2023 C L D 189

[Lahore]

Before Shahid Karim, J

POSCO INTERNATIONAL CORPORATION through Authorised Officer---Plaintiff

Versus

RIKANS INTERNATIONAL through Managing Partner/Director and 4 others---Defendants

C.O.S. No. 53422 of 2020, decided on 26th May, 2022.

(a) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---

----Arts. II & V(1)(a) of Schedule---Terms "incapacity" and "parties to the agreement" ---Connotation---Term "incapacity" used in Art.V(1)(a) of Schedule to Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, has a reference to capacity of parties to enter into a contract in the first place---Words "parties to the agreement" referred to in Article II of Schedule to Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, are closely tied in with the words "under some incapacity".

(b) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---

----Art. V (1)(b) of Schedule--- Term "public policy"--- Effect---Recognition and enforcement of an arbitral award may be refused if competent authority in the country finds that the award would be contrary to the public policy of that country---Term "public policy" has been subject of interpretation of Courts all around the world and still remains an extremely fluid term not capable of definite meaning---Concept of public policy gained wide-ranging and polycentric traction and scope of its application became broader---Same principles have been used interchangeably for both foreign and domestic awards losing sight of the purpose and intent in enacting law for enforcement of foreign awards to which different set of principles narrower in scope, must by applied---Such is necessary to maintain integrity of international commercial contracts and trust in Pakistani Courts to enforce foreign awards---Trust may be shaken irretrievably if Courts of Pakistan are to evince an anti-enforcement policy by seeking shelter in nebulous concept of "public policy".

Renusaghar Power Company Ltd. v. General Electric Company 1994 SCC Supl. (1) 644 and Associated Builders v. Delhi Development Authority 2014 (4) ARBLR 307 (SC) distinguished.

(c) Jurisprudence---

----Justice and morality---Scope---Justice or morality do not signify any concept of precision---Morality may fluctuate from one community to another and from one country to the other---Courts are not required to enforce moral standards but as Courts of law are merely concerned with enforcement of law enacted by Legislature.

(d) Arbitration---

----Agreement---Scope---Arbitration agreement not only imposes a "positive" obligation upon parties to proceed with a dispute but also creates negative undertaking for parties which obligates them not to bring any claims falling within the scope of arbitration agreement, in a forum other than arbitration.

AES [2013] 1 W.L.R. 1889 and West Tankers Inc. [2007] UKHL 4 ref.

(e) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---

----Ss. 3, 6 & Art. V (1)(a)(b) of Schedule---Foreign Arbitral Award---Recognition and enforcement---Challenge to award---Plea of "public policy"---Applicability---Civil suit, pendency of---Effect---Applicant company sought recognition and enforcement of foreign arbitral award---Respondent company raised plea of pendency of civil suit before Civil Court in Pakistan---Validity---There was a need to fence the power so that opinion of Courts exuded deference to Legislative intent---Arbitral award was contrary to public policy, if it had offended a Constitutional mandate or was forbidden by law or would defeat provisions of any law---Such were the only grounds on which a public policy challenge could succeed---Multiplicity of proceedings, conflicting decisions (between Arbitral Tribunal and Courts in Pakistan) and futility were not grounds covered by the doctrine of public policy---High Court recognized the Foreign Award in question as a binding and enforceable award---High Court granted judgment in the amount represented in the Foreign Award and the same would be executed as a decree of High Court---High Court in terms of O. XXI, R. 10, C.P.C. converted the application into execution proceedings---Application was allowed accordingly.

Orient Power Company (Private) Ltd. through Authorized Officer v. Sui Northern Gas Pipelines Ltd. through Managing Director 2021 SCMR 1728 and Words and Phrases, Permanent Edition, 35A (2006) ref.

Mian Sami ud Din, Ali Uzair Bhendari and Ms. Fatima A. Malik for Plaintiffs.

Muhammad Ali Raza and Ms. Habiba Alvi for Respondent No.1.

Sardar Taimoor Aslam Khan for Respondent No.5.

Date of hearing: 20th April, 2022.

JUDGMENT

SHAHID KARIM, J.---This is an application (the "Application") pursuant to sections 3 and 6 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (the "2011 Act") for recognition and enforcement of a foreign arbitral award dated 26.02.2020 (the "Foreign Award").

2. The Application is made by POSCO International Corporation Limited ("POSCO") through Mr. Jeongki Ham (Passport No.M77544665), who is authorized by virtue of a Letter of Authority and Letter of Confirmation executed on 12.06.2020. The Applicant's Articles of Incorporation are also annexed to this Application.

3. Pursuant to section 5 read with Article IV of the Schedule to the 2011 Act ("NY Convention"), the Application is accompanied by:

i. A certified copy of the duly authenticated original Foreign Award dated 26.02.2020; and

ii. A certified copy of the sales contract dated 16.10.2015 ("Sales Contract") containing the arbitration agreement in clauses 18/19 of the Sales Contract.

4. POSCO is a company established in the Republic of Korea engaged in trade, resources development, project organization and steel processing services with its principal place of business at 165 Convensia-Dae-Ro, Yeonsu-gu, Incheon.

5. The respondent to this Application is Rikans International (the "Rikans"), a partnership firm acting through its Managing Partner/ Director, Chaudhry Muhammad Imran, with its principal place of business at 453, 2nd Floor Main Boulevard DHA, Lahore 54000 Pakistan; and additional place of business 61-B Main Boulevard, Bankers Town, Near Ring Road DHA Phase-4 Interchange, Lahore 54600, Pakistan.

Facts:

6. A brief narration of facts giving rise to the Application are stated as follows:

Agreements between the Parties:

a. On 26.08.2015, the Applicant and Respondent entered into an agreement (The "August 2015 Agreement") whereby the Applicant would sell to the Respondent, and the Respondent would buy 17 units of heavy machinery comprised of wheel type excavators, crawler type excavators, wheel loaders and parts manufactured by Doosan Infracore, Co. Ltd. (the "Goods").

b. The parties negotiated and modified certain terms of the August 2015 agreement and subsequently executed the Sale Contract dated 16.10.2015 (Sales Contract"), replacing the August 2015 Agreement for the sale and purchase of the same 17 units of the Goods (clause 1 of the Sales Contract).

c. The total price of the Goods was set as USD 1,583,834.00 (the "Contract Price"), full payment of which was due "90 days from receipt of Original Shipping Documents" (clause 8 of the Sales Contract).

d. The Applicant shipped the Goods on or around 30.08.2015 and the shipment arrived at the destination port of Karachi on 20.09.2015. The Respondent took possession of the Goods on or about 14.10.2015. On 30.10.2015 the Respondent signed a confirmation of the receipt of the original shipping documents and promised to make payment on 14.1.2016 in accordance with the Sales Contract. Despite the promise, the Respondent failed to make payment.

e. On 5.1.2016, Respondent sent a letter to the Applicant purporting to cancel the Sales Contract for alleged failure by the Applicant to fulfill its obligations.

Arbitration Agreement:

f. The Sales Contract contained an arbitration clause whereby the parties agreed to refer all disputes under the Contract to arbitration. Clauses 18/19 (the "Arbitration Clause") of the Sales Contract provides as follows:

"All disputes in connection with this Contract or the execution or breach thereof shall be settled through friendly negotiations. In case no settlement is reached through negotiation within 30 days after notice, then such disputes shall be finally settled by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Arbitration Centre for the time being in force, which rules are deemed to incorporated by reference in this clause. The arbitration award shall be final and binding upon the parties concerned.

Arbitration Proceedings and Arbitrator's Award:

g. The Applicant, exercising its contractual rights under the Arbitration Clause issued a notice of commencement of arbitration to Singapore International Arbitration Centre (SIAC) on 18.09.2018. The Respondents issued a reply to this notice

on 19.09.2018 raising jurisdictional objections on several grounds.

h. On 19.10.2018, the SIAC wrote to the parties, determining that the Respondent's jurisdictional objection would be referred to the Court of Arbitration. On that basis SIAC proceeded to constitute the Tribunal.

i. On 13.12.2018, the SIAC constituted the arbitral tribunal and appointed Mr. Kelvin Poon as the sole arbitrator (the "Arbitrator").

j. Between 04.06.2019 till 22.2.2020 the arbitration proceedings was conducted, and the Respondent was given multiple opportunities to put up a defence to the claim of the Applicant. However, as the Foreign Award, paragraphs 33 to 49 demonstrate, the Respondent had no real defence and failed to dispute liability.

k. On 26.02.2020, after due deliberations the Arbitrator issued the Foreign Award in favour of the Applicant.

l. In the Foreign Award, the Arbitrator made the following findings, declarations and awards in favour of the applicant:

a. The Respondent shall forthwith pay to the Claimant USD 1,583,834.00.

b. The Respondent is directed to pay to the Claimant the costs of the arbitration fixed at SGD 92,373.69.

c. The Respondent is directed to pay the Claimant its legal costs and expenses in an amount of USD 233,243.84.

d. The Respondent shall pay simple interest on USD 1,583,834.00 from 14 January 2016 until full payment of the same, at a rate of 5.33% per annum.

e. The Respondent is directed to the Claimant simple interest on the costs of SGD 92,373.69 (awarded at paragraph 141b above) from the date of this award until full payment by the respondent of the sums awarded to the Claimant, at a rate of 5.33 % per annum.

f. All other claims and requests are denied."

7. Hence, the Applicant has now filed the present Application seeking recognition and enforcement of the Foreign Award.

Request for enforcement of the Foreign Award:

i . Both Pakistan and Singapore are signatories to the NY Convention, and the foreign Award has been made in Singapore and is therefore a "foreign arbitral award" within the meaning given in section 2(e) of the 2011 Act.

ii. Article III of the NY Convention provides that:

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the follows articles."

iii. According to POSCO the conditions for enforcement have been met. Pursuant to Article IV of the NY Convention, the Applicant has annexed herewith a certified copy of the duly authenticated original Foreign Award, and a certified copy of the original arbitration agreement.

iv. POSCO has requested to "recognize and enforce the award in the same manner as a judgment or order of a court in Pakistan" as required by section 6 of the 2011 Act.

8. Further facts which will exercise a gravitational pull on the present case must be recounted in the following terms (in chronological order):

11.06.2016 Rikans Partnership filed the civil suit against POSCO with Lahore Civil Court.

25.02.2016 POSCO wrote a letter to Rikans Partnership inviting it to negotiate the matter.

02.06.2016 POSCO filed written statement of jurisdictional objections and an application to reject the suit before Lahore Civil Court on the basis of the arbitration clause in the Main Contract.

17.09.2018 POSCO filed a Stay Application under section 4 of the 2011 Act with Lahore Civil Court.

18.09.2018 POSCO filed a Notice of Arbitration to SIAC and copied Rikans Partnership.

19.09.2018 Rikans Partnership filed a Reply of Notice of Arbitration.

21.09.2018 POSCO responded to objections of Rikans in its Reply to the NoA, and requested SIAC to refer Rikans Partnership's jurisdictional objection to SIAC Court of Arbitration.

28.09.2018 SIAC requested Rikans Partnership to confirm whether it was raising a jurisdictional objection.

01.10.2018 POSCO asked Rikans Partnership whether it would agree to appointment of sole arbitrator.

01.11.2018 SIAC informed by email that Rikans Partnership had not confirmed whether it was raising a jurisdictional objection and that it would proceed with the appointment of a sole arbitrator unless Rikans Partnership respondent by 6 November 2018.

06.11.2018 Rikans Partnership through Respondent No.2 informed SIAC by email that its former counsel has "not been able to pursue the matter due to certain exigencies" and was replaced with new counsel.

07.11.2018 By email SIAC asked Rikans Partnership to confirm whether it was raising jurisdictional objection by 09.11.2018.

08.11.2018 Rikans Partnership confirmed and submitted to SIAC its jurisdictional objection.

19.11.2018 SIAC Registrar informed the Parties that the jurisdictional objection will not be determined by the SIAC Court of Arbitration and that a sole arbitrator would be appointed. This power was exercised under Rule 28 of the SIAC Arbitration Rules.

13.12.2018 Constitution of the Tribunal. Mr. Kelvin Poon was appointed as sole arbitrator.

19.12.2018 Rikans Partnership filed an anti-arbitration injunction in the Lahore Civil Court and the Civil Court without notice to POSCO order it not "to take the matter to the Singapore International Arbitration Centre (SIAC) unilaterally", whereas the arbitration had already been initiated in September 2018.

21.12.2018 Rikans Partnership made a request to stay the arbitration on the basis of the Lahore Civil Court's anti-arbitration injunction.

03.01.2019 POSCO filed FAO against anti-arbitration injunction which Honourable Lahore High Court suspended.

12.01.2019 Tribunal dismissed Rikans Partnership request for stay.

23.01.2019 Rikans Partnership did not provide its availability for the procedural conference, the tribunal postponed the procedural conference to after POSCO has submitted its Statement of Claim.

04.02.2019 Rikans Partnership filed a reply to POSCO's Stay Application under section 4 of the 2011 Act before the Civil Court.

11.02.2019 Lahore High Court's Order to set aside the 19.12.2018 anti-arbitration injunction by consent of the parties.

28.02.2019 POSCO's Statement of Claim was filed in the arbitration.

01.03.2019 The Tribunal directed Rikans Partnership by email to submit Statement of Defence by 28.03.2019.

30.03.2019 Rikans Partnership filed a second stay request to the Tribunal pending the Lahore Civil Court's determination of POSCO's Stay Application under section 4 of the 2011 Act.

04.04.2019 POSCO's response by email to Rikans Partnership's Second Request for Stay of Arbitration.

25.04.2019 First Procedural Conference, wherein counsel for Rikans Partnership participated along with counsel for POSCO and made submission before the Tribunal.

25.04.2019 Procedural Order 1 wherein the Tribunal dismissed the Second Stay Request of Rikans Partnership and directed it to submit a Statement of Defence on jurisdictional objections and merits by 09.05.2019.

09.05.2019 Rikans Partnership's submitted a Statement of Defence on jurisdictional issues only and chose not to submit on the merits and requested bifurcation of proceedings.

15.05.2019 Procedural Order No.2 issued by the Tribunal dismissed Rikans Partnership's bifurcation request and directed Rikans Partnership to submit a Statement of Defence on merits by 31.05.2019.

31.05.2019 Rikans Partnership's counsel withdraw and Rikans Partnership's Managing Partner, Muhammad Imran Chaudhry informed Tribunal that it would not participate in the arbitration proceedings.

03.06.2019 Tribunal informed the Parties that it would proceed in the absence of Rikans Partnership.

10.06.2019 Lahore Civil Court ordered stay of the court proceedings under section 4 of the 2011 Act in favour of POSCO.

17.07.2019 Rikans Partnership filed a Civil Revision against the Stay Order of the Civil Court.

20-24.06.2019 Respondent No.2, Mr. Ch. Muhammad Imran of Rikans Partnership communicated to the Tribunal the suspension of the Civil Court Stay Order in Civil Revision before the Honourable High Court.

Discussion:

9. Rikans' defence is almost entirely based on Article V(1)(a) and (b) of the Schedule to the Act, 2011, which provides that:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:-
>
> (a) The parties to the agreement referred to in Article II
>
> were, under the law applicable to them, under some
>
> incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration, can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority if the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:-
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

10. But before we plunge into the main issues on this Application, a flanking rather than frontal attack was made on the competence of POSCO to bring this Application. The objection is centered on the evolution of Daewoo International Corporation (party to the agreements) into POSCO. This ground was also agitated in C.O. No.14766 of 2020 an Enforcement Application filed by POSCO (in respect of a different award) and was answered in favour of POSCO in the following terms:

> "6. The license agreement was executed between Daewoo International Corporation and Daewoo Pakistan Express Bus Service Limited. The learned counsel for Daewoo laid much emphasis on the fact that the initial license agreement was executed by the name of Daewoo International Corporation and the present application which has been filed by POSCO is unauthorized and is liable to be thrown out on this basis. This objection should receive a short shrift. The repayment agreement executed on 8.12.2017 was done by Daewoo with POSCO Daewoo Corporation which was a different company from Daewoo International Corporation. It is pertinent to mention that during this period, Daewoo International Corporation was taken over and owned by different corporate entities and on this account the change of name took place. However, the rights and liabilities remained unaffected and were acquired by the new company each time. Currently they are held by POSCO which has brought the present application. This is evident from the various documents attached with this application. It would suffice to refer to the recent history. In this regard, the first document is the minutes of the 16th ordinary general meeting of shareholders held on 14.03.2016 by which name of Daewoo International Corporation was changed to POSCO Daewoo Corporation (on the acquisition of shareholding). Subsequently, as a result of another amalgamation whose documents have also been attached with this application, POSCO Daewoo Corporation evolved into POSCO International Corporation. This change took place in the 19th ordinary general meeting of shareholders held on 18.3.2019. These meetings were presided by the Chairman/representative director Young Sang Kim. Therefore, there is no substance in the objection raised by Daewoo in this regard."

11. The arguments in this Court on behalf of Rikans revolved around the words "under some incapacity" contained in Article V(1)(a). This was the first defence broached by Rikans. It will be borne in mind that the defence of Rikans is entirely set out against the backdrop of proceedings which were commenced before the Civil Court by Rikans in which a claim for damages was made. In that context Rikans submits that those proceedings rendered it incapacitated to set up a defence before the Arbitrator and thus Rikans was unable to present its case.

12. A read of Article V (1)(a) will show clearly that the construction sought to be put by Rikans on the words "under some incapacity" is without any lawful basis and such a construction is not culled out of the provision itself. The term "incapacity" used in Article V(1)(a) has a reference to the capacity of the parties to enter into a contract in the first place. The words "parties to the agreement" referred to in Article II are closely tied in with the words "under some incapacity". Article II stipulates that each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship. Since Article V makes reference to the agreement in Article II, that agreement is one which is entered into by the parties under which they undertake to submit to arbitration all or any of their differences. It is therefore not the incapacity which may be incurred after the agreement has been executed and acted upon

and the parties thereafter allege breach of the terms of the agreement and seek to settle their disputes by resort to one or the other forum. Rikans invites this Court to hold that because the proceedings were pending in the Civil Court at Lahore, it was incapacitated in some way to put up a defence before the Arbitrator at SIAC. This is a fantastic interpretation to be put on Article V(1)(a) which has no relevance to the incapacity which is sought to be set up by Rikans. It is based upon a view which could not reasonably be held. A further read of Article V(1)(a) would show that it goes on to state that because of the incapacity as alleged, the agreement is not valid under the law to which the parties have subjected it. Once again the reference is to the primary agreement executed by the parties to submit to arbitration and is a reiteration of the basic notion encapsulated in Article V(1)(a) that the incapacity is the incapacity to contract and not an incapacity to perform the contract or to put up a defence once an Arbitrator is appointed in accordance with the agreement of arbitration. This necessarily alludes to the status at the time of agreement in writing and not any purported incapacity which arises subsequently. It must have a close nexus to the time when the agreement was entered into. In this regard, the Supreme Court of Pakistan in Orient Power Company (Private) Ltd. through Authorized Officer v. Sui Northern Gas Pipelines Ltd. through Managing Director (2021 SCMR 1728), had this to say:

> "Thus, enforcement of an award under this Article may be refused if the arbitration agreement is invalid or if the parties lacked the capacity to arbitrate, which is not the position in the instant case.
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> 43. Under the Commentary of the New York Convention by Herbert Kronke et al titled 'Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention', it has been stated that Article V(1)(a), permits a court to deny recognition and enforcement of an award if no arbitration agreement exists. We must however, be careful in noting that the issue here is not the existence of the arbitration agreement, but rather, whether the existing arbitration clause could have been read into another agreement i.e. the Payment clause."

13. The defence set up on this basis is therefore rejected.

14. The second defence set up by Rikans is based on Article V(1)(b) and in particular the words "unable to present his case". Once again it is contended by Rikans that it was unable to present its case before the Arbitrator because it was constricted by pendency of civil litigation at Civil Court, Lahore. Firstly, that litigation had been brought by Rikans itself and so it cannot be urged that it was precluded to present its case before the Arbitrator. The words "unable to present his case" refer to circumstances beyond control of a party and not where a party elects not to present its case by choice. These are diametrically opposed concepts. Making a deliberate effort to avoid the proceedings before the Arbitrator is distinct from being subjected to detriments due to which a party is "unable to present his case". It could be an anti-suit injunction (arbitration in this case) and from the facts adumbrated it is clear that there was no such injunction against Rikans not to appear before the Arbitrator or present its case. On the contrary, if at all, the Civil Court had issued an injunction against POSCO not to file arbitration claim before the Arbitrator which too was meaningless because POSCO had, by that time, filed its claim before the Arbitrator. Therefore, Rikans cannot be heard to contend that it was unable to present its case because of some circumstances which enjoined Rikans from setting up a defence in response to the notice of Arbitrator. Moreover, these words invoke the concept of fairness and due process. This can be culled out from a holistic reading of Article

V(1)(b) which taken as a whole implies that it will be a good defence to set up if the party against whom the award is invoked was not given proper notice of appointment of the Arbitrator or of the arbitration proceedings or was otherwise unable to present its case. These are related concepts and must be read in ejusdem generis. There were no circumstances which constrained Rikans from presenting its case before the Arbitrator and sufficient opportunities were given to present its case and to set up a defence to the claim filed by POSCO. The pendency of civil proceedings in the Civil Court, Lahore cannot be taken as a circumstance which presented itself as an insurmountable hurdle in the way of Rikans to present its case before the Arbitrator. The proceedings by Rikans seeking anti-arbitration injunction come to a close on 11.02.2019 and substantial proceedings before the Arbitrator were held between 04.06.2019 and 22.02.2020, that is, afterwards. It was a risky proposition on the part of Rikans to have completely abandoned its defence before Arbitrator and to rely solely on the claim before the Civil Court while it was aware of the fact that POSCO had filed an application seeking to restrain the Civil Court from proceeding with the suit on the ground that the parties had agreed to submit their differences to arbitration at SIAC. Moreover, on 10.06.2019 the Civil Court had ordered stay of the proceedings under section 4 of the Act, 2011 in favour of POSCO. This was a further circumstance which ought to have guided Rikans into making a proper and full defence before the Arbitrator. Since Rikans had every opportunity through a proper notice by the Arbitrator to give a defence on merits of POSCO's claim, it is irrational and unarguable for Rikans to state this as a defence to the enforcement of the award made by the Arbitrator. Such a defence must fall on barren ground and ought to be rejected.

15. Rikans next contended that the award was not enforceable as it is contrary to the public policy of Pakistan. This argument is based on Article V(2)(b) which provides that:

> "V(2)(b): The recognition or enforcement of the award would be contrary to the public policy of that country."

16. To recapitulate the said provision provides that the recognition and enforcement of an arbitral award may also be refused if the competent authority in the country finds that the award would be contrary to the public policy of that country. The term "public policy" has been subject of interpretation of courts all around the world and still remains an extremely fluid term not capable of definite meaning. It is notoriously slippery and inherently vague. Learned counsel for Rikans relied upon a number of judgments from the Indian jurisdiction and a recent judgment of the Supreme Court of Pakistan which considered the meaning of the term 'public policy' so as to lend actuality to that term. The primary reliance of the learned counsel was on Renusaghar Power Company Ltd. v. General Electric Company reported as 1994 SCC Supl. (1) 644 where the Supreme Court of India expounded the term 'public policy' to mean:

i. Fundamental policy of Indian law;

ii . The interest of India;

iii. Justice or morality.

17. On the basis of the above ingredients to comprise the term 'public policy' it was held in the context of a foreign award that the award would be contrary to public policy if any of these ingredients were found to exist and the courts would then hold the award to be null and of no effect. This was followed in a number of Indian judgments in the later years. The entire case law was once again considered by the Supreme Court of India in

Associated Builders v. Delhi Development Authority 2014 (4) ARBLR 307 (SC). Associated Builders was concerned with a domestic award and Renusaghar was referred for seeking guidance regarding construction of the expression 'public policy'. The Indian Supreme Court has, as will be seen from a reading of these judgments, expanded on the term 'public policy' particularly with regard to the enforcement of domestic awards. Various nuances were added to give an expansive meaning to the term 'public policy' as originally laid down in Renusaghar. However, the Supreme Court of Pakistan has taken a much narrower view of the term 'public policy' and for good reasons. In my opinion, the Indian Supreme Court has added a great degree of uncertainty by expanding on the term 'public policy' and therefore, muddled the concept of other defences mentioned in Article V which are all liable to be merged in the greatly expanded defence of public policy mentioned in Article V(2)(b). It will also be seen that the concepts which have been introduced to comprise in the term 'public policy' are incapable of a definite and exact meaning. The fundamental policy of Indian law is an amorphous term and it is difficult to ascertain with any degree of certainty as to what is the fundamental policy of Indian law except that that policy is contained in the Constitution which can only be referred as containing the fundamental policy of a constitutional democracy. Likewise, the interest of India is again a plastic term and there is no criterion by which the interest of India can be ascertained with exactness. Finally justice or morality do not signify any concept of precision as morality may fluctuate from one community to another and from one country to the other. Courts are not required to enforce moral standards but as courts of law are merely concerned with the enforcement of law enacted by the legislature. This holds true for 'justice' as well for judges man courts of law and not justice. Therefore, in my opinion, these concepts, if allowed to be included in the term 'public policy', will only add to the confusion and will be tools in the hands of courts to give them unbridled and unstructured discretion in setting aside a foreign arbitral award on the basis of notions of justice, morality or fundamental policy of Pakistan. I do not subscribe to the views expressed by the Supreme Court of India in the judgments cited by the learned counsel for Rikans.

18. On the other hand, the Supreme Court of Pakistan has a better reading of the term in Orient Power Company and alluded to the concept of public policy in the following words:

> "...The wording "incompatible with the public policy of the country in which is award is sought to be relied upon" was recommended, the reasoning behind the same was that the public policy criterion should not be given a broad scope of application. The Convention adopted the draft of Working Party III, which now reads as Article V(2)(b) under the New York Convention.
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> 104. Article V(2)(b)'s defense of public policy is one ground that is frequently invoked by a party resisting enforcement of the award, but rarely is it granted. We find that it would be remiss if we did not echo the Learned High Court in quoting the words of an English Court upon this issue, which are by now almost inextricably linked to this topic and oft cited: "public policy is a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail."
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> 105. Another frequently cited judicial comment on public policy is from Judge Joseph Smith in Parsons and Whittemore Overseas Inc. v. RAKTA, who observed that the public policy defense ought only to succeed where enforcement of the award would violate the forum State's most basic notions of morality and justice.

> 106. The recent Privy Council decision of Betamax Ltd. (Appellant) v State Trading Corporation (Respondent) (Mauritius) is of some guidance, in which, on appeal, the Privy Council overturned the decision of the Supreme Court of Mauritius which had set aside an award for being contrary to the public policy of Mauritius, because the underlying contract between the parties was in breach of the public procurement law of Mauritius. The Board held that the court was not entitled to use the guise of public policy to reopen issues relating to the meaning and effect of a contract or whether it complies with a regulatory or legislative scheme. For that reasons the decision of the Supreme Court of Mauritius setting aside the Award fell to be reversed.

19. The Supreme Court referred to the case of Rinesaghar but merely in the context of the unjust enrichment argument and nothing more. Finally the Supreme Court agreed with the observations of the learned Judges of Lahore High Court which were reproduced in paragraph 120:

> 120. We agree with the finding of the Learned High Court at paragraph 57 of the Impugned Judgment, wherein it is stated:
>
> "...[the] non-interference or the pro-enforcement policy is in itself a policy of Contracting States, which is not easily persuaded by the public policy exception argument... The public policy exception acts as a safeguard of fundamental notions of morality and justice, such that the enforcement of a foreign award may offend these fundamentals... [T]he public policy exception should not become a back door to review the merits of a foreign arbitral award or to create grounds which are not available under Article V of the Convention as this would negate the obligation to recognize and enforce foreign arbitral awards. Such kind of interference would essentially nullify the need for arbitration clauses as parties will be encouraged to challenge foreign awards on the public policy ground knowing that there is room to have the Court set aside the award."

20. The Supreme Court was clearly of the opinion that the definition of public policy even if invoked by a party is rarely granted and referred to the observations made by an English Judge to the effect that the public policy was an unruly horse and once you get astride it, you never know where it will carry you. Further that the courts all around the world have favored a restrictive approach to the question of public policy in arbitration and that Pakistan as a responsible nation has to develop jurisprudence while remaining cautious of the purpose of the parties to opt for arbitration and who are seeking speedy settlement of disputes which ought not be impeded by a party resorting to litigation once an award is rendered. In short, the Supreme Court of Pakistan favored an approach of non-interference and a pro-enforcement policy. Lastly, it was held that public policy exception could not be used as a back door to review the merits of a foreign arbitral award or to create grounds which were not available under Article V of the Schedule to the Act, 2011. The holding of the Supreme Court of Pakistan is the correct view and is currently the law of the country and I shall respectfully follow the views expressed in Orient Power Company rather than follow the Supreme Court of India.

21. In the context of the public policy defence, learned counsel for Rikans submitted that an application under section 4(2) of the Act, 2011 had been filed by POSCO and so POSCO could not have invoked the jurisdiction of SIAC simultaneously and ought to have awaited the final determination of the issues before the Civil Court at Lahore regarding section 4 application. On this basis it is contended that the reference to SIAC

dated 17.9.2018 is contrary to section 4 of the Act, 2011. This argument has no basis and cannot prosper. It simply cannot succeed on the ground that the claim before the Civil Court had been filed by Rikans and it was the right of POSCO to file an application seeking stay of the proceedings and for referral of the matter to Arbitration under the arbitration clause. Section 4 of the Act, 2011 is in any case an obligation cast on the courts of Pakistan to see that in case the parties have entered into an arbitration agreement, the referral should on that basis be made to the Arbitration Tribunal and the claim should not be agitated before the Civil Courts. In the opinion of Rikans, having invoked the jurisdiction of the trial court under section 4 of the Act, 2011, POSCO was required to await the determination. This is a misplaced notion as POSCO had not invoked the jurisdiction of the Civil Court at Lahore who had merely filed an application to seek a stay of the proceedings and to enjoin the courts at Lahore to refer the parties to arbitration. POSCO was compelled to file the application and did not itself invoke the jurisdiction of the Civil Court at Lahore. A related argument raised by Rikans is that in the absence of referral by the trial court, the award which was issued by the Arbitration Tribunal falls afoul of the Pakistani law. Once again this argument is unsubstantiated and fanciful. It seems that Rikans by raising this argument invites this Court to hold that in every case a referral by a court in Pakistan is sine qua non for the arbitration proceedings to commence before the Arbitration Tribunal. There is no such requirement in law and the Civil Courts at Lahore were involved only because Rikans chose to file a claim before the Civil Court, Lahore contrary to its obligation under the arbitration agreement to refer the matter to Arbitration. There was no violation of Pakistani law or the public policy as alleged by Rikans since the public policy contained in section 4 of the Act, 2011 is very clear. It obliges and compels parties to an arbitration agreement to take their claims to the tribunals agreed for resolution of disputes by the parties and further requires the courts in Pakistan to refer the parties to arbitration. This is the public policy of Pakistan and must be adhered to.

22. Rikans argues that the recognition and enforcement of the award would be contrary to public policy (of Pakistan) since the civil court at Lahore was seized of an action brought by it. This argument runs counter to the stated public policy of Pakistan as a contracting state which is to refer the parties to arbitration (section 4(2) and Article II(3)) and avoid getting engaged in foreign litigation. An arbitration agreement not only imposes a 'positive' obligation upon the parties to proceed with a dispute but also creates the negative undertaking for the parties which obligates them not to bring any claims falling within the arbitration agreement's scope in a forum other than arbitration. According to U.K Supreme Court the negative undertaking:

> "is as fundamental as the positive obligation imposed by an arbitration agreement"
>
> (AES [2013] 1 W.L.R. 1889)
>
> As Lord mance (of UKSC) has observed:
>
> "It is in practice no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that ... the only remedy is to become engaged in the foreign litigation pursued in disregard of the clause. Engagement in the foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aimed and bargained to avoid."
>
> (West Tankers Inc. [2007] UKHL4)

23. POSCO did not bargain to become engaged in foreign litigation when an arbitration agreement was formed under which the parties were obligated to proceed with the arbitration which included the duty to co-operate to progress the proceedings and the duty to comply with any award rendered. Section 4(2) and Article II(3) of the Act, 2011 are forms of Anti-suit injunction to enforce negative undertaking lest the claimant is deprived of its contractual rights in a situation where demages would be manifestly an inadequate remedy. Rikans was in breach of the arbitration agreement (if not repadiatory breach) by commencing proceedings at civil court Lahore. It is in my opinion a public policy of Pakistan law that parties do not breach the negative undertaking imposed by an arbitration agreement. In this case it boils down to weighing the public policy enacted by the provisions of the Act 2011 against a purported public policy invoked by Rikans on the basis of litigation commenced to bring a simple claim for damages. There is no known public policy which constrains this Court from enforcing the award on the premise that one of the party has brought a claim in the local courts. If the section 4 application of POSCO were to remain unsuccessful the result would be an adjudication of Rikans' claim by the Civil Court Lahore without affecting in any manner the award rendered by SIAC, which was done under separate proceedings and liable to challenge only under the Act, 2011. While analyzing the cluster of case-law handed down by the Indian Supreme Court post Ranesagar it can be seen that the concept of public policy gained wide-ranging and polycentric traction and the scope of its application became broader. The same principles have been used interchangeably for both foreign and domestic awards losing sight of the purpose and intent in enacting the law for enforcement of foreign awards to which different set of principles narrower in scope, must be applied. This is necessary to maintain the integrity of international commercial contracts and the trust in Pakistani courts to enforce foreign awards. That trust will be shaken irretrievably if the courts of Pakistan were to evince an anti-enforcement policy by seeking shelter in the nebulous concept of 'public policy'.

24. The defence in Article V(2)(b) is clearly distinct from one mentioned in Article V(1)(a). All challenges to an agreement underlying the transaction between the parties have to be made within the scope of Article V(1)(a). Thus the scope of a defence under Article V(2)(b) is far narrower and is triggered only when a party alleges that the recognition and enforcement of an arbitral award would be contrary to public policy. This will not entail an inquiry into the primary agreement. Since we are governed by a Constitution as a fundamental and supreme law and all statutes enacted by the Parliament (and Provincial Assemblies), public policy has duly been expressed through these documents. This cannot be left at the whims of judges as an open-textured concept changing with the Chancellor's foot. Wide and unstructured discretion is anathema in any country which observes the rule of law. In the peculiar context of the purpose of Act 2011, there is a need to fence the power so that the opinion of courts exudes deference to legislative intent. Thus an arbitral award is contrary to public policy if it offends a constitutional mandate or is forbidden by law or would defeat the provisions of any law. These are the only grounds on which a public policy challenge may succeed. Multiplicity of proceedings, conflicting decisions (between arbitral tribunal and courts in Pakistan) and futility are not grounds covered by the doctrine of public policy.

25. This view is echoed in Words and Phrases, Permanent Edition, 35A (2006), where the following statements would suffice to elucidate the term as connoting that public policy is to be discerned from the Constitution and the Laws.

"When arbitration award is challenged on public policy grounds, "public policy" must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."

"Where Legislature enacts a statute on a particular subject over which it had constitutional power to legislate, "public policy" is what the statute enacts, and in absence of statute public policy is found in decisions of court and constant practice of government officials."

"public policy" of a state means the law of the state whether found, in the Constitution, the statutes, or judicial records."

26. In summation, in a country governed under a Constitution and Laws, there is little scope for the meaning of 'public policy' to be kept floating. It must derive its provenance from the Constitution and the laws unlike countries governed by common law. In the circumstances of the present case, no issue of public policy arises to compel this Court to refuse to recognize and enforce the Foreign Award.

27. Respondents Nos. 2, 3, 4 and 5 were impleaded as parties. On 02.07.2021, respondents Nos. 2 to 4 were proceeded ex parte. Respondent No.5 filed a defence stating that Rikans partnership had been dissolved and respondent No.5 was its successor. However, respondent No.5 is neither a party to the Arbitration agreement nor was the Foreign Award made against it. Despite this, its defence has been considered and since it is similar to that set up by Rikans Partnership in material particulars, it is rejected too for the same reasons.

28. This application is allowed. Accordingly, there will be an order as follows:

1) The Foreign Award made on 26.02.2020 is hereby recognized and as a binding and enforceable award and enforced through this order.

2) Applicant is granted judgment in the amount represented in the Foreign Award, which shall be executed as a decree of this Court. Decree-sheet shall be drawn accordingly.

3) The Applicant shall have costs of this Application.

4) In terms of Order XXI, Rule 10 of the Code of Civil Procedure, 1908 (C.P.C.) this Application is converted into execution proceedings.

29. To come up for further proceedings on 27.06.2022.

MH/P-16/L Application allowed.