1979-1980 to the year 1980-1981. Though it sought permission, it was not granted by the Government and an award was passed against NAFED.

NAFED, by relying upon clause 14 of the agreement, adopted a stand that on happening of the contingency agreed 111/168 CARBP-414-18.odt to by the parties, the contract was rendered unenforceable under Section 32 of the Contract Act and as such, it could not be held liable to pay damages under foreign award.

In arriving at a conclusion that the award was unenforceable under Section 7 of the Foreign Awards Act, and while dealing with main objection for enforceability of the award being; NAFED was unable to comply with the contractual obligations to export due to Government's refusal; the question arose, whether enforcement of the award is against the public policy.

While deriving its conclusion, reliance was placed upon Section 32 of the Contract Act and I must gainfully reproduce the relevant observations.

> "44. In the present case, parties have agreed, and in Clause 14 of the Agreement, it was contemplated that during the contract if there is any prohibition of the export or any other executive or legislative Act by or on behalf the Government of the Country of origin, the unfulfilled part of the contract shall be cancelled. Because of the refusal by the Government, it was not permissible to NAFED to make a supply to the Alimenta S.A. Hence, the unfulfilled part was required to be cancelled. Thus, NAFED was justified in not making the supply as it would have violated the Export Control Order, and it was not permissible to carry forward the quantity of the previous year to the next year because of the Export Control Order without permission of the Government.
>
> 45. It is apparent that the contract came to an end in terms of Clause 14 of the Agreement. The contract became void in view of the provisions contained in Section 32 of the Indian Contract Act, 1881 (for short, "the Contract Act"). The stipulation in Clause 14 releases both parties from the performance of the contract.

46. ... ...

47. ... ...

48. Section 32 of the Contract Act applies in case the agreement itself provides for contingencies upon happening of which contract cannot be carried out and provide the consequences. To this case, provisions of Section 32 of the Contract Act is attracted and not Section 56. In case an act becomes impossible at a future date, and that exigency is not provided in the agreement on the happening of which exigency, impossible or unlawful, the promisor had no control 112/168 CARBP-414-18.odt which he could not have prevented, the contract becomes void as provided in Section 56.....

49. In the present case, because of the clear stipulation in Clause 14 of the Agreement, it is apparent that the parties have agreed for a contingent contract. They knew very well that the Government's executive, or legislative actions might come in the way as provided in Clause 14 of the Agreement. Thus, in this case, Section 32 of the Contract Act is attracted and not the provisions of section 56. It was an agreement to do an act impossible in itself without permission, and that is declared to be void by Section 32. The contract was capable of being performed in case the Government gave the requisite authorisation. It is not an event that was not in contemplation at the time of entering into the agreement. Government permission was necessary. Section 56 is not attracted as the promisor and promisee both knew the reason in advance as in agreement such a contingency was provided itself in case of Government's executive order comes in the way, for cancellation of the contract. Thus, the contract became void on the happening of the contingency, as provided in Section 32 of the Contract Act."

In conclusion, the Apex Court held thus :-

"58. It would have been unlawful for NAFED to affect the supply in view of the Government's refusal to accord the permission, and both the parties knew it very well and agreed that the contract would be cancelled in such an exigency for no-supply in quantity. Thus, they were bound by the agreement. The award pre- supposes supply could have been made after the Government's refusal. If supply had been made, it would have been unlawful. Thus, the parties agreed for its cancellation as such an award is against the basic law and public policy as applied in India.

59. It is also apparent that the Government rightly objected to the supply being made at the rate of the previous season in the next season, particularly when the prices escalated thrice. The addendum was entered into subsequently, unfairly, and the parties fully understood that the Government would not permit export at the rate on which supply was proposed, and NAFED was acting only as a canalising agent of the Government of India. Thus, for such an unfair contract, permission was rightly

> declined by the Government. In the previous year, the commodity could not be supplied due to force majeure. In no event, supply could have been made in December 1980 and January 1981 sans permission from the Government of India."

108. Answering the question as to whether award can be contrary to the public policy, with reference to Section 23 of the Contract Act, which prescribed as to what consideration 113/168 CARBP-414-18.odt and objects are lawful and what are not, it was noted that the consideration or object of an agreement is unlawful, if the Court regard it as immoral or against the public policy and it would be void. On an exact exhaustive reproduction of the observations in Renusagar Power Co. Ltd. (supra), Ssangyong Engg. & Construction Co. Ltd. (supra) as well as Western GECO (supra), in the wake of clause 14 of the agreement and as per the law applicable in India, it was concluded that no export could have taken place without the permission of the Government and the appellant-NAFED was unable to supply in absence of these permissions. This was held to be a matter pertaining to fundamental policy of India and the conclusion of the Apex Court was worded explicitly as below :-

> "69. It is apparent from abovementioned decisions as to enforceability of foreign awards, Clause 14 of FOSFA Agreement and as per the law applicable in India, no export could have taken place without the permission of the Government, and NAFED was unable to supply, as it did not have any permission in the season 1980-1981 to effect the supply, it required the permission of the Government. The matter is such which pertains to the fundamental policy of India and parties were aware of it, and contracted that in such an exigency as provided in clause 14, the Agreement shall be cancelled for the supply which could not be made. It became void under Section 32 of the Contract Act on happening of contingency. Thus, it was not open because of the clear terms of the Arbitration Agreement to saddle the liability upon NAFED to pay damages as the contract became void. There was no permission to export commodity of the previous year in the next season, and then the Government declined permission to NAFED to supply. Thus, it would be against the fundamental public policy of India to enforce such an award, any supply made then would contravene the public policy of India relating to export for which permission of the Government of India was necessary.
>
> 70. In our considered opinion, the award could not be said to be enforceable, given the provisions contained in Section 7(1)(b)(ii) of the Foreign Awards Act. As per the test laid down in Renusagar, its enforcement would be against the fundamental policy of Indian Law and the basic concept of justice. Thus, we hold that award is unenforceable, and the High Court erred in law in holding otherwise in a perfunctory manner."
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> 114/168 CARBP-414-18.odt In the result, the appeal filed by NAFED was allowed and the award was held to be unenforceable.

109. In the facts of the present case, the agreement which contemplated permission to be granted by RBI, unless there is compliance of this stipulation, the agreement is not a lawful contract under the Indian Contract Act, 1872 since it remains forbidden. It is an admitted position that E-City vide its communication to the Exchange Control Department, RBI, in reference to the "remittance for lease of capital equipment", sought approval to make the necessary remittances. In its communication, it clarified that it was desirous of bringing in large 3D format experience for Indian viewers and they have tied with world's leader in this field i.e. IMAX Corporation of Canada and they have to import 3D cinema projection equipments on lease, as this technology is exclusively available with IMAX in the world. By clearly stating that they have to pay US$ 1 million as upfront lease consideration in three tranches (non-refundable) and the last tranche would be due on successful installation of the equipment and the other two shall be advance remittances of US$ 300,000 and further US $ 160,000 needs to be paid for a period of five years from the date when the theater commence its commercial operations and also there was a liability to pay the royalties and annual maintenance charges till the lease expired, when the equipment will have to be exported out of India, the necessary approval was sought.

On 30/10/2000, SBI (the authorised dealer) addressed a letter to General Manager, Exchange Control Department, RBI 115/168 CARBP-414-18.odt by bringing the facts regarding the proposed remittances and seeking approval of US$ 300,000 in terms of E-City's request towards first tranche, in token of acceptance in view of arrangement proposed to be entered by E-City with IMAX.

Once again, on 15/12/2000, E-City expressed its urgency seeking its approval for acquiring on credit, the System 1 and take delivery of the system in Canada/U.S.A. and to pay the consideration in installment, so that it can execute necessary agreement with IMAX..

Here, E-City was struck as until it received permission from RBI, the proposed transaction would not have been a lawful contract within the meaning of Section 10 read with Section 23 of the Contract Act, 1872 and this resulted in IMAX issuing notice of termination of exclusivity to E-City by asserting that they were at liberty to pursue sale and/or lease of IMAX systems and opening of IMAX theaters around India. On 17/05/2004, IMAX issued a notice of default, in pursuance of the Master Agreement by citing time as its essence. Clarifying that if E-City fails to make arrangements acceptable to IMAX within 20 days, it threatened to enforce its right pursuant to the Master Agreement, including commencement of arbitration proceedings.

E-City could not have made any payment without RBI's approval, as this condition was part of the agreement and even IMAX had acknowledged that the structure of the transaction is contingent upon the approval of the RBI. If IMAX would have made payment, it would have been illegal and in violation of the Regulations operating in the country and, since, the agreement was contingent upon the remittances being made 116/168 CARBP-414-18.odt with the approval of the RBI, the exposition of law emerging from the National Agricultural Co-Operative Marketing Federation of India (supra) squarely apply to the case of the Petitioner, where the award was held to be unenforceable because the Indian law is not followed.

110. Yet another exposition of law on this subject by the Apex Court is in the case of Asha John Divianathan (supra), which has reiterated that a contract is void, if it is prohibited by a statute imposing penalty, even without expressed declaration that the contract is void and this was in reference to Section 31 of the FERA, to be read with other provisions in the Act, contemplating obtaining of previous permission of RBI, which was held to operate in the nature of prohibition. Holding that a transfer/transaction in contravention of requirement of previous permission of RBI under Section 31 of FERA is void, it is held that no ex post facto permission can be granted by RBI under Section 31.

Asha John Divianathan (supra) relied upon Vijay Karia (supra), while it concluded that the requirement of seeking general or special permission of RBI in respect of transaction covered by Section 31 of the FERA is mandatory and in a transaction of sale or gift of the property situated in India by a foreigner in contravention thereof would be unenforceable in law.

While deciding the central issue in the appeal in reference to Section 31 of FERA, 1973 in relation to a transaction entered into, in contravention of that provision is void or is only voidable, Mrs.F, a foreigner and the owner of the 117/168 CARBP-414-18.odt property in question gifted it to the respondent, without obtaining previous permission of the Government under the Act of 1973 and even a supplementary gift deed executed in his favour was without seeking the previous permission of RBI. Before executing the gift deed, she had executed an agreement for sale in favour of Mr.R.P.David, father of the appellant, whereunder the title deed of the schedule property was delivered by her to Mr.David.

A suit filed by Mr.David was decreed, declaring that he was the absolute owner of the suit property. The appellant, however, filed an appeal before the High Court of Karnataka against the judgment and decree with reference to the validity of the gift deed and the supplementary gift deed, both executed in favour of respondent No.1 in respect of the large property. The High Court negatived the challenge and held that lack of permission under Section 31 of FERA did not render the subject gift deed void much less illegal and unenforceable.

In the appeal before the Apex Court, the appellant-Asha John urged that the gift deeds are null and void and not binding upon her, as they are unenforceable in light of mandate of Section 31 of the Act of 1973. In support of the submission, reliance was placed upon the decision in the case of Renusagar Power CO. Ltd. (supra) and Vijay Karia (supra).

104. Recording the undisputed fact that Mrs.F was not a citizen of India and she transferred the right, title and interest in the larger property by way of sale to Mr.R.P.David and around the same time, gifted some portion of the property to Vikrant Malhotra, the respondent. As regards the sale deed in 118/168 CARBP-414-18.odt favour of Mr.R.P.David, it was executed only after previous permission given by RBI. However, the gift deeds were not backed by RBI's permission, either special or general and in this background, it is noted that the appellant is questioning the validity of the transaction/transfer in favour of respondent No.1.

Focusing upon the avowed object of Section 31, being to minimise the drainage of foreign exchange by way of repatriation of income from immovable property and sale proceeds in case of disposal of property by a person, who is not a citizen of India, its purpose was highlighted being to put restrictions on acquisition, holding and disposal of immovable property in India by foreigners/non-citizens.

In paragraphs 19 and 20, the scope of this Section was clearly summarized in the following words :-

> "19. On a bare reading of Section 31(1), it is crystal clear that a person, who is not a citizen of India, is not competent to dispose of by sale or gift, as in this case, any immovable property situated in India without previous general or special permission of RBI. The only exception provided in the proviso is that of acquisition or transfer of immovable property by way of lease for a period not exceeding five years. This provision applies to foreign citizens and foreign and FERA companies only. A non-resident Indian Citizen is not covered thereunder.....
>
> 20. In other words, a person, who is not a citizen of India, holding immovable property situated in India was obliged to make disclosure and declaration in that behalf of RBI; and in any case, if he/she intended to dispose of such property by sale, mortgage, lease, gift, settlement or otherwise, was expected to obtain previous general or special permission from RBI. Only the, transfer so intended could be given effect to. It is true that the consequences of failure to seek such previous permission have not been explicitly specified in the same provision or elsewhere in the Act, but then the purport of Section 31 must be understood in the context of intent with which it has been enacted, the general policy not to allow foreign investment in landed property/buildings constructed by foreigners or to allow them to enter into real estate business to eschew capital repatriation, including the purport of other provisions of the Act, such as Sections 47, 50 and 63."
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> 119/168 CARBP-414-18.odt
>
> 111. The soul of the decision lies in its observation in paragraph 26, which read as under :-
>
> "26. It is well established that a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. Further, it is settled that prohibition and negative words can rarely be directory. In the present dispensation provided under Section 31 of the 1973 Act read with Sections 47, 50 and 63 of the same Act, although it may be a case of seeking previous permission it is in the nature of prohibition as observed by a three-Judge Bench of this Court in Mannalal Khetan v. Kedar Nath Khetan. In every case where a statute imposes a penalty for doing an act, though, the act not prohibited, yet the thing is unlawful because it is not intended that a statute would impose a penalty for a lawful act. When penalty is imposed by statute for the purpose

> of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable...."

112. From the analysis of Section 31 of the Act and upon conjoint reading of Sections 47, 50 and 63 on facts, it was concluded thus :-

> "32. ...we must hold that the requirement of taking "previous"

permission of RBI before executing the sale deed or gift deed is the quintessence; and failure to do so must render the transfer unenforceable in law. The dispensation under Section 31 mandates "previous" or "prior" permission of RBI before the transfer takes effect. For, RBI is competent to refuse to grant permission in a given case. The sale or gift could be given effect and taken forward only after such permission is accorded by RBI. There is no possibility of ex post facto permission being granted by RBI u nder Section 31 of the 1973 Act, unlike in the case of Section 29 as noted in LIC. Before grant of such permission, if the sale deed or gift deed is challenged by a person affected by the same directly or indirectly and the court declares it to be invalid, despite the document being registered, no clear title would pass on to the recipient or beneficiary under such deed. The clear title would pass on and the deed can be given effect to only if permission is accorded by RBI under Section 31 of the 1973 Act to such transaction."

113. Taking note of cleavage of opinion that revolve around the effect of Section 13 of FERA and by recording a specific observation that merely because no provision in the Act makes 120/168 CARBP-414-18.odt the transaction void or say that no title in the property passes to the purchaser in case there is contravention of the provision of Section 31 is of no avail, as that does not validate the transaction referred to in Section 31, which is not backed by "previous" permission of RBI.

By referring to the distinct opinions expressed by different High Courts, it is held that the decisions, eventually seal the position of law that when the enforcement of the contract is against any provision of law, it will amount to enforcement of an illegal contract, though the contract per say may not be illegal, but its enforcement requires compliance of statutory conditions and its failure would, therefore, amount to statutory violation and this view was found to be acceptable. Holding that the requirement of seeking previous, general or special permission, of RBI is mandatory, the contrary decisions of the High Court were held to have missed the legislative intent and the spirit of enacting Section 31 and until such permission is accorded in law, the transfer cannot be given effect to and for contravening that requirement, the person may be visited with penalty and consequences provided in 1973 Act.

114. In the wake of the observations made to the above effect, I am convinced to accept the objection raised by E-City about the award not being enforceable, as it is in contravention of the fundamental policy of Indian law, since no permission of RBI was received and, therefore, no remittance was allowed, which resulted into a notice of default issued by the Petitioner on 17/05/2004.

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115. I must also take note of the defence adopted by E-City before the ICC, when it filed its submission of defence, when it averred that the terms of agreement contemplated that it was contingent upon E-City receiving RBI's approval.

Coming to the awards, the liability award dated 09/02/2006 passed in favour of IMAX, the submission about RBI' approval is taken note of and even the correspondence made on behalf of the E-City and the authorised dealer (SBI) to the RBI is also produced, but the Tribunal has observed that there was no hint or suggestion in these letters that this was other than the done deed and a further observation in the declaratory award, must be taken note of :-

> "The Tribunal finds that the parties did intend to create legal relationship and be bound by 28th September, 2000 agreement. That is supported by the contemporaneous record not least E-City's letter to RBI and the SBI."

In the statement of defence in the post liability phase also, E- City reiterated that it was obliged under investment to obtain approval from RBI as per Clause 14 of the agreement, but no such transfer came despite request.

116. E-City submitted the expert legal opinion on the RBI and FEMA regime, of Mr.Akshay Chudasama, Indian qualified Advocate and Solicitor of the Supreme Court of England and Wales, where he opined that given that the authorised dealer has sought prior approval to make the remittance, E-City could not have made the remittance without prior approval.

This opinion from Mr.Chudasama, a witness competent to depose, went un-controverted, as he was not cross- examined.

122/168 CARBP-414-18.odt Reply statement of Mr.David Berman(on behalf of IMAX Corporation) is also to be noted, where he admitted as below :-

> "... RBI approval has been obtained for IMAX Theaters in Mumbai, Hyderabad, Delhi....
>
> In each of these transactions, the transaction has been structured or restructured as a sale from the standard Imax lease transaction.
>
> ...purchase agreements structured in the manner we have in India do not pose an issue for the RBI."

However, this statement is not as regards E-City as per the agreement, but was a general statement, as the subject agreement was for lease and not for sale.

However, in the award, the Tribunal rejected the argument that the clause concerning RBI rendered the obligations unenforceable, by recording that clause 14 for that matter does not say that the permission of the bank is a condition precedent to the enforcement of the agreement, on the

contrary all that clause 14 does, is refer to the obligation of the parties to negotiate a change in the structure, should the RBI not approve it. It is concluded that it was not an escape clause for E-City to avoid any liability, but it was a clause indicating that the parties would restructure their arrangement within the framework of the Master Agreement, if the RBI raise concern.

This observation is clearly in teeth of the FEMA as well as notifications/circulars issued by RBI, which clearly contemplated a prior approval.

117. Even Mr.David Berman, the witness on behalf of IMAX, gave a clear admission that in respect of additional payments, 123/168 CARBP-414-18.odt it is conceded by RBI to be extraordinary commercial borrowings and if it is so then definitely the FEMA and the restrictions imposed by RBI as well as the Central Government are expected to be complied with, having been held to be mandatory.

Since the partial final award on jurisdiction and quantum is passed without taking into consideration the material issue raised that without RBI's approval, the agreement was unenforceable, in the place of its performance i.e. India, and since the award failed to take into consideration the imperative mandate of seeking RBI's approval under the law of the country, on the objection of the E-City that the enforcement of the awards would be contrary to the public policy in India, I deem it appropriate to accept the said contention and in the wake of the finding rendered above, decline the enforcement of the arbitral awards in favour of IMAX.

118. It being a well settled principle, right from the decision of the Apex Court in Renusagar (supra) that violation of Foreign Exchange Act and disregarding the orders of superior courts in India, would be regarded as being contrary to the fundamental policy of Indian Law, since the mandatory condition of obtaining approval of RBI is not satisfied in the present case, which was necessary and the preceding condition for executing an Agreement for Lease, which definitely is not curable in nature, and if any remittances were made without its approval, it would have impacted the Indian economy and affected the interest of the public at large and, 124/168 CARBP-414-18.odt therefore, it amounts to breach of fundamental policy of Indian Law as violations of FEMA is not curable and as distinguished, the observations of the Apex Court in the case of Asha John has clarified the position.

119. Another aspect which Mr. Seksaria representing E-City, being a matter of public policy, in form of 'fair hearing' which is placed into service, also deserve an analysis.

A party, in an adversary system deserve an opportunity to challenge by cross-examination, the evidence of any witness of the opposing party, so as to impact the witnesses's credibility, so that his evidence shall not be accepted on that point and this is a well recognized matter of fairness in legal proceedings. This opportunity ensure that a witness is given an opportunity to explain his or her evidence, if it is to be impugned. A Party is disentitled to impugn the witness or another parties witness, if he has not asked appropriate question enabling the witness to deal with the same.

120. This issue of requiring mandatory approval of Reserve Bank of India, is actually determined by me as the bone of contention between the Parties, since the objection to the enforceability of the

Awards is raised on the ground that the Awards are passed in contravention to the fundamental policy in India and here the FEMA Act and Regulations/Circulars under the said Act. The Arbitral Tribunal ought to have focused upon the specific stand raised by E-City in its statement of defence qua the requirement of mandatory 125/168 CARBP-414-18.odt approval of Reserve Bank of India, but unfortunately this was dealt with in a routine manner without focusing upon the same in depth. The Arbitral Tribunal has failed to consider the prime issue whether the Agreement in question is forbidden by law based upon the principal of private International Law viz. a contractual obligation which can be invalidated by Exchange Control Registration if it part of the law in the place of its performance.

The Agreement clearly contemplated prior approval of Reserve Bank of India, but the Award proceed on the basis that there is no evidence to prove that Reserve Bank of India would not have given permission, without testing the assertion of E-City that RBI never granted permission. Mr. Chudasma, the witness of E-City has unequivocally stated; "..... Given by, that the Authorized Dealer State Bank of India itself had sought prior Reserve Bank of India approval for remittance of monies under the LOI and it was not possible for E-City to have made the remittances without prior approval of RBI." The Tribunal ought to have, therefore, considered the issue by taking into consideration the above statement surfacing from the evidence of Mr. Chudasama which went un-contraverted.

115. In the Judgment of Supreme Court of England in TUI UK Ltd. (supra), delivered on 29/11/2023, when the Appeal raised the question of fairness of the trial and the question was raised, whether the trial Court was entitled to find that the claimant had not proved his case, the claimants expert had given un-contraverted evidence, which was not illogical or inconsistent or based on any misunderstanding of facts or unrealistic assumptions, but was only criticized as being 126/168 CARBP-414-18.odt incomplete in its explanations and for its failure expressly to discount on the balance of probabilities of all other possible causes of Mr.Griffiths.

The question so arose, when Mr. and Mrs. Griffiths and their youngest son went on a package holiday, which included package of meals. Mr. Griffith suffered a serious stomach upset which left him in long term problem and he sued the travel company. At trial, Mr. and Mrs. Griffiths gave uncontested evidence as to the fact. The evidence of an expert was also lead, who expressed an opinion, that on the balance of probabilities the food or drink served at the hotel was the cause for Mr. Griffiths woes.

The travel company defended, but did not require the expert to attend cross-examination and also do not lead any evidence on its own and its counsel argued and persuaded the Judge that deficiencies in the expert's report meant that claimant had failed to prove its case on balance of probabilities.

Thus, in this background, Lord Halsbury agreed with the Lord Chancellor's statements as to how a trial should be conducted, and held as under :-

> "To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to." (Emphasis added)
>
> 121. The principle set out by Latham LJ as a general rule was reproduced which read thus :
>
> 127/168 CARBP-414-18.odt "The general rule in adversarial proceedings, as between the parties, is that one party should not be entitled to impugn the evidence of another party's witness if he has not asked appropriate questions enabling the witness to deal with the criticisms that are being made."

It was further elaborated by stating that the procedural fairness not only to the parties but to the witness, requires that if their evidence were to be disbelieved, then they must be given a fair opportunity to deal with the allegation.

On taking review of the case law on this point, the rules of natural justice were clearly culled out with reference to Browne Vs. Dunn42 to the following effect :

> "70. In conclusion, the status and application of the rule in Browne v Dunn and the other cases which I have discussed can be summarised in the following propositions:
>
> (i) The general rule in civil cases, as stated in Phipson, 20th ed, para 12-12, is that a party is required to challenge by cross-

examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.

(ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

(iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

(iv) Maintaining the fairness of the trial inchides fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of 42 (1863) 6 R 67 128/168 CARBP-414-18.odt dishonesty, but there is no principled basis for confining the rule to cases of dishonesty."

122. By reading of the aforesaid principles, which has also found its way in the Indian Jurisprudence, being recognized as a principal of natural justice, if there is no cross- examination on a particular point which has surfaced on record through the testimony of a particular witness, in that case the said statement being uncontroverted deserve to be accepted and admitted in evidence. Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony cannot be disputed at all.

123. Justice PB Mukharji in AEG Carapiet (supra), by relying upon Browne (supra), has concluded thus in Para 9 :-

> "9. The law is clear on the subject. Wherever the opponent has declined to avail /himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross- examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross- examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated."

124. When the admissions coming from the witness of E-City was not controverted by subjecting him to cross-examination, 129/168 CARBP-414-18.odt I find that the Tribunal derived an inference contrary to what has been deposed by the witness, without affording a chance to explain or clarify the said statement, has definitely resulted into a loss of fair hearing as Mr. Chudasama had unequivocally stated that it was not possible for E-City to have made the remittances without prior approval of Reserve Bank of India, but without going for the cross-examination, the Tribunal has questioned this testimony, expressed doubt and derived at a finding that it was not a mandatory

requirement and it was not refused, which definitely has resulted into perversity in its finding.

In Para 16 of the Partial Final Award on jurisdiction and quantum the Tribunal took note of the following :-

> "16. In the event, Mr. Chudasama was not called to give oral testimony in London, Mr.Cooperman indicating that he did not require to cross-examine him and Mr.Coomaraswamy SC saying that therefore he would not call him. However, in accordance with normal practice, Mr. Chudasama's statement was admitted as his evidence and became part of the record of the arbitration."

125. Further in the very same Award, when the Respondent raised a issue on the role of RBI, by stating that the lack of RBI approval made the conclusion of any Agreement even less feasible and the RBI never came up with any request or suggestion to make this or another structure more feasible, Tribunal observed thus :

> "52. But is it open to the Respondent to take this point that the proper exercise of the powers RBI would have precluded the implementation of the contracts as permission would not have been forthcoming? It was to this issue that the evidence of Mr Chudasama was directed. Here again, the Respondent falls foul of the ruling of this Tribunal at the liability stage.
>
> 53. At paragraph 120 the Tribunal said this:
>
> 130/168 CARBP-414-18.odt ".....Neither, for that matter, does Clause 14 when referring to the Reserve Bank of India, say that permission of the Bank is a condition precedent to the entry into force of the agreement. On the contrary all that Clause 14 does is refer to the obligation of the parties to negotiate a change in the structure should the Reserve Bank of India not approve it, in itself a recognition that the structure established by the Agreement was binding. It was, after all, that Agreement which would be submitted to the Reserve Bank of India. The renegotiation of the structure must take place within the clearly defined parameters of Clause 14 itself. In the Tribunal's view it would be open to arbitrators, were there to be a dispute as to significant adverse effect, to resolve that by an award."

126. In utter contrast, in Para 54, the Tribunal record that according the evidence of Mr. Burman, the Tribunal has no hesitation in accepting that the Reserve Bank of India has given permission for remittances of funds pursuant to other contracts, which other Indian parties have entered into and, therefore, there could have been no difficulty with the RBI in this respect, the contracts being structured in from of Sale and Purchase, rather than IMAX's customary form of lease.

What the Tribunal has failed to consider is, in this particular case where the LOI refer to entering into separate Agreement for Lease never received approval from Reserve Bank of India, which IMAX and other Indian Parties had entered in to, had received its approval.

Unfortunately, the Arbitral Tribunal has rendered a finding the evidence of Chudasama going uncontrovered and this is clearly in the teeth of Browne (supra).

Even on this point, I find the Award which is in violation of principal of natural justice, on the ground of "fairness", is contrary to the public policy and hence cannot be enforced.

ISSUE NO.E Whether the Petitioner can raise challenge to the de-merger scheme ?

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127. Respondent/E-city has specifically opposed the Petition on the ground that the Petitioner has assailed the demerger scheme and a specific stand is adopted in the reply filed by it that the Petition is filed to enforce the foreign award not only against Respondent No.1, but against Respondent Nos.2 to 4 on the premise that the demerger scheme by which assets of Respondent No.1 were validly and legally transferred in favour of Respondent Nos.2 and 3 are alleged to be fraudulent transfers, in order to defeat the foreign awards in its favour.

It is noted that the scheme of de-merger has been sanctioned by the High Court and is already implemented. It is also evident that the Petitioner was well aware of the demerger scheme when it approached the Court in Ontario, Canada, for recognition of the foreign Award, but instead of raising a challenge to the demerger scheme, the Petitioner preferred to prosecute the proceedings in Canada and subsequently in New York and on failing in its attempts of recognizing and executing foreign award in New York, the Petitioner has approached this Court raising objection to the demerger scheme which was sanctioned by the competent Court in India.

128. I have perused the orders passed by the High Court of Judicature at Bombay, in the Company Petitions, where sanction was sought from the Court to the scheme of demerger under Section 391 to 394 of the Companies Act, 1956.

The Petitions filed by E-City Entertainment (I) Pvt. Ltd. placed before the Court alongwith the necessary statutory 132/168 CARBP-414-18.odt compliance and Affidavit filed by the Regional Director to that effect, was duly accepted by the court by recording an undertaking that the necessary compliances shall be carried out, and by further recording that there is no objection in sanctioning the scheme of demerger, the Petitions were made absolute, by directing the Company Petitioner to take appropriate steps by passing a special resolution as contemplated under Section 100 of the Companies Act and by declaring that the scheme of de-merger shall come into effect only upon such resolution being passed.

The first order dated 20/6/2007 deals with the first de- merger involving E-City Real Estate Pvt. Ltd., whereas, the second dealt with the E-City Project Construction Pvt. Ltd. In the Affidavit filed by Respondent No.1 to the Petition, the justification for the demerger is offered indicating the process that was followed in the following manner :

> "I say that since the company had received an attractive investment proposal from a strategic financial investor who was willing to invest in company's properties namely Lucknow, Kanpur and Coimbatore which were compliant with the FDI norms. Therefore, it was decided to demerge the FDI compliant properties into a new company. I say that on August 31, 2006, Board of Directors of Respondent No. 2 approved the scheme of demerger. I say that on October 31, 2006, Board of Directors of Respondent No. 3 NOTARY approved the scheme of demerger.
>
> With respect to paragraph 42, I say that on November 15, 2006 Respondent No. 1 filed a demerger petition before this Hon'ble Court. The "effective date" is only a nominal date on which the sanctions, approval or orders specified in Clause 20 of the Scheme are to be obtained. I say that the purpose of the demerger process was to hive off the real estate division of Respondent No. 1 to Respondent No. 2 in order to allow certain assets of Respondent No. 1 to be permitted to receive FDI, as permissible under the relevant Act of Government of India."

It is also specifically stated that the process for re- organization of business of E-City i.e. Respondent No.1 and 133/168 CARBP-414-18.odt demerger of real estate business of the Company was in pursuant to the Direct Automatic Root FDI Policy as a business decision and after receipt of advise of experts, such as APMG and ERNST and Young, this process kick started on 07/06/2005 on which date the Board of Directors of E-City passed a resolution to make the Company FDI compliant and this was much prior to the statement of case by IMAX and even much prior to the passing of Partial Final Award on liability on 09/02/2006. The incorporation of Respondent No.2 was immediately after the announcement of FDI Policy, whereas, incorporation of Respondent No.3 was after the Board Meeting dated 07/06/2005, and it is noted by me that only upon sufficient disclosures and statutory compliances being ensured, the High Court allowed the prayer of demerger in the company petitions in accordance with the Companies Act and the Rules thereunder.

The order permitting the demerger has ensured the statutory compliance as stipulated under Section 391(2) of the Companies Act, 1956 viz. i)the latest financial position of the Company and ii) latest Auditors Report on the accounts of the Company. The form and contents of the balance-sheet and profit and loss are stipulated in Section 211 of the Companies Act read with Schedule VI and disclosures as required were made in the Note to Accounts which included the contingent liabilities and commitments. The mandatory disclosures required, form part of the Petition and the High Court ensured the compliance of the Rules while sanctioning the scheme of arrangement/demerger as prescribed under Rule 67-87 including Form No.'40' of the Companies (Court) Rules, 1959.

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129. I find substance in the submission of Mr. Seksaria that no notice was required to be given to the Petitioner as it was not a creditor of E-City and it is not necessary to give notice to the contingent creditors. In fact, right of the Petitioner to recover 'damages' was crystalized only when the final Award was passed by the ICC Tribunal and this event occurred on 24/04/2008, which is almost a year after the completion of demerger, through the process contemplated in India. It is worth to

note that the declaratory Award cannot be enforced without quantification and, therefore, the final Award dated 24/04/2008 is the one which is sought to be enforced. The annual report of E-city for the financial year 2006,2007 made disclosure of liability towards IMAX and the Petitioner and the pending proceedings. The annual report for the year ending on 31/03/2006 formed part of the Company Petitions filed before this Court for approval of demerger scheme of Respondent Nos.2 and 3 and, therefore, when an order is passed by a competent Court, permitting the de-merger, there can be no challenge raised to the same.

Another submission of Respondent No.1, which deserve appreciation is, the Petitioner was always aware of the scheme of demerger and this is sought to be established on the basis of its own annual reports filed before the Securities Exchange Commission, USA for the year 2006-2007 and 2007-2008, which refer to the pendency of arbitration proceedings, the declaratory Award and that the partial quantification and costs were never treated as Assets or Receivables in the Petitioners Book, but they were only reflected as 'contingencies', making it clear that the Petitioner never 135/168 CARBP-414-18.odt treated the Respondent as a Debtor and the amounts which were to be received were contingent on the conclusion of the disputes interse. The Petitioner itself has produced the scheme of arrangement with the Petition, but it is a draft scheme of de-merger and not the scheme which was finally approved.

Though Mr.Seksaria has attempted to raise certain objection about its confidentiality, it being a privileged document, which predate the approved scheme presented before its Board of Directors, being placed before the Court at Ontario and some doubt is raised about the manner in which it has been procured, I do not intend to delve deep into this aspect, but at this stage deem it appropriate to only note that the Petitioner was aware of the proposed scheme of demerger, but chose to maintain silent and now for the first time, the scheme of demerger is called in question. However, with the explanation offered by Mr. Chinoy, that the Petitioner has no intention to raise challenge to the demerger scheme and even the impleadment of Respondent Nos.2 and 3 is for the reason that the Petitioner perceived it as an attempt to divest E-City of its assets so as to defeat the Award, I deem it appropriate to close this issue at this stage, as I have noted that it is by two orders passed by this Court in the Company Petition, the scheme of demerger between Respondent Nos.1 and 2 and Respondent Nos.1 and 3 has been approved and the schedule to the scheme clearly reflect the book value of the assets vis- a-vis liabilities of the Company and, therefore, there is no gainsay in the submission advanced on behalf of the Petitioner that the whole object of the de-merger scheme was to strip 136/168 CARBP-414-18.odt Respondent No.1 of its assets to avoid the liabilities under the declaratory Award and to render its enforcement infructuous.

146. The relevant excerpts of the Annual Report filed on behalf of the Petitioner for the fiscal year ending on 31/12/2006 had clearly recorded in relation to the same as below :-

> "Item 3. Legal Proceedings.
>
> .....In January 2004, the Company and IMAX Theatre Services Ltd..... on February 1, 2006, the ICC issued an Award on liability finding unanimously in companies favour on all claims..... The ICC Panel has not yet rendered its decision with respect to

damages and no amount has yet been recorded for these damages."

It is, after this reporting, the partial Award on jurisdiction and quantum was passed by ICC Tribunal on 24.08.2007 and, therefore, the contention of Mr. Chinoy that the scheme of demerger was intended to defraud IMAX, the Petitioner, cannot be accepted.

The Petitioner had a knowledge of the demerger of Respondent No.1 when it approached the Supreme Court of New York as an authenticated true copy of the order dated 31/08/2007 passed by the Bombay High Court in Company Petition No.407/2007 approving the scheme of demerger between Respondent Nos.1 and 3 was annexed alongwith the proceedings and the certified copy of the same was obtained by the Petitioner on 01/11/2007. Since the Petitioner continued to remain silent despite having knowledge of the demerger scheme from 2008, after a gross delay of 11 years, there cannot be an indirect challenge to the scheme of demerger as the orders have already attained finality.

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ISSUE NO.F

Necessity of impleading Respondent Nos.2 to 4 in the petition seeking enforcement and execution of the Arbitral Awards.

130. The liability award dated 9/6/2006 in favour of IMAX has inter alia declared; (i) the Master Agreement dated 28/9/2000 give rise to legal binding obligation and (ii) E-City Entertainment (I) Pvt Ltd had breached its obligations under the Master Agreement.

The Quantum Award dated 24/8/2007 awarded damages along with the interest, whereas the final award dated 27/6/2008 computed the actual amount payable to the petitioner by segregating it as per the timelines of payment of interest.

131. Mr.Chinoy, who seek recognition and enforcement of the deemed decrees of the three foreign awards made in the ICC Arbitration held in London, U.K., concede to the fact that Respondent Nos. 2 to 4 were not the parties to the arbitration proceedings and are also not award/judgment debtors.

He would candidly submit that the Respondent Nos.2 to 4 have been joined at the execution stage of the awards as the respondents have, during the pendency of the arbitration proceedings, divested the assets and properties of Respondent No.1 to the Respondent Nos.2 and 3 Companies through the two schemes of De-merger, leaving E-City Entertainment (L) Pvt Ltd with a meager asset of approx. 700,000 US$. The Respondent No.1 face an accusation that this improper diversion of its assets to the Respondent No.2 i.e. E-City Real 138/168 CARBP-414-18.odt Estate Pvt. Ltd. took place in June 2007 after the 'liability award' dated 09/03/2006 was made and the improper diversion of balance assets of E-City to the Respondent No.3, E- City Project Construction Pvt Ltd, took place in August 2007 after both, the liability award' dated 09/07/2007 and the 'quantum award' dated 24/08/2007 were pronounced. As far as Respondent No.4 E-City Investment and

Holding Co. Pvt. Ltd is concerned, it is the holding Company which holds more than 98% shares of E-City Real Estate and E-City Project Construction Pvt.Ltd, and which along with, E-City Real estates holds 99% of E-City Entertainments.

Respondent No.4 face the accusation that as the holding Company of Respondent Nos.1, 2 and 3, it has arranged for the improper diversion of Respondent No.1 to Respondent Nos.2 and 3.

132. The declaration sought in the Arbitration Petition in favour of the petitioner to the effect that the three awards passed by the Arbitral Tribunal are enforceable under Part II of the Act of 1996, and the further direction to enforce and execute them as decree in favour of the petitioner and against all the respondents. Similarly, the relief of deposit of the decretal amounts is also sought against the Respondent Nos.1 to 4, but since Mr.Chinoy has offered a clarity that the petitioner seek recognition only against E-City Entertainment, but since it, with an intention to defeat the awards, it has divested its assets to Respondent Nos.2 and 3, they are impleaded in the proceedings.

139/168 CARBP-414-18.odt It is, therefore, clear from the submission of Mr.Chinoy that the Petitioner do not seek recognition or enforcement against Respondent Nos.2 and 3, and dealing with the preliminary objection raised on behalf of Mr.Seervai, representing Respondent Nos.2 and 3, that these entities have no role to play in the whole episode, Mr.Chinoy has invoked the law laid down by this Court in Bhatia Industries (supra) which has categorically ruled on the doctrine of Piercing Corporate Veil in the execution proceedings which is not restricted only to the cases of holding subsidiary companies or case of tax evasion, but is equally applicable in execution proceedings.

133. The legal scenario flowing from the decision, has acknowledged that the doctrine of piercing the corporate veil, is also applicable in execution proceedings, when the Company is a creature of the group and it has masked itself in an attempt to avoid recognition by the eye of equity or when it is a mere cloak or sham and in truth, the business was being carried out by one person and not by a company as a separate entity, or when the Companies are intricably interlinked corporate entities. The Corporate veil can be lifted in cases where the Court from the material on record derive an inference that the judgment debtor is trying to defeat the execution of the award and in such a situation, if Respondent Nos.2 and 3 are only the cloaks and mask behind which the Respondent No.1 attempted to operate, so as to avoid its liability under the awards and the entire assets were transferred only with this intention, then, in such exceptional circumstances, it is permissible to pierce the corporate veil 140/168 CARBP-414-18.odt and the law in this regard is, by this time, well settled.

It is necessary to note the sequence of incorporation of the Respondent Nos. 2 and 3 and as to how the schemes of De- merger operated.

134. E-City Entertainment (I) Pvt.Ltd, Respondent No.2 was incorporated on 29/4/2005, a year later, after the claim was instituted by IMAX before the ICC, whereas Respondent No.3, E-City Project Construction was incorporated was 8/6/2005.

The first scheme of arrangement (the Diversion Scheme) between Respondent No.1 and Respondent No.2 is dated 20/6/2007 when some assets are alleged to have transferred hands in consideration of the shares being transferred to Respondent No.4 and Respondent No.2.

It is the accusation against Respondent No.1 that under the scheme, assets of Respondent No.1 of Rs.92 crores (i.e. assets with book value of Rs.75 crores and current assets of Rs.17.07 crores) were transferred to Respondent No.2 in consideration of its allotting shares to the shareholders of E- City Entertainment.

This Scheme received sanction from the High Court on 20/6/2007.

The second scheme of arrangement (Diversion) between Respondent Nos.1 and 3 is dated 31/8/2007 and it is alleged that immovable properties and assets of Respondent No.1 valued at Rs.119.80 crores were transferred to Respondent No.3 in consideration of it allotting shares to the shareholder of Respondent No.1, i.e. E-City Investment and Holding Co. Ltd., the Respondent No.4 and E-City Real Estate Pvt.Ltd i.e. 141/168 CARBP-414-18.odt Respondent No.2. Even this scheme received sanction on 31/8/2000.

All the Respondents collectively have adopted a stand that since the scheme of demerger was sanctioned by the High Court, and it is now not permissible to re-open them after a lapse of considerable time.

Mr.Chinoy insisted in recording his submission that under the two schemes of demerger, the Respondent No.1 divested and stripped itself virtually all of its assets and improperly divested its properties having a book value of Rs.170 crores and other current assets valued at Rs.38.5 crores to Respondent Nos.2 and 3, and after this transfer, it is left only with assets worth US$ 769,287.

135. To appreciate whether this Court would be justified in piercing the corporate veil as sought by the Petitioner, I must focus on the scheme of Part II of the Act of 1996, which looked at holistically, demonstrates that Foreign Awards are only held to be binding between the parties to the arbitration proceedings.

136. Section 48 of the Act of 1996 which set out the conditions for enforcement of foreign awards, also specifically refer to the 'party against whom it is invoked', and even sub- clause (b) of sub-section (1) thereof also refer to the same terminology.

A reading of the Chapter I in Part II of the Act of 1996, lead to a position that Section 44, which has used the expression "persons", which necessarily stipulate that the 142/168 CARBP-414-18.odt legal relationship between the parties need not be a contractual one. Further, the power to be exercised under section 45, to refer the parties to arbitration, permit its exercise at the request of one of the parties. Moreso, Section 45 which is the power of judicial authority to refer the parties to arbitration, has used the phrase ".... parties or any person claiming through or under him, ..."

128. Section 49 casts an obligation upon the Court to satisfy itself that the foreign award in consideration before it is enforceable under Chapter II. This would necessarily mean that the Court would have to satisfy itself that the exceptions to enforcement as set out in Section 48(1) of the Arbitration Act are not attracted, since then the Court is bound to refuse enforcement.

It is important to highlight that the scheme of the Arbitration Act as contained in Part II has a categoric distinction in language with regard to provisions that come into play at the pre-arbitration stage when compared to the provisions that are attracted only at the post-award stage.

Whilst Section 44 contemplates arbitration proceedings between persons having a legal relationship that may or may not be contractual, Section 45 contemplates invocation of arbitration not only by a party to the agreement also by parties that claim through or under a party to the agreement.

In contrast, the post-award provisions such as Sections 46 and 48 read with Section 49 specifically deploy restrictive language that reflects the fact that an award, once made, is only binding on those persons who were parties to the arbitration proceedings.

143/168 CARBP-414-18.odt Another clear indicator of the legislative intent to recognize foreign awards as binding only between the parties between whom it was made comes to light when comparing the language of Section 46 (under Part II) and Section 35 (under Part I) of the Arbitration Act. Whilst the finality ascribed to foreign awards under Section 46 is only between the parties to the arbitration proceedings, the finality ascribed to awards under Part I is significantly wider where awards under Part I are held to be final and binding on not only the parties to the arbitration proceedings but also as between the persons claiming under them.

137. Mr.Seervai as well as Mr.Jagtiani have heavily relied upon the decision in case of Gemini Bay Transcription Private Limited (supra) where the detail analysis of the relevant provisions of Part II of the Act is undertaken by the Apex Court, in the backdrop of the issue of enforceability of foreign award against the parties who though non signatories to the to the Arbitration Agreement were parties to the Arbitration Proceedings.

The decision has brought about the interplay between distinct provisions in Part II of the Act of 1996 with extreme precision and lucidity and I must reproduce the thrust of the said decision :-

> "43. Given the parameters, let us examine arguments of the appellants insofar as Section 48(1)(a) is concerned. If read literally, Section 48(1)(a) speaks only of parties to the agreement being under some incapacity, or the agreement being invalid under the law to which parties have subjected it. There can be no doubt that a non-party to the agreement, alleging that it cannot be bound by an award made under such agreement, is outside the literal construction of Section 48(1)(a). Also, it must not be forgotten that whereas Section 44 speaks of an arbitral award on differences 144/168 CARBP-414-18.odt between "persons" Section 48(1)(a) refers only to the "parties" to the agreement referred to in Section 44(a). Thus, to include non- parties to the agreement by introducing the word "person" would run contrary to the express

> language of Section 48(1)(a), when read with Section 44. Also, it must not be forgotten that these grounds cannot be expansively interpreted as has been held above. The grounds are in themselves specific, and only speak of incapacity of parties and the agreement being invalid under the law to which the parties have subjected it. To attempt to bring non- parties within this ground is to try and fit a square peg in a round hole."

138. Reliance is placed by Mr.Chinoy upon the decision of learned Single Judge in Mitsui OSK Lines Limited (Japan) (supra), which is distinguished by Mr.Seksaria, where an execution application seeking execution of a foreign award was sought to be amended in order to implead third parties to the execution proceedings despite them not being parties to the arbitration proceedings. The basis to implead third-parties in this case was that monies had purportedly been siphoned off from award-debtor's account in favor of these third parties who were said to be related entities. In addition, reliance was also placed on the state of affairs between the third-parties and the award-debtor as reflected from the books of account which, according to the award-creditor, demonstrated that the companies' affairs were inextricably linked to one another and they operated in similar businesses. However, the Court was pleased to dismiss the chamber summons after observing as under:-

> "69. The Chamber Summons appears on the face of it to be an attempt on the part of the Award Holder to trace monies in the hands of the Additional Respondents, particularly, since the Additional Respondents were not parties to the arbitration proceedings and/or the Foreign Award. Such personal liability sought to be imposed upon the Additional Respondents can only be determined in a substantial suit being filed by the Award Holder against the Additional Respondents. By allowing the Award Holder 145/168 CARBP-414-18.odt to execute the Foreign Award against the Additional Respondents by making them personally liable, the Executing Court would indeed be proceeding behind and/or beyond the decree.
>
> 71. Considering that this is a Foreign Award of which the execution has been sought by the Award Holder, it would be necessary to consider the relevant provision of the Arbitration and Conciliation Act, 1996 viz. Section 48 thereof. Section 48 of the said Act reads thus :-
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> .....
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> 72. It is clear from this provision that the party against whom the Foreign Award is to be enforced, is required to be given an opportunity as to why the Foreign Award should not be enforced against it. The provision also contemplates a case where the enforcement of the Foreign Award may be refused by the Court and which includes where the subject matter of the difference is not capable of settlement by arbitration under the law of India or the enforcement of the Award is contrary to the public policy of India.

The Additional Respondents not being parties to the foreign arbitration proceedings and/or the Foreign Award, the Chamber Summons appears to evade this provision. The Additional Respondents have not been given an opportunity to show cause as to why the Foreign Award should not be enforced against them, as they were not parties as envisaged under Section 48 of the said Act. The Foreign Award was enforceable only against the Judgment Debtor who was the party to the arbitration agreement and against whom the Foreign Award was passed. The Foreign Award cannot be enforced against the Additional Respondents who are neither parties to the arbitration agreement nor to the Award.

73. Various allegations of fraud have been averred in the Chamber Summons which are nothing but bare assertions, allegations, surmises and conjectures and hence, it would not be necessary for this Court to go into the same, without the same being established. These allegations have been made in support of the Applicant's contention that the Corporate Veil is required to be lifted to execute the Foreign Award against the Additional Respondents albeit they are not parties to the Foreign Award and/or the Foreign Award not having been passed against them. Since various submissions have been made with regard to lifting of the Corporate Veil, it would be necessary to deal with these submissions in order to consider whether the Executing Court can at all lift the Corporate Veil by making parties personally liable to satisfy the decree in execution, when the decree/Foreign Award (in the present case) was not passed against them."

139. The decision in Mitsui (supra) has distinguished the earlier decision of this Court in Bhatia Industries in the following words :-

146/168 CARBP-414-18.odt "74. The Award Holder has not been able to produce a Single judgment where, as in the present case, the Additional Respondents are to be made personally liable to satisfy the decree passed against the Respondent/Judgment Debtor. In fact, the judgment relied upon by the Award Holder viz. Bhatia Industries And Infrastructure Ltd. (supra) is entirely distinguishable on facts as in that case, the attachment was alleged to be made in respect of coal which belonged to BIIL and not the Judgment Debtor (BIL). It was when the said BIIL sought to vacate the attachment, the Division Bench of this Court concluded that both BIL and BIIL are in fact, one and the same and therefore, the attachment was in effect of the properties of BIL. the Judgment Debtor. In fact, it appears from the decision of the Single Judge in case of Bhatia Industries And Infrastructure Ltd. (supra) that, the claim made by the BIIL that the coal belonging to it, could not be attached as BIIL is not the Judgment Debtor was held to be false and a finding was arrived at that the coal in fact belonging to BIL who was the Judgment Debtor. In the present case the Award Holder is not going against the Associate Companies who are the Additional Respondent Nos. 1 to 4 in respect of particular assets claiming that they belong to the Judgment Debtor, but is in fact, making the Additional Respondents personally liable in respect of the Foreign Award passed against the Judgment Debtor. Hence, the judgment in Bhatia Industries And Infrastructure Ltd. (supra) will have no application in the facts and circumstances of the present case. In any event, the Supreme Court in case of Bhatia Industries And Infrastructure Ltd. (supra) has kept the question of law open. Considering that the ratio decidendi arrived at in the case of Bhatia Industries And Infrastructure Ltd. (supra) does not apply to the present case, the precedent relied upon by the Award Holder cannot apply in the facts and circumstances of the present case."

140. The ruling in Bhatia Industries (supra) as regards the permissibility of piercing the corporate veil which has relied upon the decision of Delhi High Court in Formosa Plastic Corporation Ltd. vs. Ashok Chauhan43, in my considered opinion would not govern the present case as the doctrine of "alter ego" and the piercing of corporate veil has been exhaustively deliberated upon by the Apex Court in case of Gemini Bay Transcription Private Limited (supra).

Bhatia Industries (supra) was a case dealing with execution of foreign award and the issue relating to piercing of 43 1999(1) AD (Delhi) 392 147/168 CARBP-414-18.odt the corporate veil arose at the stage of issuance of precepts under Section 46 of the Code of Civil Procedure and the Court was not called upon to consider the enforceability of the Award and, therefore, the entire scheme of Part II including Section 48 which prescribe that foreign awards can only be enforced against parties to the arbitration, was not considered by the learned Single Judge in Bhatia Industries (supra).

The decision in Bhatia Industries (supra) was subjected to challenge by way of SLP (c) No. 31066/2016 and by order dated 07.11.2016 the Supreme Court dismissed the SLP by offering a clarification that the question of law set out therein was kept open.

141. In Mitsui (supra) Justice Chagla had an opportunity to deal with the principle of piercing the corporate veil at the stage of execution, in order to proceed against third parties and he distinguished the position in Bhatia Industries (supra) with the following observations :

> "82. It is thus clear that the context of that decision was in respect of the statute which itself required the Corporate Veil to be lifted. The principles have been set out in above paragraph for lifting of the Corporate Veil, which would arise where statute lifts the Corporate Veil or where protection of public interest is of paramount importance or where company has been formed to evade obligations imposed by the law, then the Court will disregard the Corporate Veil. The Judgment Creditor in the present case has not satisfied any of these principles and accordingly, the lifting of the Corporate Veil is not at all justified in the facts and circumstances of the present case. This finding is without prejudice to the earlier finding that in the present case the lifting of the Corporate Veil cannot at all arise as the Additional Respondents are neither the parties to the Foreign Arbitration Agreement nor parties to the Foreign Award and as such cannot be proceeded against in execution of the Foreign Award. Further, the Additional Respondents are neither legal representatives nor representatives of the Judgment Debtor within the meaning of the provisions of the CPC which is a complete code in itself."

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142. With reference to the law that has evolved from the

Gemini Bay Transcription Private Limited (supra) as well as decision of the learned Single Judge in Mitsui (supra), it can be gainfully inferred that on plain reading of Section 44 to 48 of the Act of 1996, persons other than parties to the commercial relationship cannot be arraigned in enforcement/execution proceedings and it is

claimed that IMAX did not implead the Respondents in the arbitral proceedings at the relevant time, as a consequence they were never afforded an opportunity to participate in the proceedings and now to foist the liability under the Arbitral Awards on them,at the stage of execution/enforcement, would amount to gross failure of natural justice and is also a facet to be construed as in violation of fundamental policy of the Indian Law.

It is only a party to the Award which can raise an objection to it under Section 48(1) and in Gemini Bay Transcription Private Limited (supra) the Supreme Court has clearly interpreted that Section 48(1)(a) speaks only of parties to the Agreement deemed under some capacity, or the Agreement being invalid under the law to which the Parties have subjected it and definitely the non-party to the Agreement is outside its purview. The Apex Court had also distinguished the English case in Dallah Real Estate & Tourism Holding Co. vs. Ministry of Religious Affairs44, by recording a specific finding that :-

" Given the conclusion on Section 48 (1)(a) when read with Section 44 of the Arbitration Act, we cannot follow what is stated to be "International practice" and trying to fit a non-signatory's objection to a foreign award being binding upon it under Section 48(1)(a). We therefore distinguish Dallah case (Dallah Real Estate & Tourism 44(2011) 1 AC 763 149/168 CARBP-414-18.odt Holding Co. v. Ministry of Religious Affairs of the Govt. of Pakistan, (201) 1 AC 763: (2010) 3 WLR 1472) on facts as well as on law - a non-signatory's oibjection cannot possibly fit into Section 48(1) (a) as has been held by us hereinabove. Without delving deep into this problem, it may perhaps be open in an appropriate case for a non-

signatory to bring its case within Section 48(2) read with Explanation 1 (iii) as explained in Sangyong."

143. The learned senior counsel Mr.Jagtiani has invoked the fundamental principle of company law as extended in Salomon (supra), about the company being an independent legal entity distinct from its shareholders and this fundamental principle of company law was found its entry in Indian jurisprudence and was noticed in Tata Engineering and Locomotive Co. Ltd. & Ors. (supra), in the following words :-

"24. The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This position

> has been well established ever since the decision in the case of Salomon v. Salomon & Co. was pronounced in 1897; and indeed, it has always been the well- recognised principle of common law."

144. With this principle in mind, the doctrine of piercing the veil of a corporate entity has to be appreciated, as the object of it is to make those behind the veil i.e. the shareholders, liable for the debts of the company. In Balwant Rai Saluja (supra), where the issue, whether employees of a contractor engaged in statutory canteens would be treated as employees of principal employer came up for consideration, the contractor being the 150/168 CARBP-414-18.odt Hotel Corporation of India Limited ("HCI"), which was a subsidiary of Air India. The contention advanced was that HCI was a sham and camouflage subsidiary of Air India and, hence, it was a fit case to pierce the corporate veil.

While dismissing the appeal, by holding that employees of HCI could be held to be workmen of Air India, the Apex Court remarked as below :-

> "70. The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders within its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation.
>
> 71. In recent times, the law has been crystallised around the six principles formulated by Mumby, J. In Ben Hashem v. Ali Shayif [Ben Hashem v. Ali Shayif,2008 EWHC 2380 (Fam)]. The six principles, as found at paras 159-64 of the case are as follows :
>
> i. Ownership and control of a company were not enough to justify piercing the corporate veil;
>
> ii. The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, namely, because it is thought to be necessary in the interests of justice; iii. The corporate veil can be pierced only if there is some impropriety;
>
> iv. The impropriety in question must be linked to the use of the company structure to avoid or conceal liability; v. To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and vi. The company may be a "facade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.

> 73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in LIC v. Escorts Ltd. [(1986) 1 SCC 264], while discussing the doctrine of corporate veil, held that :
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> 151/168 CARBP-414-18.odt "90. ...Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or an beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."

74. Thus, on relying upon the aforesaid decision, the doctrine of piercing the veil allows the court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company, the application would thus depend upon the peculiar facts and circumstances of each case."

145. Considering the nature of control exercised by parent company over its subsidiary, when the Court was called upon to pierce the corporate veil in Vodafone International Holdings BV (supra), the Court refused to do so, by clarifying that merely because a parent company might have some ability to persuade its subsidiary do not make the two entities one and in this background, the doctrine received a further expansion in the following way :-

> "101. A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has nothing to do with its separate legal existence. If the owned company is wound up, the liquidator, and not its parent company, would get hold of the assets of the subsidiary. In none of the authorities have assets of the subsidiary been held to be those of the parent unless it is acting as an agent. Thus, even though a subsidiary may normally comply with the request of a parent company, it is not just a puppet of the parent company. The difference is between having power or having a persuasive position. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will look to see 152/168 CARBP-414-18.odt whether there are separate commercial interests which should be guarded.
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> 102. When there is a parent company with subsidiaries, is it or is it not the law that the parent company has the "power" over the subsidiary. It depends on the facts of each case. For instance, take the case of a one-man company, where only one man is

> the shareholder perhaps holding 99% of the shares, his wife holding 1%. In those circumstances, his control over the company may be so complete that it is his alter ego. But,in case of multinationals it is important to realise that their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. Of course, in many cases the courts do lift up a corner of the veil but that does not mean that they alter the legal position between the companies.
>
> 103. The Directors of the subsidiary under their articles are the managers of the companies. If new Directors are appointed even at the request of the parent company and even if such Directors were removable by the parent company, such Directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholders' influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) Directors. They cannot be reduced to be puppets. The decisive criterion is whether the parent company's management has such steering interference with the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive Directors."

146. In K.K.Modi Investment & Financial Services Pvt. Ltd. vs. Apollo International Inc. & Ors.45, the Delhi High Court was considering whether an arbitration clause could be enforced against non-signatories merely on the ground of economic unity between the entities/persons and in answering the question in the negative, it reiterated that merely because companies may have parent-subsidiary relationships and have a common management, would not lead to the presumption that all the companies are one entity. The relevant paragraph of the decision clarify as under :-

> 45 (2009) 2 Arb LR 499 153/168 CARBP-414-18.odt "5. The first requirement of Section 7 is that there should be a contract between petitioner and respondent, if there is no contract between petitioner and respondent the arbitration clause between them cannot be inferred. In the present case, the contract is there only between petitioner and respondent no. 1 in the form of a Shareholders' Agreement. There is no contract between petitioner and respondents no.2, 3 & 4. Can such a contract be inferred between petitioner and respondents no.2, 3 & 4 merely on the ground of economic unity of respondents 1 to 4 ? Every company which is incorporated under the relevant law of a country is a separate legal entity/person having right to enter into contracts with other legal entities of persons independent of the holding company or the parent company of which it is subsidiary. Unless the law provides that all companies having common management or subsidiary companies or holding Companies shall be considered one legal entity for the purpose of contracts, the Court cannot presume that all subsidiary companies and the holding or parent company shall be considered as one legal person and a contract with one company shall be considered as a contract with every other company of that group. If it is so,

then the registration of separate companies as subsidiary companies or wholly owned companies would have no meaning and the Court would be effectively merging all subsidiary companies wholly or partly owned companies into one company. That is not the position under company law or any other law that a subsidiary company practically has no legal existence and it is only the main company which has legal existence. A contract with respondent no. 1 cannot be considered as a contract with respondents no.2, 3 & 4. If respondents no.2, 3 & 4 were to be considered one and the same person then there was no reason for the petitioner to enter into contract with only a subsidiary company. The petitioner should have entered into a contract with main company. The very fact that the petitioner entered into a contract with subsidiary company on the basis of an agreement of respondent no.1 with respondent no.3, shows that the petitioner knew that respondents no.1 & 3 were two different legal persons and he was entering into contract with respondent no.1 or not with respondents no.2, 3 or 4. The contract between respondent no.1 & 3 cannot be considered as contract between petitioner and respondents no.1 & 3 on the ground of economic unity of respondents no.1 & 3. By the notice dated 22.4.2009 the respondent no. 3 had terminated the license, which it granted to respondent no. 1 under a separate contract which was entered into between respondents no.1 & 3. The person aggrieved can only be respondent no.1 who could have invoked arbitration clause contained in the license agreement against respondent no.3."

147. Mr.Jagtiani has submitted that the reference to the discussion of the law and the manner of its application to the 154/168 CARBP-414-18.odt facts, in Crown Prosecution Services Vs. G.46 is apposite, where the UK High Court of Justice was dealing with an application which required it to determine whether the assets of two companies- Prolink and Powervale- could be treated as the assets of one of its shareholders and directors, Mr.G., by piercing the corporate veil.

The allegation of the Crown was that the business of Prolink was purchased by a loan from a bank and GBP 200,000 which were funds that G had allegedly money- laundered. The shareholding in Prolink was split 34-33-33 between Mr.G, Mr.Croft and Mr.Kennedy. Prolink's business was operated out of a valuable yard which was owned by Powervale. Powervale was owned entirely by Prolink. All 3 of the shareholders were directors in Prolink and Powervale. The Court had to determine whether it could treat the assets of Powervale including the valuable yard, as the assets of Mr.G. The parties were ad idem on the law regarding piercing the veil; that assets or property owned by the company are not the property of the shareholders; that in order to lift the veil it must be shown that the Defendant had used the corporate structure as a device or facade to conceal criminal activities; it has to be shown that either the company was conceived in fraud or that though incorporated for a legitimate purpose, it's character has wholly changed and become essentially a vehicle for money laundering or fraudulent activities.

In deciding that the veil could not be pierced on the facts before the court, it was held that :-

46 [2010]EWHC 1117 (Admin) 155/168 CARBP-414-18.odt "Whilst it is plain to me that there is a good arguable case that the £200,000.00 advanced to Prolink by G

> represented criminal monies, the real question is whether there is a good arguable case that the company's assets should be treated as G's realisable property. It plainly cannot be the case that every injection of criminal funds into a business would result in the corporate veil being lifted, and a restraint order made against the company in terms that its assets were to be treated as those of the criminal. A much closer examination of the facts than that is required. In my judgment, the circumstances of this case are not such that it is appropriate to maintain the restraint order insofar as it relates to the land and property owned by Powervale Limited at Romford Road....The available evidence does not appear to me to show a substantial arguable case of use of a corporate structure as a device or facade to conceal criminal activity in circumstances where substantial trading activity took place to continue an already existing genuine business, and where the loan was openly recorded.

Whilst what occurred no doubt enabled G to invest what appear to be part of his ill-gotten gains. I am not persuaded that on the evidence an arguable case is demonstrated to show that G was attempting to hide behind the corporate veil so as to conceal his crime and his benefits from it..."

148. In the Indian scenario, on domestic front, in Chloro Controls India Pvt. Ltd. (supra), the Apex Court was called upon to decide whether party could invoke arbitration in respect of an arbitration agreement to which it was not a signatory and if so, the parameters within which it can invoke arbitration.

Chloro Controls India Pvt. Ltd. (supra) was rendered in the context of an expressed statutory provision in Part II of the Act of 1996 to extend arbitration agreement to non- signatories i.e. Section 45 of the Act which enumerated the power of judicial authority to refer party to the arbitration and with reference to Section 44, it contemplated that a judicial authority shall, at the request of one of the parties or any person claiming through or under him, refer parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

156/168 CARBP-414-18.odt The Apex Court permitted the impleadment of the parties at the pre-arbitration stage, but it also reiterated that ordinarily arbitration would take place only between the persons, who are parties to the arbitration agreement and the substantive contract underlining it. However, in certain circumstances, a non-signatory could be subjected to arbitration without its prior consent, but it would be only in exceptional circumstances.

Such circumstances included a case, where it could be demonstrated that it was a mutual intention of all the parties to bind the signatories and non-signatories such as when a composite transaction has been entered into, which necessarily includes the performance of the parent agreement alongwith the subsidiary agreement. However, in the subsequent decision of Cox and Kings Limited (supra), it is specifically held that the principle of piercing the corporate veil cannot be the sole basis for impleading a non-signatory under the Group of Companies doctrine and it would require something more such as the common intention of the parties to participate in the transaction.

The recent pronouncement in Cox and Kings Limited revolve around the definition of "parties" under Section 2(1)

(h) read with Section 7 of the Act of 1996, to include both signatory as well as non-signatory parties, although the conduct of the non-signatory parties was held to be an indicator of their consent to be bound by the arbitration agreement. Drawing a distinction between the concept of "party", which is distinct and different from the concept of "persons claiming through or under a party to the arbitration 157/168 CARBP-414-18.odt agreement", it was held that the underlying basis for the application of Group of Companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory to the arbitration agreement. The Constitution Bench, categorically ruled that the principle of alter ego or piercing the corporate veil cannot be the basis for the application of the Group of Companies doctrine, which has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) alongwith Section 7 of the Act of 1996.

The approach of the Supreme Court in Chloro Controls India Pvt. Ltd. (supra) to the extent that it traced the Group of Companies doctrine to the phrase "claiming through or under"

> is held to be erroneous and against the well established principles of contract law and corporate law. By setting the law straight, it is pronounced that the Group of Companies doctrine should be retained in the Indian arbitration jurisprudence, considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements.
>
> The Apex Court emphasized the onus on the party seeking the impleadment of non-signatory to the agreement in order to rope it in the arbitral proceedings and it was held to be permissible only when a strong case on facts and in law was made out. If the high burden to subject a non-signatory to arbitration is made, the consequence would be that the non-
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> signatory participate in the arbitration and avail an opportunity to present its case. However, in the present
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> 158/168 CARBP-414-18.odt
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> scenario when the Respondent Nos.2 to 4 were not parties to the arbitration proceedings and since they are not even parties to the award, merely because it is alleged that the Respondent Nos.2 to 4 with an intention to divest Respondent No.1 of its asset, so that the petitioner is not in a position to get the award enforced/executed, by playing a fraud, is not a sufficient ground to lift the veil as it is a bald pleading that the assets were transferred to avoid the liability under the

awards.

140. As far as the facts of the case are concerned, I have already noted that the Respondent No.1 was incorporated in the year 1999, whereas the Master Agreement with the petitioner was entered into on 28/9/2008. The Respondent No.4 was incorporated on 29/9/2000, with an object to invest, hold and acquire shares and other securities, thus essentially making it a holding company.

On the date when the Master Agreement was entered into, Respondent No.4 was not even in existence, and admittedly, it is not signatory to it.

When the Petitioner seek to pierce the corporate veil between Respondent No.1 and Respondent No.4 and want to hold it liable for the debts of the former, it definitely cannot rest its case on commonality of shareholding and management as it is not sufficient that two entities share a parent and subsidiary relationship.

Merely being a group company cannot result in making an independent company liable for its debts, in absence of any material particulars being revealed to prove that respondent no.4 was responsible for fraud and the Corporate structure is used to perpetrate the fraud.

The Respondent No.4 is a distinct legal entity incorporated in the year 2000 with the purpose of being an 'investment company' having its distinct business from the business of the other respondents, which are engaged in the business of entertaining and real estate. Upon the demerger of Respondent No.1, into resulting entities, i.e. Respondent Nos.2 and 3, the Respondent No.4 did not become the owner of any assets of Respondent No.1 and even as on date, it is the specific case of Respondent No.4 that its assets are distinct from that of Respondent Nos.1 to 3. The Respondent No.4's shareholding in Respondent Nos.2 and 3, from inception has been its asset, as Respondent No.4 was a member of Respondent Nos.1, 2 and 3, but it is not the owner of the assets of these Companies.

149. Though the claim in the Petition is about the purported fraud engaged by Respondent No.4, the pleading to that effect is merely vague, as it is asserted that the respondents have conspired to fraudulently transfer the asset of Respondent No.1 to Respondent Nos.2 to 4 during the pendency of the arbitration, but except the bare statement, there is no material to demonstrate the alleged fraud, as merely alleging fraud is not sufficient as fraud has to be established by cogent evidence.

The common thread, which according to the Petitioner, connect all the Respondents are Mr.Atul Goel, Ms.Laxmi Goel, Ms.Chandra Goel, Mr.Arpit Goel, Ms.Charu Goel and Mr.Ankit Goel, the eventual shareholders of Respondent No.4, who are the eventual holder of Respondent Nos.1 to 3.

Therefore, to show that Respondent No.4 and Respondent No.1 are alter 160/168 CARBP-414-18.odt egos of one another, it would have been necessary to implead the shareholders of Respondent No.4 and plead specific facts about actions taken by these shareholders. Not only is the Petition entirely devoid of any such pleadings, but the shareholders of Respondent No.4 have not even been impleaded.

150. Since the Respondent Nos.2 to 4 who are not signatory to the arbitration agreement are sought to be roped into the present proceedings, which is the post arbitration stage, the burden of establishing the necessity to implead them as parties, is on the petitioner and it is an onerous burden, as they are the parties being proceeded in execution and never had the opportunity to make out a case before the Arbitral Tribunal. They had no opportunity to plead/contradict the pleadings, lead evidence, advance arguments, and therefore, impleading them at this stage, on a broad premise that they have participated in the fraud, so as to divest the Respondent No.1, a party to the award, of its assets, with an intention to avoid its liability under the awards, is very difficult proposition to be accepted.

The Respondent Nos.2 to 4 were never party to the agreement, nor they were part of any transaction, nor they had any opportunity to meet the case against them during the arbitral proceedings. Merely alleging that they had played a fraud is insufficient, as fraud is not to be pleaded and in absence of any evidence tendered to that effect, the bare and unsubstantiated averment cannot be entertained and hence, according to me, no case is made out by the petitioner against 161/168 CARBP-414-18.odt the Respondent Nos.2 to 4, in seeking the relief in the present petition. On the other hand, Chamber Summons taken out by Respondent Nos.2 to 4 to delete them from the proceedings deserve to be made absolute.

ISSUE NO. G Objection of E-City that IMAX Ltd. had merged into IMAX Corporation in January 2002 and, hence, invocation of arbitration by IMAX Ltd. was invalid under the laws of Singapore

151. The partial final award on jurisdiction and quantum by the ICC has exhaustively dealt with the jurisdictional issue in the wake of the objection raised by the Respondent to the effect that IMAX Ltd. had no legal status pursuant to the corporate law to initiate proceedings in that name in 2004, similarly, IMAX had no capacity in 2004 to appoint an attorney to act on its behalf in connection with such proceedings.

The award quoted Mr.Lenczner QC's opinion on 30/08/2006 to the following effect:-

> "Imax Limited was first incorporated in Ontario on December 14,1998. It paid the statutorily required incorporation fees, filed annual returns, and carried on business in Ontario following its inception. Imax Limited was regulated by Ontario's Minister of Consumer and Business services, and was governed by various Ontario statutes including the OBCA, the Corporations Information Act, and the regulations promulgated thereunder. In March 1999, Imax Limited changed its name to "Imax Ltd." In December 2000, Imax Ltd. left the jurisdiction of Ontario and continued itself as a federal corporation named "3850391 Canada Inc.". A certificate of

> continuance was issued pursuant to s.187 of the CBCA [Canadian Business Corporation Act].
>
> On January 1, 2001, 3850391 Canada Inc. amalgamated with Imax Corporation, another already existing dual corporation, pursuant to s. 181 of the CBCA.
>
> I have conducted a corporate search and learned that a further amalgamation took place on January 1, 2002 resulting in a successor entity with the same name, "Imax Corporation"
>
> 162/168 CARBP-414-18.odt On June 16, 2004, Imax Ltd. commenced ICC arbitration proceedings in its own name against E-City. This was done despite the fact that it commenced on January 23, 2004 a separate but related arbitration proceeding in the name of "Imax Corporation".

...

On June 7, 2005, Robert D Lister executed a Power of Attorney granting counsel at Kelly Drye & Warren LLP the power to sign all E-City ICC arbitration documents on behalf of Imax Ltd. Mr.Lister executed this Power of Attorney in the capacity of "Executive Vice President, Business and Legal Affairs and general Counsel" of Imax Ltd."

152. IMAX Corporation responded to the application under Article 6.2 and summarized its case as under :-

> "Respondent's application is without merit. As demonstrated in the accompanying statement of the Honorable James Farley, Q.C., this issue is a matter of form, not substance. At best, this is a minor and technical error that can be easily corrected. When Imax Ltd. was amalgamated into Imax Corporation, all of the rights that Imax Ltd. Had under the Master Agreement continued in Imax Corporation. This is not a situation where rights to enforce the Master Agreement have somehow disappeared, as Imax Ltd. continues to exist under Imax Corporation. Under Canadian law, this situation would be quickly remedied by permitting the caption of this case to be changed to substitute Imax Corporation for Imax Ltd. Claimant respectfully submits this application to the Panel pursuant to Article 19 of the ICC Rules to substitute or join Imax Corporation as Claimant and respectfully submits that the Panel should allow this substitutions to make what is essentially a ministerial change in the interest of justice and efficiency."

153. With a specific stand being adopted on behalf of the claimant that Imax Ltd. was the same as Imax Corporation, although as a precaution, it was sought the joinder of the Imax Corporation, which in fact was unnecessary given that both the entities were same and all that was necessary was for the purpose of arbitration to change the word "Limited" to the word "Corporation". Mr.Farley QC had opined in support of Mr.Cooperman's submission, opining that Imax Corporation is

possessed of all its predecessor amalgamating corporations' 163/168 CARBP-414-18.odt rights and privileges, including those under pre-existing contracts and agreements with third parties. If the name of the amalgamating corporation is used, the amalgamated corporation has the rights and obligations entered into under its amalgamating corporation's name. Certainly, to avoid confusion, the name of the amalgamated corporation should be used in business operations.

The ICC referred to Canada Business Corporation Act (CBCA) and in particular, Section 186 and took note of the difference of view of the two experts as to the proper interpretation of Section 186 of CBCA, which included the opinion of Mr.Lenczner QC and Mr.Farley QC.

154. Both parties advanced expert evidence on the procedure before the Ontario Court by which amendments are permitted, though both sides accepted that the procedural law of the arbitration is English. However, one of the experts, Mr.Farley QC was firmly of the view that if this matter was before the Ontario Court, it would permit the change of the name from "Limited" to "Corporation", the change being a formality and not a matter of substance. Recording that the arbitration was subject to ICC Rules and the English Arbitration Act of 1996, but the procedure appears to have been adopted in Ontario Court, being helpful in illustrating whether as a matter of Canadian law, the Tribunal is concerned merely with a change of name or whether it is concerned with substantive rights and who may exercise them.

Deliberating on the two contra opinions, the Tribunal accepted Mr.Farley's view that having regard to the 164/168 CARBP-414-18.odt substantive law on continuance and amalgamation, the Ontario Courts would regard the amendment of the title of the action as a matter of form, not substance; and that an amendment would be permitted. Further observing that under Ontario law, the Court would allow amendments to pleadings at any stage of an action, unless prejudice would result that could not be dealt with by costs or adjournment, the Tribunal expressed its view that by change of the word "Limited" to the word "Corporation" in the title of the arbitration, no prejudice is caused to the Respondent. It, therefore, recorded its conclusion in the following words :-

> "36. The Tribunal has no doubt, therefore, given the view of the substantive law set out by Mr.Farley QC in his opinion, that the interests of justice in this case require the name of the Claimant be changed from IMAX Limited to IMAX Corporation to reflect the position under Canadian law. As Mr.Farley QC has explained in his conclusion :
>
> "As a matter of Canadian corporate law, the rights and obligations of Imax ltd. continued with effect from January 1, 2001 (the date of amalgamation) in Imax Corporation. These include the right to initiate proceedings under the September 28, 2000 document. The fact that the proceedings were instituted in the name of one of the amalgamating corporations does not in any way affect the validity of those proceedings, the claim, or any findings made to date. The error in the style of cause does not render the proceedings a nullity, and is a mere irregularity that, if brought before the Ontario Courts, would be corrected by way of an amendment to the pleadings. In my opinion, based on my experience, and for all the reasons noted

above, it is inconceivable to me that such a change would not be permitted."

37. The Tribunal declines therefore to accept the narrow view of Section 186 for which Mr Coomaraswamy SC contended and prefers the evidence of Mr.Farley QC as to the status of IMAX Limited upon merger to the effect that it is to be regarded as the same company as IMAX Corporation.

38. It was suggested by Mr Coomaraswamy SC, that even if the Tribunal accepted Mr.Farley QC's Opinion, given the ICC procedures for approval of any Award, it was not open to us, as arbitrators, to change the title of the Final Partial Award and of the Arbitration. The Respondent's application under Article 6.2 of the ICC Rules raises a fundamental question of jurisdiction and invites the 165/168 CARBP-414-18.odt Tribunal to rule that this Arbitration and the Final Partial Award is a nullity because IMAX Limited had no legal status or power to make the Reference to Arbitration and to conduct the arbitration as required by the ICC Rules. The Claimant says that all that has happened is that the arbitration has been commenced and conducted in the wrong name. That is the essential dispute which the Tribunal has resolved in the Claimant's favour. It would, to adopt the language of Persona, make no sense if, in resolving that dispute, the Tribunal had no power to grant the relief which necessarily follows, namely to change the name of the Claimant, not of course, its identity. The Tribunal plainly has the power to declare that IMAX Ltd is IMAX Corporation and does so."

This view being the most plausible view and as the Tribunal has already concluded this issue in the partial final award on jurisdiction and quantum, I do not deem it appropriate to interfere with the said decision on merits, by invoking Section 48(1)(a) or (d) of the Arbitration Act, as it would be amounting to review of the decision on merits.

155. In the wake of the finding recorded by me on the above issues/points, which arose for consideration, I conclude by holding that the subject contract entered between the Petitioner and the Respondent No.1, was a contract contingent upon the approval of Reserve Bank of India and IMAX had acknowledged this fact and agreed for any reasonable restructuring, as long as it did not negatively impact it in a material fashion. Admittedly, no prior approval of Reserve Bank of India was received and the transaction could not be completed. The ICC has awarded the damages on the premise that RBI's approval could have come, but the fact remains that it never came. Since, according to me, as held above, the necessity of RBI's approval was imperative and obtaining such an approval was in tune with the FEMA, in not adhering to its requirement and acting in violation of it's provision, is a 166/168 CARBP-414-18.odt matter of public policy, and since in the wake of the statutory provision under Section 48(2)(b), the enforcement of the award, which is contrary to the public policy shall be refused by the Court, I am rejecting the relief sought in the Petition by the Petitioner, seeking enforcement of the awards.

In addition, since there is also violation of fair hearing rule, which is also a part of the fundamental policy of Indian law and the process followed by the Tribunal in arriving at the awards, being in violation of the same, I also express that it is in contravention of the fundamental policy of Indian law. I must clarify that the test for contravention of fundamental policy of Indian law, which is

applied by me, in no way has touched the review of the matter on merits of the dispute between the parties.

156. In addition, I have concluded that the Petition is barred by limitation, since in light of the law laid down by the Apex Court in Vedanta Ltd.(supra), the enforcement and execution of a foreign award shall be governed by Article 137 of the Limitation Act, 1963, and though it is permissible to condone the delay, but in absence of the Petitioner seeking condonation of delay, and rather assertively staking the claim that the Petition is within limitation, I am left with no option,but to dismiss the Petition.

Similarly, I have also expressed that the impleadment of Respondent Nos.2 to 4 in the Petition is unwarranted and specifically when Mr.Chinoy has set out his intention clear and loud, that the Respondent Nos.2 to 4 are impleaded, based on an assumption that the assets of E-City are diverted through them.

167/168 CARBP-414-18.odt There could be definitely no challenge raised to the demerger schemes, which by this time are settled, with the sanction from the Company Court in the country and they cannot be re-opened.

157. Though it is sought to be argued on behalf of Respondent No.1 that there was no valid invocation for the reference to the Arbitral Tribunal and an objection is also raised to the composition of the Tribunal, coupled with non-compliance of ICC rules and the ground that proper authority to file claim was not determined is also pressed into service on behalf of E- City, as some of the points on which, the enforcement of the awards is opposed by it, in the wake of the finding rendered above, I have already formed an opinion that the awards do not deserve enforcement and execution in light of the scheme contained in Part II, Chapter I of the Act of 1996 under the New York Convention awards, I have refrained myself from considering the said issues.

From the awards passed against Respondent No.1 and in favour of IMAX, a foreign party, who has not even supplied the goods under the agreement, but which is held entitled for a huge sum of money under the awards and the money will be taken out of this country, without the stipulation of the agreement being complied with and since, this shock the conscious of the Court, the enforcement and execution of awards, as prayed by the Petitioner in the Petition, is declined.

The Petition, therefore, stands dismissed with no order as to costs.

168/168 CARBP-414-18.odt The pending Notices of Motion/Chamber Summons/ Interim Applications are also disposed off, in the wake of the dismissal of the Petition in its entirety.

(SMT. BHARATI DANGRE, J.) More, Salgaonkar, Ashish, Tilak