Cliff Navigation S.A. Vs LMJ International Limited

Court: Calcutta High Court

Date of Decision: July 23, 2015

Acts Referred: Arbitration and Conciliation Act, 1996 - Section 10, 11(6), 16, 34, 34(2)(b)(ii)
Foreign Awards (Recognition and Enforcement) Act, 1961 - Section 7
Succession Act, 1925 - Section 88

Hon'ble Judges: Soumen Sen, J

Bench: Single Bench

Advocate: S.N. Mitra, Shyamal Sarkar, Senior Advs., D.N. Sharma, Navneet Misra, Sananda Mukhopadhyay, Sankarsan Sarkar, for the Appellant; Abhrajit Mitra, Sr. Adv., Satadeep Bhattacharya, Biswajit Kumar, Natasha Roy, Advocates for the Respondent

Final Decision: Dismissed

Judgement

Soumen Sen, J
The applicant is the judgment debtor. The judgment debtor has filed this application challenging the enforceability and

executability of a foreign award in this jurisdiction.

2. The application is in the nature of an objection under Section 48 of the Arbitration and Conciliation Act, 1996.

3. Cliff Navigation S. A. is the award holder.

4. The claimant/decree-holder raised dispute with regard to the payment of final demurrage and shifting under an invoice dated 27th December

2010 for USD 330,996.50 plus interest plus cost. A notice of arbitration was issued by the solicitor of the award holder on 8th March 2011

whereby the award holder initiated an Arbitration Proceeding at Singapore against the respondent by appointing Mr. Toh Kian Sing S.C. as

owner"s Arbitrator. It is stated in the said notice that pursuant to the terms and conditions of the charter party and in particular the charter party"s

law and jurisdiction clause which provides for ""Arbitration in Singapore and English law to apply"", the award holder would refer the dispute to

Singapore Arbitration proceedings against the respondent.

5. In reply to the said notice, the judgment debtor contended that the invocation of the arbitration clause is ex facie bad and illegal inasmuch as

there is no valid arbitration agreement between the parties. It was stated that in fact there is no valid or binding arbitration agreement in the Fixture

Note dated 21st September 2010 which could entitle the decree holder to refer the dispute to Singapore Arbitration Proceedings. The agreement

between the parties as contained in the fixture note dated September 21, 2010 specified only commercial terms that were agreed upon by parties

and not intended to include or incorporate any arbitration agreement. It was further contended that the purported claim is stale and barred by law

and contrary to clause 12 of the Fixture Note dated 21st September 2010.

6. The solicitor of the decree holder replied to the said notice by asserting that the claim is on account of demurrage and shifting charges that were

incurred at Paradeep (Load Port) and reiterated that there was a valid and binding arbitration agreement between the respondent as charters and

the decree holder as owners of the Vessel in the Fixture Recap (Clause 23) sent by the brokers on 21st September, 2010. The Fixture Note

dated 21st September, 2010 clearly and expressly states in Clause 23 that the arbitration would be in Singapore and English law would apply and

clause 24 is for other details as per the proforma charter party. Clause 44 of the proforma charter party provides inter alia the default procedure in

case the judgment debtor failed to appoint an arbitrator in the reference. Accordingly, a fax was sent to the President of the London Maritime

Arbitrators Association (LMAA) for appointment of an arbitrator. It was reiterated that the judgment debtor has admitted existence of the Fixture

Note dated 21st September 2010 and therefore it is no more open for them to deny the validity and binding nature of the arbitration clause and

agreement.

7. It appears that thereafter an arbitral tribunal was constituted consisting of Mr. Toh Kian Sing of Singapore and Mr. David Martin Clark of

London. The arbitrators gave direction for filing of statement of claim and defence statement.

8. The judgment debtor did not contest the said proceeding. The arbitrators thereafter proceeded ex parte and passed an award on 26th April,

2012.

9. The award is challenged in this proceeding by the judgment debtor, inter alia, on the following grounds:--

(I) There is no arbitration agreement between the respondent and petitioner.

(II) Assuming but not admitting that there was an Arbitration Agreement between Cliff Navigation S.A. and L.M.J. International Ltd., the

composition of the Arbitral Authority was not in accordance with the Arbitration Agreement and the law of the country, where the Arbitration took

place.

10. Mr. S.N. Mitra, learned senior counsel appearing on behalf of the applicant judgment debtor submits that the composition of the arbitral

tribunal is contrary to the Singapore law. Even if it is assumed that there is a valid arbitration agreement between the parties, it would be evident

from the communications of the arbitrators as well as the orders passed by the arbitrators that the seat of the arbitration is at Singapore and the

Singapore law would apply to procedural matters. It is submitted that the contention of the respondent that there is no valid arbitration agreement

between the claimant and the applicant is based on the Fixture Note which is an agreement entered into between the owner of M.V. Pantanassa

and the applicant as the charterer. There is no agreement enforceable in law between the decree-holder and the applicant. The learned senior

counsel has referred to the Fixture Note to show that the decree-holder is mentioned as head owners and Vamvaship Maritime S.A. is referred to

as Managers. The invoices were raised by the Managers and amounts were paid to the said Vamvaship Maritime S.A. The decree-holder

nowhere featured in the agreement or in the transaction on the basis of which the claim petition was filed. It is submitted that even if it is assumed

that there is a valid arbitration agreement, the composition of the arbitral tribunal is bad and defective. The learned Senior Counsel has referred to

clauses 23 and 24 of the Fixture Note and Clause 26 of the Charter Party to show that there are apparent inconsistencies in Clause 23 and 24 of

the Fixture Note.

11. The Fixture Note dated 21st September, 2010, and particularly Clause 23 thereof provides ""'ARBITRATION IN SPORE AND ENGLISH

LAW TO APPLY"".

12. Clause 24 of Fixture Note provides ""'OTHERS DTL AS PER CHRTS PFMA C/P"". Assuming though not admitting that there was a

Proforma Charter Party as relied on by Cliff Navigation S.A., Clause 25 thereof provides as follows:--

25. Law and Arbitration:

State 19(a), 19(b), 19(c) of Clause 19: if 19c agreed also state Place of Arbitration. If not filled in, 19(a) shall apply in London and English Law to

apply"".

13. Clause 19 of the proforma charter party is as follows:--

19(a) :- this charter party shall be governed by and considered in accordance with English law and any dispute arising out of this charter party

shall be referred to arbitration in London in accordance with the Arbitration Act, 1950 and 1970 or any statutory modification or as considered

thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the

arbitrators so appointed shall appoint a third arbitrator. The decision of the three man tribunal thus constituted or any law of there shall be final. On

the receipt by one party of the nomination in writing of the other party''s arbitrator, that party shall appoint their arbitrator within fourteen days

failing which the decision of the single arbitrator shall be final.

For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25, the arbitration shall be conducted in

accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.

19(b):- this charter party shall be governed by in accordance with Title 9 of the United States Code and the Maritime Law of the United States

and should say dispute arise out of this charter party, the matter in dispute shall be referred to three persons at New York, one to be appointed by

each of the parties hereto, and the third by the two so chosen their decision or that of any two of them shall be final and for purpose of enforcing

any award, this agreement may made the rule of the court. The proceedings shall be conducted with the rule of the Society of Maritime Arbitrators

Association.

For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25, the arbitration shall be conducted in

accordance with the Chartered Arbitration Procedure of the Society of Maritime Arbitrators Association.

19(c):- Any dispute arising out of this Charter Party shall be referred to arbitration at the place indicated in Box 25, subject to the procedure

applicable there. The laws of the place indicated in Box 25 shall govern this Charter Party.

14. It is submitted that Clause 19(c) was not agreed. Clause 23 of the Fixture Note and clause 44 of proforma charter party are inconsistent and

irreconcilable. While Clause 23 of the Fixture Note refers Singapore as the seat of Arbitration, Clause 44 refers London as the seat of Arbitration.

In view of such inconsistencies, no effect could be given to such arbitration clause. The learned Counsel has referred to VISA International Ltd.

Vs. Continental Resources (USA) Ltd., AIR 2009 SC 1366 : (2008) 4 ARBLR 539 : (2008) 13 JT 242 : (2008) 15 SCALE 497 : (2009) 2

SCC 55 : (2009) 1 UJ 331 : (2009) AIRSCW 791 : (2009) 1 Supreme 8 and argued that when it is found that the said two clauses of the Fixture

Note are inconsistent with one another and irreconcilable, no effect can be given to such document. In this connection, reference was made to the

following paragraphs of Russell on Arbitration (23rd Edition):--

Paragraph 2-058:

..... Ultimately, if an agreement contains jurisdictional references which are completely contradictory, the jurisdictional agreement may be

void for uncertainty"".

Paragraph 2-068:

.....On the other hand an agreement referring ""any dispute and/or claim"" to Arbitration in England followed by a clause referring ""any other

dispute"" to Arbitration in Russia was held to be void for ambiguity and was neither effective nor enforceable"".

15. In the alternative, it is submitted that it is well-settled that when there are conflicts between two Clauses of an Agreement, the earlier Clause

shall prevail. In this regard reference was made to Radha Sundar Dutta Vs. Mohd. Jahadur Rahim and Others, AIR 1959 SC 24 : (1959) 1 SCR

1309 .

16. In other words, in the instant case, Clause 23 of the Fixture Note would prevail over Clause 44 of the charter party and the place of

Arbitration should be Singapore and the laws of Singapore shall apply.

17. The same was also the understanding of M/s. Clyde & Co., the solicitor of the award holder while sending their fax message dated 8th March,

2011.

18. By the said fax message dated 8th March, 2011, the said M/s. Clyde & Co. while appointing one Mr. Toh Kian Sing S.C. as the Owners

Arbitrator had called upon L.M.J. International Ltd. to appoint its Arbitrator and notify such appointment within 14 days.

19. Admittedly, L.M.J. International Ltd. did not appoint its Arbitrator. On such refusal to appoint Arbitrator by L.M.J. International Ltd., the

owner of the vessel was to follow the Singapore Law for appointment of an Arbitrator on behalf of L.M.J. International Ltd.

20. The Singapore Law, Chapter III, Articles 10,11, 11(3)(a) provides that on the failure of a party to appoint the Arbitrator, the appointment

shall be made upon request of a party by the Court or other authority specified in Article 6. In the instant case, there was no such ""Other

Authority"" and as such the Second Arbitrator was to be appointed by making an application before the Court.

21. In the instant case, no such application was made, either for appointment of the Second Arbitrator or for appointment of the Third Arbitrator.

22. Even the Arbitrators accepted that the reference was not governed by English Law but by Singapore Law. Under the circumstances, the

composition of the Arbitral Authority was not in accordance with the Agreement of the parties and with the law of the country, where the

Arbitration took place. In view of the aforesaid, the award cannot be enforced.

23. It is submitted that in Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another, AIR 2005 SC 3766 : (2005) 3 ARBLR 1 : (2005)

127 CompCas 97 : (2005) 4 CTC 297 : (2005) 7 JT 426 : (2005) 7 SCC 234 : (2005) 3 SCR 699 Supp : (2005) 2 UJ 1277 : (2005)

AIRSCW 4384 : (2005) 6 Supreme 15 , the Hon''ble Supreme Court of India in Paragraphs 86, 87 & 101 to 106 has held that all applications

under Section 48 of the Arbitration and Conciliation Act, 1996 are to be decided by holding a trial involving all kinds of evidence including oral

evidence.

24. It is submitted that till date the said judgment of the Hon''ble Supreme Court of India is good law. In fact, the said judgment has also been

relied upon by the Hon''ble Supreme Court of India in a subsequent judgment reported at Chloro Controls (I) P. Ltd. Vs. Severn Trent Water

Purification Inc. and Others, (2013) 1 ABR 563 : (2012) 4 ARBLR 1 : (2012) 111 CLA 1 : (2013) 1 CompLJ 19 : (2013) 1 CTC 418 : (2012)

10 JT 241 : (2012) 10 JT 187 : (2012) 4 RCR(Civil) 638 : (2012) 9 SCALE 595 : (2013) 1 SCC 641 .

25. Mr. Mitra has also relied upon a decision of the Court of appeal in Dallah Estate and Tourism Holding Company v. Ministry of Religious

Affairs of the Government of Pakistan reported at 2010 (2) WLR 805 at page 811 for the same proposition.

26. In view of the above, it is submitted that the above application under Section 48 of the Arbitration and Conciliation Act, 1996 is required to be

set down for trial and only thereafter to consider the prayer of the petitioner.

27. It is submitted that since the seat of arbitration is Singapore, the matters relating to procedure shall be governed by the Singapore Arbitration

law. Chapter 3 of the Singapore Arbitration law deals with composition of arbitral tribunal. It is stated in the said Act that the parties are free to

determine the number of arbitrators, failing which the number of arbitrator shall be three. Article 11 deals with the procedure to be followed for

appointment of arbitrators. The said Article 11 reads:

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of

this Article.

(3) Failing such agreement,

(a) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appoint shall the third arbitrator, if a

party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on

the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority

specified in Article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the

court or other authority specified in Article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure; or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in Article 6 to take the necessary measure, unless the agreement on the appointment

procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this Article to the court or other authority specified in Article 6 shall be subject to

no appeal. The court or other authority, in appointing in arbitrator, shall have due regard to any qualifications required of the arbitrator by the

agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the

case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the

parties.

28. However, rider 44 of the Proforma Chartered Party provides a default procedure which is different from the procedure mentioned in the

Singapore law. Clause 44 which is the arbitration clause reads as follows:

CLAUSE 44

ARBITRATION CLAUSE

ALL DISPUTES OR DIFFERENDCES ARISING OUT OF OR UNDER THIS CONTRACT WHICH CAN NOT BE AMICABLY

RESOLVED SHALL BE REFERRED TO ARBITRATION IN LONDON AND ENGLISH LAW TO APPLY.

UNLESS THE PARTIES AGREE UPON A SOLE ARBITRATOR, ONE ARBITRATOR SHALL BE APPOINTED BY EACH PARTY. IN

THE CASE OF ARBITRATION ON DOCUMENTS, IF THE TWO ARBITRATORS SO APPOINTED ARE IN AGREEMENT THEIR

DECISION SHALL BE FINAL. IN ALL OTHER CASES THE ARBITRATORS SO APPOINTED SHALL APPOINT A THIRD

ARBITRATOR AND THE REFEENCE SHALL BE TO THE THREE-MAN TRIBUNAL THUS CONSTITUTED.

IF EITHER OF THE APPOINTED ARBITRATORS REFUSES TO ACT OR IS INCAPABLE OF ACTING, THE PARTY WHO

APPOINTED HIM SHALL APPOINT A NEW ARBITRATOR IN HIS PLACE.

IF ONE PARTY FAILS TO APPOINT AN ARBITRATOR, WHETHER ORIGINALLY OR BY WAY OF SUBSTITUTION FOR TWO

WEEKS AFTER THE OTHER PARTY, HAVING APPOINTED THEIR ARBITRATOR, HAS (BY TELEX FAX OR LETTER) CALLED

UPON THE DEFAULTING PARTY TO MAKE THE APPOINTMENT THE PRESIDENT FOR THE TIME BEING OF THE LONDON

MARITIME ARBITRATORS ASSOCIATION SHALL, UPON APPLICATION OF THE OTHER PARTY, APPOINT AND

ARBITRATOR ON BEHALF OF THE DEFAULTING PARTY AND THAT ARBITRATOR SHALL HAVE THE LIKE POWERS TO

ACT IN THE REFERENCE AND MAKE AN AWARD (AND IF THE CASE SO REQUIRES, THE LIKE DUTY IN RELATION TO THE

APPOINTMENT OF A THIRD ARBITRATOR) AS IF HE HAD BEEN APPOINTED IN ACCORDANCE WITH THE TERMS OF THE

AGREEMENT.

THIS CONTRACT IS GOVERNED BY ENGLISH LAW AND THERE SHALL APPLY TO ALL PROCEEDINGS UNDER THIS

CLAUSE THE TERMS OF THE LONDON MARITIME ARBITRATORS ASSOCIATION CURRENT AT THE TIME WHEN THE

ARBITRATION PROCEEDINGS WERE COMMENCED. ALL APPOINTEES SHALL BE MEMBERS OF THE ASSOCIATION.

PROVIDED THAT WHERE THE AMOUNT IN DISPUTE DOES NOT EXCEED THE SUM OF USD 25,000 (OR SUCH OTHER SUM

AS THE PARTIES ANY AGREE ANY DISPUTE SHALL BE RESOLVED IN ACCORDANCE WITH THE SMALL CLAIMS

PROCEDURE OF THE LONDON MARITIME ARBITRATO''S ASSOCIATION.

29. It is submitted that if there is an apparent conflict with regard to the seat of arbitration having regard to the settled principle of law that in case

of two conflicting clauses, the first clause shall prevail over the second clause, Clause 23 of the Fixture Note shall apply. In fact, at paragraph 19 of

the award, the arbitrators have noticed that the tribunal in its communication to the parties dated 1st September, 2011 directing the charterer to

peremptorily deliver their defence and counter-claim had inadvertently referred to the English Arbitration Act, 1996. The English Act is not relevant

to the reference as the procedural law applicable to the reference is the law of Singapore. The tribunal accordingly requested the parties to

disregard its message of 1st September, 2011 and its subsequent message of 13th September, 2011 and, instead, on 6th October, 2011 the

Tribunal issued a fresh order requiring the applicant judgment-debtor to deliver their defence (counter-claim, if any) by not later than 19th October,

2011. It is submitted that the arbitral tribunal was constituted on the basis of the English Arbitration Act which is contrary to clause 23 of the

Fixture Note.

30. In view thereof it is contended that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. Learned

Senior Counsel has referred to Clause 48(d) of the Arbitration and Conciliation Act, 1996 and submitted that in the instant case this condition is

fulfilled and, accordingly, the enforcement of the foreign award should be refused.

31. Per contra, Mr. Abhrajit Mitra, learned Senior Counsel appearing on behalf of the decree-holder submits that the issue raised by the judgment

debtor in this petition with regard to the existence and validity of the Arbitration Agreement has been decided in an interlocutory proceeding

initiated by the judgment debtor in the suit instituted by the said judgment debtor for stay of arbitration proceedings. The learned Senior Counsel

has referred to the order dated 28th November, 2011 passed in the interlocutory application being G.A.2930 of 2011 and submitted that the

learned single Judge has prima facie held:--

(i) That the plaintiff (judgment debtor herein) has failed to make out a prima facie case that it did not enter into a contract with the defendant

(award holder herein);

(ii) That the judgment debtor had entered into a contract with the award holder on whose behalf M/s. Vamvaship Maritime SA had signed the

contract and raised invoices on the judgment debtor;

(iii) No case of judgment debtor being made to sign the fixture note under duress, coercion or the like made out;

(iv) That the venue of the arbitration (i.e. Singapore) is stated in the fixture note. Because of the overriding effect of the fixture note over the charter

party, the venue of arbitration stated in the charter party (i.e. London) would not prevail over the venue as stated in the fixture note (i.e.

Singapore);

(v) That the arbitration has commenced at the agreed venue, i.e. Singapore;

(vi) That the award holder is not entitled to any ad-interim order of anti-arbitration injunction.

32. The judgment debtor did not prefer any appeal against any order. It is submitted that Shin Etsu (supra), is not a judgment on Section 48 but

was rendered on an application under Section 45 of the 1996 Act. At Paragraph 2 of this judgment it is clarified as below:--

2. .....interpretation of Section 45 of the Arbitration & Conciliation Act, 1996 (for short ""The Act"") falls for determination of this

matter.....

33. As to the scope of Section 48 application, the observations made are orbiter dictum. The learned Counsel has referred to Shri Lal Mahal Ltd.

Vs. Progetto Grano Spa, (2013) 3 ARBLR 1 : (2013) 115 CLA 193 : (2013) 4 CTC 636 : (2013) 11 JT 84 : (2013) 4 RCR(Civil) 105 : (2013)

8 SCALE 489 : (2014) 2 SCC 433 : (2013) AIRSCW 4368 and submitted that the said judgment was delivered on an application filed under

Section 48 and the findings on the scope of Section 48 constitute the ratio of the judgment.

34. Similarly Chloro Controls (supra) as cited by the judgment debtor has no manner of application in the facts and circumstances of the instant

case. The said judgment was passed while dealing with the scope and object of Section 45 of the Arbitration & Conciliation Act, 1996.

35. The judgment in Visa International (supra) was passed while dealing with an application under Section 11(6) and (9) of the Arbitration &

Conciliation Act, 1996 which is an application for appointment of an arbitrator. In the aforesaid case after considering the facts and circumstances,

the Hon''ble Supreme Court was pleased to negate the contention of the respondent therein and was pleased to appoint an arbitrator.

Furthermore, in the facts and circumstances of the present case, as stated earlier, there are no inconsistencies between the arbitration clause as

contained in the fixture note and the Clause 44 of the Proforma Charter Party. Such fact has also been duly clarified by the learned Arbitral

Tribunal in the award which is sought to be executed herein.

36. Similarly, the decision of the Supreme Court in the case of Radha Sundar (supra) for the same reasons as held in Visa International Limited

(supra) has no manner of application in the facts and circumstances of the present case.

37. In dealing with the submission that even if it is assumed that there was an arbitration agreement between Cliff Navigation SA and LMJ

International Limited, the composition of the Arbitral Authority was not in accordance with the arbitration agreement and was not in accordance

with the law of the country, where the arbitration took place, it is submitted that on the issue of composition of Arbitral Tribunal the judgment

debtor could have filed a setting aside application under Article 34(2)(c)(iv) of the Model Law, (i.e. the First Schedule to the International

Arbitration Act of Singapore). However, they chose not to do so.

38. In C.S. No. 230 of 2011 which was filed after the Arbitral Tribunal had been constituted, this point was not taken. This point was also not

argued at the hearing of G.A. No. 2930 of 2011 at the interim stage.

39. The point was also not taken in the judgment debtor''s letter dated 22nd March, 2011 where they had disputed the validity of the arbitration

agreement in the fixture note. Therefore, the judgment debtor had waived its objection to the constitution of the Arbitral Tribunal.

40. Article 4 of the Model Law is pari materia with Section 4 of the Arbitration & Conciliation Act, 1996 which permits waiver of right to object

to any derogable provisions of the Act. As to the number of arbitrators, Article 10 of the Model Law is similar to Section 10 of the Arbitration &

Conciliation Act, 1996 and so is Article 16 of the Model Law similar to Section 16 of the Arbitration & Conciliation Act, 1996. Interpreting all

these provisions of the Arbitration & Conciliation Act, 1996, in Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, AIR 2002 SC 1139 :

(2002) 1 ARBLR 493 : (2002) 2 CompLJ 374 : (2002) 2 JT 222 : (2002) 2 SCALE 232 : (2002) 3 SCC 572 : (2002) 38 SCL 625 : (2002) 1

SCR 1136 : (2002) AIRSCW 898 : (2002) 2 Supreme 69 , the Apex Court held that an award made by an Arbitral Tribunal having two

arbitrators only is not even a ground for setting aside of the award under Section 34 of the Arbitration & Conciliation Act, 1996.

41. In Anita Garg Vs. Glencore Grain Rotterdam B.V., (2011) 7 AD 165 : (2011) 4 ARBLR 59 : (2011) 182 DLT 365 , it was held that the law

laid down in Narayan Prasad Lohia (supra) is still good law, i.e., even after the S.B.P judgment of the Supreme Court.

42. As such the composition of the Arbitral Tribunal (i.e. having two arbitrators only) would not have been a ground for setting aside of award,

leave aside a ground of challenge at the post execution stage under Section 48.

43. Mr. Mitra further submits that although the Tribunal was not required to decide its jurisdiction to adjudicate the dispute in absence of any

challenge, nonetheless, the Tribunal in all fairness had taken into consideration the reply given on behalf of the charter party on 13th April, 2012 to

the effect that the Tribunal has no jurisdiction to pass an award. It is submitted that the Tribunal in Paragraphs 38 to 45 of the award had

considered the nature of the objection and decided the said issue in its favour. Mr. Mitra would submit that the arbitrator is the final authority on

interpretation of the terms of contract and the Court would be extremely chary to interfere with the findings of the arbitrator on interpretation of

contract. Mr. Mitra in this regard has relied upon the decision of the Hon''ble Supreme Court in State of U.P. Vs. Allied Constructions, (2003) 3

ARBLR 106 : (2003) 4 CTC 173 : (2003) 7 JT 273 : (2003) 6 SCALE 265 : (2003) 7 SCC 396 : (2003) 2 SCR 55 Supp : (2003) 2 UJ 1454 ,

McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, (2006) 2 ARBLR 498 : (2007) 3 CompLJ 213 : (2006) 11 JT 376 :

(2006) 6 SCALE 220 : (2006) 11 SCC 181 : (2006) 2 SCR 409 Supp - unreported judgment of this Court dated 29th November, 2014 passed

in A.P. No. 5 of 2013, Paragraphs 126 and 129.

44. Mr. S.N. Mitra, the learned senior Counsel in reply has submitted that law laid down in Shin-Etsu (supra) has not been diluted by any of the

decisions of the Hon''ble Supreme Court. It is preposterous to argue that the observation of the Hon''ble Supreme Court made with regard to

Section 48 of the Arbitration and Conciliation Act, namely, that when the award is challenged on the grounds available under Section 48 of the

Arbitration and Conciliation Act it has to be tried out by a full trial by involving all kinds of evidence (oral evidence) are obiter. In this regard, the

learned senior Counsel has relied upon a decision of the Court of Appeal in Dallah Estate and Tourism Holding Company v. Ministry of Religious

Affairs of the Government of Pakistan reported at 2010 (2) WLR Paragraphs 13, 14, 21 and 22 and submitted that the Court of Appeal was also

of the same view and opinion while interpreting similar provision of the English Arbitration Act, namely, Section 103(1)(2).

45. It is submitted that the aforesaid decisions would clearly show that a party must be entitled to adduce all evidence necessary to specify the

burden of proof on it to establish the existence on one of the grounds set out in Section 48 corresponding to Section 103(2) of the English Act. It is

submitted that a party is entitled to ask the Court to reconsider all relevant evidence on the facts (including foreign law). Mr. Mitra has relied upon

Paragraphs 20, 21 and 22 of the said decision which read:--

20. Miss Heilbron submitted that the Convention policy of giving primacy to the supervisory court meant that Article V.1 contemplated a review

within a narrow compass and not a wholesale re-hearing of the issues determined by the tribunal, a matter that should be left to the supervisory

court. As will be apparent, I am unable to accept that there is any policy of the kind she suggested, but quite apart from that, her argument

founders on the language of Article V.1 itself, which requires the party against whom enforcement is sought to ""furnish proof"" of the matters to

which it refers (an expression accurately reflected in the more modern language of section 103(2) of the Act). In a case where the tribunal has

determined its own jurisdiction there is an obvious possibility that a party opposing enforcement will wish to challenge some of its findings of fact or

conclusions of law and I find it very difficult to interpret the expression ""furnish proof"" as meaning anything other than requiring proof in the manner

and to the standard ordinarily required in proceedings before the enforcing court.

21. Moreover, I have to say that I find it difficult to understand exactly what Miss Heilbron had in mind when submitting that the court should

accord deference to the tribunal''s conclusions, particularly in view of the fact that she asserted that the principle was flexible in its application. If it

meant no more than that the court should have regard to the tribunal''s reasoning in reaching its own conclusion, I should have little difficulty with it,

since the tribunal''s reasons will almost invariably be before the court and will carry as much persuasive weight as their cogency gives them. That is

not, however, what I understood her to mean, since it was essential to her argument that the court should at least accord great weight to the

tribunal''s conclusions unless they are clearly wrong. However, as became clear in the course of argument, it is impossible to formulate any

satisfactory principle that falls somewhere between a limited review akin to that which the court undertakes when reviewing the exercise of a

judicial discretion and a full re-hearing, not to mention one that is also capable of flexibility in its application. Moreover, for the court to defer to the

tribunal''s conclusions in the manner suggested by Miss Heilbron when it is required to decide whether a particular state of affairs has been proved

would be to give the award a status which the proceedings themselves call into question. It is for similar reasons that our courts have consistently

held that proceedings challenging the jurisdiction of an arbitral tribunal under section 67 of the Arbitration Act involve a full rehearing of the issues

and not merely a review of the arbitrators'' own decision.

22. I agree with Miss Heilbron that a statutory provision which gives effect to an international convention of this kind should be construed with due

regard to the purpose of the convention and with a view to ensuring consistency of interpretation and application, but there is no reason to think

that the judge was not alive to that principle. In the absence of any authority, either in this country or abroad, which tends to support the conclusion

that the language of Article V.1 is to be given a meaning different from that which it naturally bears and in the light of the close similarity of language

between the Convention and the statute, I think the judge was right to treat the question as one of statutory interpretation and that his conclusion on

the meaning of section 103(2) was clearly correct.

46. It is submitted that the power under Section 48 of the Arbitration and Conciliation Act is wider than the power under Section 45 as laid down

by the Hon''ble Supreme Court in Shin-Etsu (supra) and in view thereof the issues raised in this application are required to be decided whole hog

by holding a full-fledged trial. The decision in Shri Lal Mahal Ltd. (supra) was distinguished by submitting that the said decision was confined to an

interpretation of public policy of India occurring in Section 34(2)(b)(ii) vis-Ã¯Â¿Â½-vis similar provision in Section 48(2)(b). It is submitted that in the

instant case, the public policy of India is not involved and, accordingly, the said decision is not applicable in the present facts and circumstances of

the case. With regard to the other judgments cited by Mr. Abhrajit Mitra it is stated that those decisions although passed in relation to domestic

arbitration clearly recognize that for settlement of dispute by arbitration the agreement executed between the parties is to be given importance and

an agreed procedure for appointment of arbitrator is to be placed on high pedestal. Mr. Mitra, wonders how those decisions could come in aid of

the petitioner when the very existence of the said agreement is in dispute and the applicant has questioned the very jurisdiction of the arbitrator to

adjudicate the dispute. Mr. Mitra emphasizes that the claimant wants to enforce an agreement which has not been signed by the owner of the

vessel. Vambaship Maritime S.A. had signed a fixture note for owners although there is no mention of any owner in the fixture note. The fixture

note contemplates only head owner, manager and charterer. Vambaship Maritime S.A. was manager and not the owner of the vessel. The claimant

enforced the arbitration proceedings contained in the fixture note against the charterer on the basis of the fixture note. There is no privity of contract

between LMJ and the plaintiff. The fixture note was only signed by LMJ as charterer and Vambaship Maritime S.A. as Managers and not as

owner of the vessel. Moreover, the annexure to the fixture note in Clause 25 states that the law and arbitration would be governed by 19(A),

19(B) and 19(C) of Clause 19 and if Clause 19(C) is agreed upon then the place of arbitration would be London and the English Law shall apply.

Whereas in Clause 26 it is stated that the additional clauses covering special provisions, if agreed, would be governed Clauses 20 to 46. The

petitioner has invoked Clause 44 for the purpose of appointment of the arbitrator. The said clause was never agreed upon by the applicant. It is

submitted that the view expressed by Justice Biswas at the interlocutory stage was a prima face view and His Lordship has clearly stated that His

Lordship is only giving a tentative opinion to the effect that the petitioner had entered into a contract with the defendant on whose behalf its

Manager Vambaship Maritime S.A. signed the contract and invoiced the decree-holder. Mr. Mitra was quite critical about the decision of the

Tribunal with regard to the findings and conclusions on the challenge to its jurisdiction. It is submitted that Paragraph 40 of the said award would

show that the Tribunal assumed certain facts and there was no basis to come to conclusion that there is no despondent owner in the charter party.

In view thereof it is submitted that the award should not be allowed to be enforced and executed in India.

47. I have considered the rival contentions. Section 48 of the 1996 Act materially corresponds to Section 7 of the Foreign Awards (Recognition

and Enforcement) Act, 1961. Section 48(1)(a)(b)(c)(d) and (e) of the Act corresponds to provisions of Section 103(2)(a)(b)(c)(d)(e) and (f)

respectively of the English Arbitration Act, 1996 sub-sections 48(2) and (3) of the Act corresponds to subsections 103(2) and 103(5) respectively

of the English Arbitration Act. For the sake of convenience and brevity Section 48 of the 1996 Act is set out below:--

48. Conditions for enforcement of foreign awards.-

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court

proof that-

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is

not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was

made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or

was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on

matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from

those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such

agreement, was not in accordance with the law of the country where the arbitration took place; or

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

under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that-

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India. Explanation.-Without prejudice to the generality of clause (b) of

this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the

award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-

section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the

party claiming enforcement of the award, order the other party to give suitable security.

48. The grounds of challenge enumerated in the aforesaid section are meant to be construed narrowly and do not permit review of the foreign

award on merits. The Courts are not expected in any enforcement proceedings to re-determine questions of fact. In Shri Lal Mahal Ltd. (supra) in

paragraph 45 of the report, the Hon''ble Supreme Court has specifically held that Section 48 of the 1996 Act does not give an opportunity to have

a ""second look"" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign

award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of

binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy. In

the instant case, the judgment-debtor initially filed a suit being C.S. No. 230 of 2011 praying, inter alia, for an injunction restraining the decree-

holder from proceeding with the arbitration proceedings. In the suit, the plaintiff also filed an interlocutory application alleging that arbitration

proceedings have been initiated by the defendant in Singapore. The reliefs claimed in the plaint reads:--

(a) Decree for declaration that there is no contractual relationship between the plaintiff and the defendant;

(b) Decree for declaration that there is no valid or binding arbitration agreement between the plaintiff and the defendant.

49. The learned single Judge refused to pass any ad interim order restraining the decree-holder from proceeding with the arbitration proceeding at

Singapore. The petitioner appears to have argued before the learned single Judge that the decree-holder could not have initiated any arbitration

proceeding for adjudication of disputes and differences arising out of the contract. In any case, the arbitration agreement, the plaintiff was made to

execute under duress, is vague and ambiguous. While the fixture note mentioned Singapore to be the place of arbitration, the charter party

mentioned the place to be London. Assuming that there is a valid arbitration agreement, on the facts, for appointment of arbitrator the defendant

appointing the arbitrator was required to apply to the appropriate Court. The learned single Judge on consideration of the fixture note held that at

the interim stage it appears that the petitioner had entered into contract with the defendant on whose behalf its manager Vamvaship singed the

contract and invoiced the plaintiff. The learned Judge was also of the view that the petitioner was unable to make out any case that the plaintiff was

made to sign the fixture note under duress. It was further held that the things specifically mentioned in the fixture note were to prevail over

conflicting terms and conditions, if any, in the charter party. The proceedings have been commenced in Singapore, the place mentioned in the

fixture note.

50. The plaintiff appears to have not pursued the suit. In fact, as on date the suit becomes infructuous in view of the fact that the foreign award has

been published. It was at the stage of enforceability of the said award that the plaintiff has filed this application under Section 48 of the 1996 Act. I

have carefully considered the fixture note and the two apparently conflicting clauses. There cannot be dispute that the parties have intended to

resolve their dispute through arbitration. The only dispute appears to be the mechanism that is required to be followed for appointment of

arbitrator. The petitioner disputes that the fixture note only contains commercial terms. Both the documents contain signatures of the petitioner. In

fact, the signature in the fixture note is all that important to find out if any contract has been executed by and between the parties. The petitioner

cannot resile from the terms agreed upon and contained in the fixture note. In the event there are two conflicting clauses in two documents it would

be the endeavour of the Court to harmonize the two apparently conflicting clauses and to ascertain the intention of the parties. The fixture note as

well as the proforma charter party must be read as a whole and every attempt shall be made to harmonize the terms thereof, keeping in mind that

the rule of contra proferentem does not apply in case of commercial contract for the reason that a clause in commercial contract is bilateral and has

mutually been agreed upon. The jurisdiction of the Tribunal was not questioned on the ground that the said agreement was entered into by coercion

or duress. The plaintiff is not disputing their signature on the fixture note or the existence of the fixture note. Even if a plea is taken that the

agreement was a product of fraud, the tribunal has jurisdiction to decide this issue. The Tribunal, in fact, in a detailed and well-considered award

although not obliged in all fairness considered the letter of objection dated 13th April, 2012 and discussed the said issue and gave its findings on

the challenge to its jurisdiction. The ground of challenge was that the fixture note of 21st September, 2010 was concluded not between them and

Cliff Navigation, the registered owners of the ""Pantanassa"", but between them and Vamvaship Maritime S.A. (Vamvaship). Charterers based their

this submission on the description of Cliff Navigation in the Fixture Note as ""Head Owners"", rather than simply ''Owners'' and on the fact that the

invoices for amounts due under the Fixture were sent on Vamvaship paper head, requesting remittances in favour of a Vamvaship account at the

HSBC Bank in Piraeus. The introduction to the Fixture Note of 21st September, 2010 describes it as agreed between ""Owner of M/V

Pantanassa"" and Charterer M/S LMJ International"". The body of the Note mentions both Cliff Navigation and Vamvaship. The first one is

described as ''Head Owners''; the second it describes as ''Managers''.

51. The Tribunal held that Cliff Navigation were the registered owners of the vessel. I am not prepared to accept any distinction between the

description "Head Owners" and that of "Owners". In fact, the former description is more appropriate. I am also of the view that it would be clear

from the fixture note that the said agreement was entered into between Cliff Navigation on the one hand and LMJ International "OR NOMS" on

the other. The said fixture note was signed by Vamvaship "FOR OWNERS". The Tribunal also did not find anything unusual about the remittances

in favour of Vamvaship rather than Cliff Navigation since it would be of any importance in order to arrive at a conclusion that the Vamvaship is the

principal contracting party to the fixture note and not Cliff Navigation. The Tribunal has taken the evidence of the Captain of the vessel Vamvakis

and all the evidence adduced and documents produced in support thereof. On consideration of the aforesaid material the Tribunal held that

Vamvaship was acting as for owners. On the question of applicable law to the dispute in paragraphs 43 and 44 the said issue was addressed by

the Tribunal which reads:--

43. So much for the parties to the Fixture Note. A further submission of the Charterers, foreshadowed in their letter of 22nd March, 2011

referred to in paragraph 11 above, was that there was no binding arbitration agreement between the Owners and the Charterers. The Charterers

regarded the Fixture Note as containing ""only the commercial terms that had been agreed to between the parties and were not intended to

incorporate any arbitration agreement."" The answer to this point in short: the Fixture Note itself provided for arbitration, clause 23 reading

Arbitration in Singapore and English law to apply.

44. Before the Calcutta Court, the Charterers argued that the arbitration clause in the Fixture Note was invalid, as it was in conflict with lengthy

arbitration provision contained in cl.44 of Charterers" pro-forma charterparty, which provided, amongst other things, for arbitration in London.

But, in our view, the two provisions should be read together as, in effect, substituting Singapore for London as the arbitration venue. This is

consistent with cl.24 of the Fixture Note, which reads: ""OTHERS DTL AS PER CHRTS PRMA C/P"". We read this clause as saying that any

detail not covered by the Fixture Note is to be as per the proforma charterparty but where the detail, such as the arbitration venue, is covered by

the Fixture Note, the terms of the Fixture Note prevail.

52. On the aforesaid basis the Tribunal confirmed the jurisdiction to decide the merits of the owners" claim.

53. The Court is required to construe the contract so as to give it ordinary business efficacy. This is because the Courts recognize that people do

not ordinarily enter into a contract with the intention which shall make no business sense. Clauses 23 and 24 of the Fixture Note clearly brings out

the intention of the parties. The venue of arbitration should be Singapore and for other details the clauses in the proforma charter party was

applied, that is to say, that primacy is given to the fixture note and any details not covered in the fixture note would be governed by Clause 44 of

the Charterers'' proforma charter party.

54. There is no specific challenge before the Tribunal that the composition of the Arbitral Tribunal is contrary to the terms agreed upon between

the parties. Even if it is assumed that the agreement was not with the decree-holder but with the Vamvaship, one would expect the decree-holder

to come up with the initial objection of lack of jurisdiction or that the composition of the Tribunal is not in accordance with the agreed procedure.

Once a finding is arrived at there is a valid arbitration agreement between the decree holder and the judgment debtor inasmuch as in spite of

opportunities the judgment debtor has failed to appear and raise the said objection before the Tribunal and by their conduct have allowed the

arbitration proceeding to continue resulting in an award it would not be open for the petitioner at this stage to question the composition of the

arbitration proceeding in an application under Section 48 of the 1996 Act.

55. Clauses 24 and 25 of the fixture note have to be read along with clause 44 of the Proforma Charter Party. Both the said documents refer to

arbitration for settlement of their disputes arising out of the said agreements. The only change one finds in the fixture note is with regard to the

venue of arbitration. While clause 44 refers to London as the venue, clause 24 of the fixture note says Singapore as venue. The question that would

arise is if by reason of the change of venue, the procedure agreed upon in the earlier document would perish.

56. I am in agreement with the findings of the Tribunal that Clause 24 of the Fixture Note would mean that any details not covered by the fixture

note is to be as per the proforma charter party but where the detail such as the arbitration venue is covered by the fixture note, the term of fixture

note would prevail. The letter of objection dated 22nd March, 2011 also does not specifically raise the issue that there is a failure in the mechanism

for the appointment of the arbitrator and in such a situation the procedure mentioned in Singapore Law shall apply for the purpose of appointment

of an arbitrator. The applicant also for no just cause or excuse had failed to appear before the Tribunal. The clauses in the fixture note and the

proforma charter party have to be read together with a view to find out the manifest intention of the parties. The true nature of relationship between

the parties is quite discernible from the fixture note and there cannot be any doubt that the contract was concluded between the decree-holder and

the applicant.

57. In Radha Sundar Dutta (supra) the Hon''ble Supreme Court also recognized the general principle that the Court would be required to ascertain

the intention from the entire content of the deed. It is stated that if, in fact, there is a conflict between the early clause and the later clause and it is

not possible to give effect to all of them then the rule of construction is well-establish that that it is the earlier clause that must override the later

clauses and not vice versa. The Hon''ble Supreme Court approved the observation of Lord Wrenbury stated in Forbes v. Git reported at (1922) 1

AC 256 which says:--

If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is

to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed

prevails over the later.

58. In the instant case, however, I do not find any apparent conflict between the two clauses or that the clause in the fixture note is likely to destroy

altogether the obligation created by the proforma charter party. It is only in a case where the clauses are irreconcilable the earlier provisions in the

deed prevails over the dead letter. The intention of the parties has to be gathered from the evidence and no hard and fast rule can be applied.

59. The plaintiff also realized that the suit is not maintainable in view of the decision of the Hon''ble Supreme Court in World Sport Group

(Mauritius) Ltd. Vs. MSM Satellite (Singapore) Pte. Ltd., AIR 2014 SC 968 : (2014) AIRSCW 772 : (2014) 2 JT 444 : (2014) 3 RCR(Civil)

485 : (2014) 3 SCJ 309 and Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee reported at Swiss Timing Limited Vs.

Organising Committee, Commonwealth Games 2010, (2014) AIRSCW 4958 : (2014) 7 JT 574 : (2014) 7 SCALE 515 : (2014) 6 SCC 677

where the Hon''ble Supreme Court has clearly spelt out that the Tribunal has jurisdiction to decide the issues including fraud in the event such

allegation is before the Tribunal.

60. The decision in World Sports (supra) insulates New York Convention arbitrations held outside India from disruptions caused by intervention

of Courts on account of parties alleging fraud. It is stated in the said decision that in the case of arbitrations covered by the New York Convention,

the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration

agreement is null and void, inoperative or incapable of being performed and not on the ground that allegations of fraud or misrepresentation have to

be inquired into while deciding the disputes between the parties.

61. In England after the enactment of Section 7 of the UK Arbitration Act, 1996, Courts have held that accusations of fraud are in principle

capable of falling within the scope of its agreement to arbitrate.

62. The petitioner has conveniently stayed away from participating in the arbitration proceeding. This application is an indirect method to reopen

the award which has otherwise reached its finality. The applicant was neither any incapacity or the agreement on the basis of which the arbitration

proceeding had commenced is invalid in law. There cannot be any doubt that if the composition of the arbitral authority or the arbitral procedure

was not in accordance with the agreement of the parties that the agreement was not valid under the law to which the parties have subjected it

notwithstanding any award has been passed, the said award is amenable to challenge under Section 48 of the Arbitration and Conciliation Act. In

absence of Clause 24 in the Fixture Note I would have agreed to accept the submission made by Mr. S.N. Mitra, the learned Senior Counsel

representing the applicant. There cannot be any absolute proposition that in case it is found that there are apparently conflicting clauses, the first

clause will prevail over the second clause or that the last shall prevail over the first unless there is a statutory bar, for example, Section 88 of the

Indian Succession Act which specifically says that where two clauses of gifts in a Will are irreconcilable so that they cannot possibly stand together

the last shall prevail. Whenever the Court is faced with a problem that there are apparently two conflicting clauses touching on the subject, the

Court, in my view, would be required to find out and ascertain the manifest intention of the parties to the agreement. Only in the case of Will a

preference is given to the later clause for the reasons that the testator could always change its mind and create another interest in place of the

bequest already made in the earlier part or at an earlier occasion. Moreover, having regard to the fact that the applicant had the opportunity to

raise objection with regard to the composition of the Tribunal and having failed to raise any such objection, in my view, is precluded from raising

such issue at this stage.

63. In view of the aforesaid the application fails. However, there shall be no order as to costs.

64. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.